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The Code of Federal Regulations is sold by the Superintendent of Documents.

DEPARTMENT OF THE TREASURY

31 CFR Part 1

RIN 1505-AC80

Privacy Act Regulations; Correction

AGENCY: Department of the Treasury.

ACTION: Final rule; correcting amendment.

SUMMARY: The Department of the Treasury is correcting a final rule that appeared in the **Federal Register** on October 20, 2022. The final rule modified the master list of System of Records Notices (SORN) in the Privacy Act Regulations. Several revisions that were inadvertently omitted from the table are corrected in this document.

DATES: Effective December 26, 2023.

FOR FURTHER INFORMATION CONTACT: Ryan Law, Deputy Assistant Secretary for Privacy, Transparency, and Records telephone: (202) 622-5710.

SUPPLEMENTARY INFORMATION: The Department of the Treasury is correcting a final rule published in the **Federal Register** on October 20, 2022, at 87 FR 63904. The Department has recently discovered that certain information was inadvertently omitted from the final rule.

These technical amendments update the list of Treasury SORNs claiming the following exemptions under 5 U.S.C. 552a(j)(2), 5 U.S.C. 552a(k)(1), 5 U.S.C. 552a(k)(2), 552a(k)(4), 5 U.S.C. 552a(k)(5), 5 U.S.C. 552a(k)(6). The entire section including all tables, Table 1 to Paragraph (c)(1)(i) through Table 21 to Paragraph (m)(1)(i), are being republished for ease of the reader because updates are made throughout. Updates to each table based on SORN exemption include the following:

1. 5 U.S.C. 552a(j)(2)

a. Table 1: Update title of Treasury .004 to Freedom of Information Act/Privacy Act Request Records.

b. Table 2: Update DO .309 and DO. 310 to include additional exemptions.

c. Table 4: Update CC .220 to include exemptions not included.

d. Table 5: Removed IRS 34.022, IRS 46.009, IRS 46.016, and IRS 46.022. Updated to include additional exemptions not included.

e. Table 6: Update to include FinCEN .004 Beneficial Ownership Information System.

2. 5 U.S.C. 552a(k)(1)

a. Table 7: Update table number. Removed DO .120, DO .227, and DO .411 and included Treasury .004 Freedom of Information Act/Privacy Act Request Records.

b. Table 8: Created new table to include DO .120, DO. 227, and DO .411.

c. Table 9: Created new table to include FinCEN .001 Investigations and Examinations System.

3. 5 U.S.C. 552a(k)(2)

a. Table 10: Created new table to include Treasury .004 and Treasury .013.

b. Table 11: Updated table number.

c. Table 12: Update table number.

d. Table 13: Update table number.

e. Table 14: Update table number. Update table to include CC. 600 and CC .800.

f. Table 15: Update table number. Update table to include IRS 24.047, IRS 37.111, IRS 42.002, IRS 42.005, IRS 42.031, IRS 50.222, and IRS 90.001. Updated SORN name IRS 37.007 Practitioner Disciplinary Records and IRS 37.009 Enrolled Agent and Enrolled Retirement Plan Agent Records.

g. Table 17: Update table number. Update table to include FS .020 U.S. Treasury Securities Fraud Information System.

h. Table 18: Update table number. Update table to include FinCEN .004 Beneficial Ownership Information System.

4. 5 U.S.C. 552a(k)(4)

a. Table 19: Update table number. Update to include Treasury .004 Freedom of Information Act/Privacy Act Request Records.

b. Table 20: Created new table to include IRS 70.001.

5. 5 U.S.C. 552a(k)(5)

a. Table 21: Created new table to include Treasury .004 and Treasury .007.

b. Table 22: Update table number.

c. Table 23: Update table number.

6. 5 U.S.C. 552a(k)(6)

a. Created new table to include Treasury .004.

b. Update table number.

List of Subjects in 31 CFR Part 1

Privacy.

Accordingly, the Department of the Treasury amends 31 CFR part 1 by making the following correcting amendment:

PART 1—DISCLOSURE OF RECORDS

■ 1. The authority citation for part 1 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 553; 31 U.S.C. 301, 321; 31 U.S.C. 3717.

■ 2. Revise § 1.36 to read as follows:

§ 1.36 Systems exempt in whole or in part from provisions of the Privacy Act and this part.

(a) *In general.* In accordance with 5 U.S.C. 552a(j) and (k) and § 1.23(c), Treasury hereby exempts the systems of records identified in paragraphs (c) through (o) of this section from the following provisions of the Privacy Act for the reasons indicated.

(b) *Authority.* The rules in this section are promulgated pursuant to the authority vested in the Secretary of the Treasury by 5 U.S.C. 552a(j) and (k) and pursuant to the authority of § 1.23(c).

(c) *General exemptions under 5 U.S.C. 552a(j)(2).* (1) Under 5 U.S.C. 552a(j)(2), the head of any agency may promulgate rules to exempt any system of records within the agency from certain provisions of the Privacy Act if the agency or component thereof that maintains the system performs as its principal function any activities pertaining to the enforcement of criminal laws. Certain Treasury components have as their principal function activities pertaining to the enforcement of criminal laws. This paragraph (c) applies to the following systems of records maintained by Treasury:

(i) *Treasury-wide.*

TABLE 1 TO PARAGRAPH (c)(1)(i)

No.	Name of system
Treasury .004	Freedom of Information Act/Privacy Act Request Records.

(ii) *Departmental Offices.*

TABLE 2 TO PARAGRAPH (c)(1)(ii)

No.	Name of system
DO .190	Office of Inspector General Investigations Management Information System (formerly: Investigation Data Management System).
DO .220	SIGTARP Hotline Database.
DO .221	SIGTARP Correspondence Database.
DO .222	SIGTARP Investigative MIS Database.
DO .223	SIGTARP Investigative Files Database.
DO .224	SIGTARP Audit Files Database.
DO .303	TIGTA General Correspondence.
DO .307	TIGTA Employee Relations Matters, Appeals, Grievances, and Complaint Files.
DO .308	TIGTA Data Extracts.
DO .309	TIGTA Chief Counsel Case Files. (also exempt from 552a subsection (d)(5)).
DO .310	TIGTA Chief Counsel Disclosure Section Records. (also exempt from 552a subsection (d)(5)).
DO .311	TIGTA Office of Investigations Files.

(iii) *Special Investigator for Pandemic Recovery (SIGPR).*

TABLE 3 TO PARAGRAPH (c)(1)(iii)

No.	Name of system
SIGPR .420	Audit and Evaluations Records.
SIGPR .421	Case Management System and Investigative Records.
SIGPR .423	Legal Records.

(iv) *Office of the Comptroller of the Currency (OCC).*

TABLE 4 TO PARAGRAPH (c)(1)(iv)

No.	Name of system
CC .110	Reports of Suspicious Activities.
CC .120	Bank Fraud Information System.
CC .220	Notices of Proposed Changes in Employees, Officers and Directors Tracking System (not exempt from 552a(c)(4)).
CC .500	Chief Counsel's Management Information System.
CC .510	Litigation Information System.

(v) *Internal Revenue Service.*

TABLE 5 TO PARAGRAPH (c)(1)(v)

No.	Name of system
IRS 46.002	Criminal Investigation Management Information System and Case Files.
IRS 46.003	Confidential Informants, Criminal Investigation Division.
IRS 46.005	Electronic Surveillance and Monitoring Records, Criminal Investigation Division.
IRS 46.015	Relocated Witnesses, Criminal Investigation Division.
IRS 46.050	Automated Information Analysis System.
IRS 90.001	Chief Counsel Management Information System Records (not exempt from (c)(4), (e)(2), (e)(3) or (g)).
IRS 90.003	Chief Counsel Litigation and Advice (Criminal) Records.
IRS 90.004	Chief Counsel Legal Processing Division Records (not exempt from (c)(4), (e)(2), (e)(3) or (g)).
IRS 90.005	Chief Counsel Library Records (not exempt from (c)(4), (e)(2), (e)(3) or (g)).

(vi) *Financial Crimes Enforcement Network.*

TABLE 6 TO PARAGRAPH (c)(1)(vi)

No.	Name of system
FinCEN .001	FinCEN Investigations and Examinations System.
FinCEN .002	Suspicious Activity Reporting System.
FinCEN .003	Bank Secrecy Act Reports System.
FinCEN .004	Beneficial Ownership Information System (not exempt from 552a(e)(3) and (e)(4)(I)).

(2) The Department hereby exempts the systems of records listed in paragraphs (c)(1)(i) through (vi) of this section from the following provisions of the Privacy Act, pursuant to 5 U.S.C. 552a(j)(2): 5 U.S.C. 552a(c)(3) and (4), 5 U.S.C. 552a(d)(1), (2), (3), (4), 5 U.S.C. 552a(e)(1), (2) and (3), 5 U.S.C. 552a(e)(4)(G), (H), and (I), 5 U.S.C. 552a(e)(5) and (8), 5 U.S.C. 552a(f), and 5 U.S.C. 552a(g).

(d) *Reasons for exemptions under 5 U.S.C. 552a(j)(2).* (1) 5 U.S.C. 552a(e)(4)(G) and (f)(I) enable individuals to inquire whether a system of records contains records pertaining to them. Application of these provisions to the systems of records would give individuals an opportunity to learn whether they have been identified as suspects or subjects of investigation. As further described in the paragraphs (d)(2) through (12) of this section, access to such knowledge would impair the Department's ability to carry out its mission, since individuals could:

- (i) Take steps to avoid detection;
- (ii) Inform associates that an investigation is in progress;
- (iii) Learn the nature of the investigation;
- (iv) Learn whether they are only suspects or identified as law violators;
- (v) Begin, continue, or resume illegal conduct upon learning that they are not identified in the system of records; or
- (vi) Destroy evidence needed to prove the violation.

(2) 5 U.S.C. 552a(d)(1), (e)(4)(H) and (f)(2), (3) and (5) grant individuals access to records pertaining to them. The application of these provisions to the systems of records would compromise the Department's ability to provide useful tactical and strategic information to law enforcement agencies.

(i) Permitting access to records contained in the systems of records would provide individuals with information concerning the nature of any current investigations and would enable them to avoid detection or apprehension by:

(A) Discovering the facts that would form the basis for their arrest;

(B) Enabling them to destroy or alter evidence of criminal conduct that would form the basis for their arrest; and

(C) Using knowledge that criminal investigators had reason to believe that a crime was about to be committed, to delay the commission of the crime or commit it at a location that might not be under surveillance.

(ii) Permitting access to either ongoing or closed investigative files would also reveal investigative techniques and procedures, the knowledge of which could enable individuals planning crimes to structure their operations to avoid detection or apprehension.

(iii) Permitting access to investigative files and records could, moreover, disclose the identity of confidential sources and informants and the nature of the information supplied and thereby endanger the physical safety of those sources by exposing them to possible reprisals for having provided the information. Confidential sources and informants might refuse to provide criminal investigators with valuable information unless they believe that their identities will not be revealed through disclosure of their names or the nature of the information they supplied. Loss of access to such sources would seriously impair the Department's ability to carry out its mandate.

(iv) Furthermore, providing access to records contained in the systems of records could reveal the identities of undercover law enforcement officers who compiled information regarding the individual's criminal activities and thereby endanger the physical safety of those undercover officers or their families by exposing them to possible reprisals.

(v) By compromising the law enforcement value of the systems of records for the reasons outlined in paragraphs (d)(2)(i) through (iv) of this section, permitting access in keeping with these provisions would discourage other law enforcement and regulatory agencies, foreign and domestic, from freely sharing information with the Department and thus would restrict the Department's access to information

necessary to accomplish its mission most effectively.

(vi) Finally, the dissemination of certain information that the Department maintains in the systems of records is restricted by law.

(3) 5 U.S.C. 552a(d)(2), (3) and (4), (e)(4)(H), and (f)(4) permit an individual to request amendment of a record pertaining to him or her and require the agency either to amend the record, or to note the disputed portion of the record and to provide a copy of the individual's statement of disagreement with the agency's refusal to amend a record to persons or other agencies to whom the record is thereafter disclosed. Since these provisions depend on the individual having access to his or her records, and since these rules exempt the systems of records from the provisions of the Privacy Act relating to access to records, for the reasons set out in paragraph (d)(2) of this section, these provisions should not apply to the systems of records.

(4) 5 U.S.C. 552a(c)(3) requires an agency to make accountings of disclosures of a record available to the individual named in the record upon his or her request. The accountings must state the date, nature, and purpose of each disclosure of the record and the name and address of the recipient.

(i) The application of this provision would impair the ability of law enforcement agencies outside the Department of the Treasury to make effective use of information provided by the Department. Making accountings of disclosures available to the subjects of an investigation would alert them to the fact that another agency is conducting an investigation into their criminal activities and could reveal the geographic location of the other agency's investigation, the nature and purpose of that investigation, and the dates on which that investigation was active. Individuals possessing such knowledge would be able to take measures to avoid detection or apprehension by altering their operations, by transferring their criminal activities to other geographical areas, or by destroying or concealing

evidence that would form the basis for arrest. In the case of a delinquent account, such release might enable the subject of the investigation to dissipate assets before levy.

(ii) Moreover, providing accountings to the subjects of investigations would alert them to the fact that the Department has information regarding their criminal activities and could inform them of the general nature of that information. Access to such information could reveal the operation of the Department's information-gathering and analysis systems and permit individuals to take steps to avoid detection or apprehension.

(5) 5 U.S.C. 552(c)(4) requires an agency to inform any person or other agency about any correction or notation of dispute that the agency made in accordance with 5 U.S.C. 552a(d) to any record that the agency disclosed to the person or agency if an accounting of the disclosure was made. Since this provision depends on an individual's having access to and an opportunity to request amendment of records pertaining to him or her, and since these rules exempt the systems of records from the provisions of the Privacy Act relating to access to and amendment of records, for the reasons set out in paragraph (f)(3) of this section, this provision should not apply to the systems of records.

(6) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a general notice listing the categories of sources for information contained in a system of records. The application of this provision to the systems of records could compromise the Department's ability to provide useful information to law enforcement agencies, since revealing sources for the information could:

(i) Disclose investigative techniques and procedures;

(ii) Result in threats or reprisals against informants by the subjects of investigations; and

(iii) Cause informants to refuse to give full information to criminal investigators for fear of having their identities as sources disclosed.

(7) 5 U.S.C. 552a(e)(1) requires an agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or Executive order. The term *maintain*, as defined in 5 U.S.C. 552a(a)(3), includes *collect* and *disseminate*. The application of this provision to the systems of records could impair the Department's ability to collect and disseminate valuable law enforcement information.

(i) In many cases, especially in the early stages of investigation, it may be impossible to immediately determine whether information collected is relevant and necessary, and information that initially appears irrelevant and unnecessary often may, upon further evaluation or upon collation with information developed subsequently, prove particularly relevant to a law enforcement program.

(ii) Not all violations of law discovered by the Department fall within the investigative jurisdiction of the Department of the Treasury. To promote effective law enforcement, the Department will have to disclose such violations to other law enforcement agencies, including State, local, and foreign agencies, that have jurisdiction over the offenses to which the information relates. Otherwise, the Department might be placed in the position of having to ignore information relating to violations of law not within the jurisdiction of the Department of the Treasury when that information comes to the Department's attention during the collation and analysis of information in its records.

(8) 5 U.S.C. 552a(e)(2) requires an agency to collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs. The application of this provision to the systems of records would impair the Department's ability to collate, analyze, and disseminate investigative, intelligence, and enforcement information.

(i) Most information collected about an individual under criminal investigation is obtained from third parties, such as witnesses and informants. It is usually not feasible to rely upon the subject of the investigation as a source for information regarding his criminal activities.

(ii) An attempt to obtain information from the subject of a criminal investigation will often alert that individual to the existence of an investigation, thereby affording the individual an opportunity to attempt to conceal his criminal activities so as to avoid apprehension.

(iii) In certain instances, the subject of a criminal investigation may assert his/her constitutional right to remain silent and refuse to supply information to criminal investigators upon request.

(iv) During criminal investigations it is often a matter of sound investigative procedure to obtain information from a variety of sources to verify information

already obtained from the subject of a criminal investigation or other sources.

(9) 5 U.S.C. 552a(e)(3) requires an agency to inform each individual whom it asks to supply information, on the form that it uses to collect the information or on a separate form that the individual can retain, of the agency's authority for soliciting the information; whether disclosure of information is voluntary or mandatory; the principal purposes for which the agency will use the information; the routine uses that may be made of the information; and the effects on the individual of not providing all or part of the information. The systems of records should be exempted from this provision to avoid impairing the Department's ability to collect and collate investigative, intelligence, and enforcement data.

(i) Confidential sources or undercover law enforcement officers often obtain information under circumstances in which it is necessary to keep the true purpose of their actions secret so as not to let the subject of the investigation or his or her associates know that a criminal investigation is in progress.

(ii) If it became known that the undercover officer was assisting in a criminal investigation, that officer's physical safety could be endangered through reprisal, and that officer may not be able to continue working on the investigation.

(iii) Individuals often feel inhibited in talking to a person representing a criminal law enforcement agency but are willing to talk to a confidential source or undercover officer whom they believe are not involved in law enforcement activities.

(iv) Providing a confidential source of information with written evidence that he or she was a source, as required by this provision, could increase the likelihood that the source of information would be subject to retaliation by the subject of the investigation.

(v) Individuals may be contacted during preliminary information gathering, surveys, or compliance projects concerning the administration of the internal revenue laws before any individual is identified as the subject of an investigation. Informing the individual of the matters required by this provision would impede or compromise subsequent investigations.

(10) 5 U.S.C. 552a(e)(5) requires an agency to maintain all records it uses in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination.

(i) Since 5 U.S.C. 552a(a)(3) defines *maintain* to include *collect* and *disseminate*, application of this provision to the systems of records would hinder the initial collection of any information that could not, at the moment of collection, be determined to be accurate, relevant, timely, and complete. Similarly, application of this provision would seriously restrict the Department's ability to disseminate information pertaining to a possible violation of law-to-law enforcement and regulatory agencies. In collecting information during a criminal investigation, it is often impossible or unfeasible to determine accuracy, relevance, timeliness, or completeness prior to collection of the information. In disseminating information to law enforcement and regulatory agencies, it is often impossible to determine accuracy, relevance, timeliness, or completeness prior to dissemination because the Department may not have the expertise with which to make such determinations.

(ii) Information that may initially appear inaccurate, irrelevant, untimely, or incomplete may, when collated and analyzed with other available

information, become more pertinent as an investigation progresses. In addition, application of this provision could seriously impede criminal investigators and intelligence analysts in the exercise of their judgment in reporting results obtained during criminal investigations.

(11) 5 U.S.C. 552a(e)(8) requires an agency to make reasonable efforts to serve notice on an individual when the agency makes any record on the individual available to any person under compulsory legal process, when such process becomes a matter of public record. The systems of records should be exempted from this provision to avoid revealing investigative techniques and procedures outlined in those records and to prevent revelation of the existence of an ongoing investigation where there is need to keep the existence of the investigation secret.

(12) 5 U.S.C. 552a(g) provides for civil remedies to an individual when an agency wrongfully refuses to amend a record or to review a request for amendment, when an agency wrongfully refuses to grant access to a record, when an agency fails to maintain accurate, relevant, timely, and complete records which are used to make a determination adverse to the individual,

and when an agency fails to comply with any other provision of the Privacy Act so as to adversely affect the individual. The systems of records should be exempted from this provision to the extent that the civil remedies may relate to provisions of the Privacy Act from which these rules exempt the systems of records, since there should be no civil remedies for failure to comply with provisions from which the Department is exempted. Exemption from this provision will also protect the Department from baseless civil court actions that might hamper its ability to collate, analyze, and disseminate investigative, intelligence, and law enforcement data.

(e) *Specific exemptions under 5 U.S.C. 552a(k)(1)*. (1) Under 5 U.S.C. 552a(k)(1), the head of any agency may promulgate rules to exempt any system of records within the agency from certain provisions of the Privacy Act to the extent that the system contains information subject to the provisions of 5 U.S.C. 552(b)(1). This paragraph (e) applies to the following systems of records maintained by the Department of the Treasury:

(i) *Treasury-wide*.

TABLE 7 TO PARAGRAPH (e)(1)(i)

No.	Name of system
Treasury .004	Freedom of Information Act/Privacy Act Request Records.

(ii) *Departmental Offices*.

TABLE 8 TO PARAGRAPH (e)(1)(ii)

No.	Name of system
DO .120	Records Related to Office of Foreign Assets Control Economic Sanctions.
DO .227	Committee on Foreign Investment in the United States (CFIUS) Case Management System.
DO .411	Intelligence Enterprise Files.

(iii) *Financial Crimes Enforcement Network*.

TABLE 9 TO PARAGRAPH (e)(1)(iii)

No.	Name of system
FinCEN .001	FinCEN Investigations and Examinations System.

(2) The Department of the Treasury hereby exempts the systems of records listed in paragraph (e)(1) of this section from the following provisions of the Privacy Act, pursuant to 5 U.S.C. 552a(k)(1): 5 U.S.C. 552a(c)(3), 5 U.S.C. 552a(d)(1), (2), (3), and (4), 5 U.S.C.

552a(e)(1), 5 U.S.C. 552a(e)(4)(G), (H), and (I), and 5 U.S.C. 552a(f).

(f) *Reasons for exemptions under 5 U.S.C. 552a(k)(1)*. The reason for invoking the exemption is to protect material authorized to be kept secret in the interest of national defense or foreign policy pursuant to Executive

Orders 12958, 13526, or successor or prior Executive orders.

(g) *Specific exemptions under 5 U.S.C. 552a(k)(2)*. (1) Under 5 U.S.C. 552a(k)(2), the head of any agency may promulgate rules to exempt any system of records within the agency from certain provisions of the Privacy Act if

the system is investigatory material compiled for law enforcement purposes and for the purposes of assuring the safety of individuals protected by the

Department pursuant to the provisions of 18 U.S.C. 3056. This paragraph (g) applies to the following systems of

records maintained by the Department of the Treasury:
(i) *Treasury-wide*.

TABLE 10 TO PARAGRAPH (g)(1)(i)

No.	Name of system
Treasury .004	Freedom of Information Act/Privacy Act Request Records.
Treasury .013	Department of the Treasury, Civil Rights Complaints, Compliance Reviews, and Fairness in Federal Programs Files.

(ii) *Departmental Offices*.

TABLE 11 TO PARAGRAPH (g)(1)(ii)

No.	Name of system
DO .120	Records Related to Office of Foreign Assets Control Economic Sanctions.
DO .144	General Counsel Litigation Referral and Reporting System.
DO .190	Office of Inspector General Investigations Management Information System (formerly: Investigation Data Management System).
DO .220	SIGTARP Hotline Database.
DO .221	SIGTARP Correspondence Database.
DO .222	SIGTARP Investigative MIS Database.
DO .223	SIGTARP Investigative Files Database.
DO .224	SIGTARP Audit Files Database.
DO .225	TARP Fraud Investigation Information System.
DO .227	Committee on Foreign Investment in the United States (CFIUS) Case Management System.
DO .303	TIGTA General Correspondence.
DO .307	TIGTA Employee Relations Matters, Appeals, Grievances, and Complaint Files.
DO .308	TIGTA Data Extracts.
DO .309	TIGTA Chief Counsel Case Files.
DO .310	TIGTA Chief Counsel Disclosure Section Records.
DO .311	TIGTA Office of Investigations Files.

(iii) *Special Investigator for Pandemic Recovery (SIGPR)*.

TABLE 12 TO PARAGRAPH (g)(1)(iii)

No.	Name of system
SIGPR .420	Audit and Evaluations Records.
SIGPR .421	Case Management System and Investigative Records.
SIGPR .423	Legal Records.

(iv) *The Alcohol and Tobacco Tax and Trade Bureau (TTB)*.

TABLE 13 TO PARAGRAPH (g)(1)(iv)

No.	Name of system
TTB .001	Regulatory Enforcement Record System.

(v) *Comptroller of the Currency*.

TABLE 14 TO PARAGRAPH (g)(1)(v)

No.	Name of system
CC .100	Enforcement Action Report System.
CC .110	Reports of Suspicious Activities.
CC .120	Bank Fraud Information System.
CC .220	Notices of Proposed Changes in Employees, Officers and Directors Tracking System.
CC .500	Chief Counsel's Management Information System.
CC .510	Litigation Information System.

TABLE 14 TO PARAGRAPH (g)(1)(v)—Continued

No.	Name of system
CC .600	Consumer Complaint and Inquiry Information Systems.
CC .800	Office of Inspector General Investigations System.

(vi) *Bureau of Engraving and Printing.*

TABLE 15 TO PARAGRAPH (g)(1)(vi)

No.	Name of system
BEP .021	Investigative files.

(vii) *Internal Revenue Service.*

TABLE 16 TO PARAGRAPH (g)(1)(vii)

No.	Name of system
IRS 00.002	Correspondence File-Inquiries about Enforcement Activities.
IRS 00.007	Employee Complaint and Allegation Referral Records.
IRS 00.334	Third Party Contact Reprisal Records.
IRS 22.061	Wage and Information Returns Processing (IRP).
IRS 24.047	Audit Underreporter Case Files.
IRS 26.001	Acquired Property Records.
IRS 26.006	Form 2209, Courtesy Investigations.
IRS 26.012	Offer in Compromise (OIC) Files.
IRS 26.013	One-hundred Per Cent Penalty Cases.
IRS 26.019	TDA (Taxpayer Delinquent Accounts).
IRS 26.020	TDI (Taxpayer Delinquency Investigations) Files.
IRS 26.021	Transferee Files.
IRS 34.037	IRS Audit Trail and Security Records System.
IRS 37.007	Practitioner Disciplinary Records.
IRS 37.009	Enrolled Agent and Enrolled Retirement Plan Agent Records.
IRS 37.111	Preparer Tax Identification Number Records.
IRS 42.001	Examination Administrative File.
IRS 42.002	Excise Compliance Programs.
IRS 42.005	Whistleblower Office Records.
IRS 42.008	Audit Information Management System (AIMS).
IRS 42.017	International Enforcement Program Files.
IRS 42.021	Compliance Programs and Projects Files.
IRS 42.031	Anti-Money laundering/Bank Secrecy Act and form 8300.
IRS 44.001	Appeals Case Files.
IRS 46.050	Automated Information Analysis System.
IRS 48.001	Disclosure Records.
IRS 49.001	Collateral and Information Requests System.
IRS 49.002	Component Authority and Index Card Microfilm Retrieval System.
IRS 50.222	Tax Exempt/Government Entities (TE/GE) Case Management Records.
IRS 60.000	Employee Protection System Records.
IRS 90.001	Chief Counsel Management Information System Records (k2 and J2 only).
IRS 90.002	Chief Counsel Disclosure Litigation Division Case Files.
IRS 90.004	Chief Counsel General Legal Services Case Files.
IRS 90.005	Chief Counsel General Litigation Case Files.

(viii) *Bureau of the Fiscal Service.*

TABLE 17 TO PARAGRAPH (g)(1)(viii)

No.	Name of system
FS .020	U.S. Treasury Securities Fraud Information System.

(ix) *Financial Crimes Enforcement Network.*

TABLE 18 TO PARAGRAPH (g)(1)(ix)

No.	Name of system
FinCEN .001	FinCEN Database.
FinCEN .002	Suspicious Activity Reporting System.
FinCEN .003	Bank Secrecy Act Reports System.
FinCEN .004	Beneficial Ownership Information System (not exempt from 552a(e)(3) and (e)(4)(I)).

(2) The Department hereby exempts the systems of records listed in paragraphs (g)(1)(i) through (ix) of this section from the following provisions of the Privacy Act, pursuant to 5 U.S.C. 552a(k)(2): 5 U.S.C. 552a(c)(3), 5 U.S.C. 552a(d)(1), (2), (3), (4), 5 U.S.C. 552a(e)(1), 5 U.S.C. 552a(e)(4)(G), (H), and (I), and 5 U.S.C. 552a(f).

(h) *Reasons for exemptions under 5 U.S.C. 552a(k)(2).* (1) 5 U.S.C. 552a(c)(3) requires an agency to make accountings of disclosures of a record available to the individual named in the record upon his or her request. The accountings must state the date, nature, and purpose of each disclosure of the record and the name and address of the recipient.

(i) The application of this provision would impair the ability of the Department of the Treasury and of law enforcement agencies outside the Department to make effective use of information maintained by the Department. Making accountings of disclosures available to the subjects of an investigation would alert them to the fact that an agency is conducting an investigation into their illegal activities and could reveal the geographic location of the investigation, the nature and purpose of that investigation, and the dates on which that investigation was active. Individuals possessing such knowledge would be able to take measures to avoid detection or apprehension by altering their operations, by transferring their illegal activities to other geographical areas, or by destroying or concealing evidence that would form the basis for detection or apprehension. In the case of a delinquent account, such release might enable the subject of the investigation to dissipate assets before levy.

(ii) Providing accountings to the subjects of investigations would alert them to the fact that the Department has information regarding their illegal activities and could inform them of the general nature of that information.

(2) 5 U.S.C. 552a(d)(1), (e)(4)(H) and (f)(2), (3), and (5) grant individuals access to records pertaining to them. The application of these provisions to the systems of records would compromise the Department's ability to utilize and provide useful tactical and

strategic information to law enforcement agencies.

(i) Permitting access to records contained in the systems of records would provide individuals with information concerning the nature of any current investigations and would enable them to avoid detection or apprehension by:

(A) Discovering the facts that would form the basis for their detection or apprehension;

(B) Enabling them to destroy or alter evidence of illegal conduct that would form the basis for their detection or apprehension; and

(C) Using knowledge that investigators had reason to believe that a violation of law was about to be committed, to delay the commission of the violation or commit it at a location that might not be under surveillance.

(ii) Permitting access to either on-going or closed investigative files would also reveal investigative techniques and procedures, the knowledge of which could enable individuals planning non-criminal acts to structure their operations so as to avoid detection or apprehension.

(iii) Permitting access to investigative files and records could, moreover, disclose the identity of confidential sources and informants and the nature of the information supplied and thereby endanger the physical safety of those sources by exposing them to possible reprisals for having provided the information. Confidential sources and informants might refuse to provide investigators with valuable information unless they believed that their identities would not be revealed through disclosure of their names or the nature of the information they supplied. Loss of access to such sources would seriously impair the Department's ability to carry out its mandate.

(iv) Furthermore, providing access to records contained in the systems of records could reveal the identities of undercover law enforcement officers or other persons who compiled information regarding the individual's illegal activities and thereby endanger the physical safety of those undercover officers, persons, or their families by exposing them to possible reprisals.

(v) By compromising the law enforcement value of the systems of records for the reasons outlined in paragraphs (h)(2)(i) through (iv) of this section, permitting access in keeping with these provisions would discourage other law enforcement and regulatory agencies, foreign and domestic, from freely sharing information with the Department and thus would restrict the Department's access to information necessary to accomplish its mission most effectively.

(vi) Finally, the dissemination of certain information that the Department may maintain in the systems of records is restricted by law.

(3) 5 U.S.C. 552a(d)(2), (3), and (4), (e)(4)(H), and (f)(4) permit an individual to request amendment of a record pertaining to him or her and require the agency either to amend the record, or to note the disputed portion of the record and to provide a copy of the individual's statement of disagreement with the agency's refusal to amend a record to persons or other agencies to whom the record is thereafter disclosed. Since these provisions depend on the individual having access to his or her records, and since these rules exempt the systems of records from the provisions of the Privacy Act relating to access to records, these provisions should not apply to the systems of records for the reasons set out in paragraph (h)(2) of this section.

(4) 5 U.S.C. 552a(e)(1) requires an agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or Executive order. The term *maintain*, as defined in 5 U.S.C. 552a(a)(3), includes *collect* and *disseminate*. The application of this provision to the system of records could impair the Department's ability to collect, utilize and disseminate valuable law enforcement information.

(i) In many cases, especially in the early stages of investigation, it may be impossible immediately to determine whether information collected is relevant and necessary, and information that initially appears irrelevant and unnecessary often may, upon further evaluation or upon collation with information developed subsequently,

prove particularly relevant to a law enforcement program.

(ii) Not all violations of law discovered by the Department analysts fall within the investigative jurisdiction of the Department of the Treasury. To promote effective law enforcement, the Department will have to disclose such violations to other law enforcement agencies, including State, local, and foreign agencies that have jurisdiction over the offenses to which the information relates. Otherwise, the Department might be placed in the position of having to ignore information relating to violations of law not within the jurisdiction of the Department of the Treasury when that information comes to the Department's attention during the collation and analysis of information in its records.

(5) 5 U.S.C. 552a(e)(4)(G) and (f)(1) enable individuals to inquire whether a system of records contains records pertaining to them. Application of these provisions to the systems of records would allow individuals to learn

whether they have been identified as suspects or subjects of investigation. As further described in paragraphs (h)(5)(i) through (vi) of this section, access to such knowledge would impair the Department's ability to carry out its mission, since individuals could:

- (i) Take steps to avoid detection;
- (ii) Inform associates that an investigation is in progress;
- (iii) Learn the nature of the investigation;
- (iv) Learn whether they are only suspects or identified as law violators;
- (v) Begin, continue, or resume illegal conduct upon learning that they are not identified in the system of records; or
- (vi) Destroy evidence needed to prove the violation.

(6) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a general notice listing the categories of sources for information contained in a system of records. The application of this provision to the systems of records could compromise the Department's ability to complete or continue

investigations or to provide useful information to law enforcement agencies, since revealing sources for the information could:

- (i) Disclose investigative techniques and procedures;
- (ii) Result in threats or reprisals against informants by the subjects of investigations; and
- (iii) Cause informants to refuse to give full information to investigators for fear of having their identities as sources disclosed.

(i) *Specific exemptions under 5 U.S.C. 552a(k)(4).* (1) Under 5 U.S.C. 552a(k)(4), the head of any agency may promulgate rules to exempt any system of records within the agency from certain provisions of the Privacy Act if the system is required by statute to be maintained and used solely as statistical records. This paragraph (i) applies to the following system of records maintained by the Department, for which exemption is claimed under 5 U.S.C. 552a(k)(4).

(i) *Treasury-wide.*

TABLE 19 TO PARAGRAPH (i)(1)(i)

No.	Name of system
Treasury .004	Freedom of Information Act/Privacy Act Request Records.

(ii) *Internal Revenue Service.*

TABLE 20 TO PARAGRAPH (i)(1)(ii)

No.	Name of system
IRS 70.001	Individual Income Tax Returns, Statistics of Income.

(2) The Department hereby exempts the system of records listed in paragraph (i)(1) of this section from the following provisions of the Privacy Act, pursuant to 5 U.S.C. 552a(k)(4): 5 U.S.C. 552a(c)(3), 5 U.S.C. 552a(d)(1), (2), (3), and (4), 5 U.S.C. 552a(e)(1), 5 U.S.C. 552a(e)(4)(G), (H), and (I), and 5 U.S.C. 552a(f).

(3) The system of records is maintained under 26 U.S.C. 6108, which requires that the Secretary or his delegate prepare and publish annually statistics reasonably available with respect to the operation of the income tax laws, including classifications of taxpayers and of income, the amounts allowed as deductions, exemptions, and credits, and any other facts deemed pertinent and valuable.

(j) *Reasons for exemptions under 5 U.S.C. 552a(k)(4).* The reason for exempting the system of records is that disclosure of statistical records (including release of accounting for disclosures) would in most instances be of no benefit to a particular individual since the records do not have a direct effect on a given individual.

(k) *Specific exemptions under 5 U.S.C. 552a(k)(5).* (1) Under 5 U.S.C. 552a(k)(5), the head of any agency may promulgate rules to exempt any system of records within the agency from certain provisions of the Privacy Act if the system is investigatory material compiled solely for the purpose of determining suitability, eligibility, and qualifications for Federal civilian employment or access to classified

information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence. Thus, to the extent that the records in this system can be disclosed without revealing the identity of a confidential source, they are not within the scope of this exemption and are subject to all the requirements of the Privacy Act. This paragraph (j) applies to the following systems of records maintained by the Department or one of its bureaus:

(i) *Treasury-wide.*

TABLE 21 TO PARAGRAPH (k)(1)(i)

No.	Name of system
Treasury .004	Freedom of Information Act/Privacy Act Request Records.
Treasury .007	Personnel Security System.

(ii) *Departmental Offices.*

TABLE 22 TO PARAGRAPH (k)(1)(ii)

No.	Name of system
DO .004	Personnel Security System.
DO .306	TIGTA Recruiting and Placement Records.

(iii) *Internal Revenue Service.*

TABLE 23 TO PARAGRAPH (k)(1)(iii)

No.	Name of system
IRS 34.021	Personnel Security Investigations.
IRS 34.022	Automated Background Investigations System (ABIS).
IRS 90.006	Chief Counsel Human Resources and Administrative Records.

(2) The Department hereby exempts the systems of records listed in paragraphs (k)(1)(i) and (ii) of this section from the following provisions of the Privacy Act, pursuant to 5 U.S.C. 552a(k)(5): 5 U.S.C. 552a(c)(3), 5 U.S.C. 552a(d)(1), (2), (3), and (4), 5 U.S.C. 552a(e)(1), 5 U.S.C. 552a(e)(4)(G), (H), and (I), and 5 U.S.C. 552a(f).

(1) *Reasons for exemptions under 5 U.S.C. 552a(k)(5).* (1) The sections of 5 U.S.C. 552a from which the systems of records are exempt include in general those providing for individuals' access to or amendment of records. When such access or amendment would cause the identity of a confidential source to be revealed, it would impair the future ability of the Department to compile investigatory material for the purpose of determining suitability, eligibility, or

qualifications for Federal civilian employment, Federal contracts, or access to classified information. In addition, the systems shall be exempt from 5 U.S.C. 552a(e)(1) which requires that an agency maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or executive order. The Department believes that to fulfill the requirements of 5 U.S.C. 552a(e)(1) would unduly restrict the agency in its information gathering inasmuch as it is often not until well after the investigation that it is possible to determine the relevance and necessity of particular information.

(2) If any investigatory material contained in the above-named systems becomes involved in criminal or civil

matters, exemptions of such material under 5 U.S.C. 552a(j)(2) or (k)(2) is hereby claimed.

(m) *Exemption under 5 U.S.C. 552a(k)(6).* (1) Under 5 U.S.C. 552a(k)(6), the head of any agency may promulgate rules to exempt any system of records that is testing, or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process. This paragraph (m) applies to the following system of records maintained by the Department, for which exemption is claimed under 5 U.S.C. 552a(k)(6).

(i) *Treasury-wide.*

TABLE 24 TO PARAGRAPH (m)(1)(i)

No.	Name of system
Treasury .004	Freedom of Information Act/privacy Act Request Records.

(ii) *Departmental Offices.*

TABLE 25 TO PARAGRAPH (m)(1)(ii)

No.	Name of system
DO .306	TIGTA Recruiting and Placement Records.

(ii) [Reserved]

(2) The Department hereby exempts the system of records listed in paragraph

(m)(1) of this section from the following provisions of the Privacy Act, pursuant

to 5 U.S.C. 552a(k)(6); 5 U.S.C. 552a(c)(3), 5 U.S.C. 552a(d)(1), (2), (3), and (4), 5 U.S.C. 552a(e)(1), 5 U.S.C. 552a(e)(4)(G), (H), and (I), and 5 U.S.C. 552a(f).

(n) *Reasons for exemptions under 5 U.S.C. 552a(k)(6).* The reason for exempting the system of records is that disclosure of the material in the system would compromise the objectivity or fairness of the examination process.

(o) *Exempt information included in another system.* Any information from a system of records for which an exemption is claimed under 5 U.S.C. 552a(j) or (k) which is also included in another system of records retains the same exempt status such information has in the system for which such exemption is claimed.

Ryan Law,

Deputy Assistant Secretary Privacy, Transparency, and Records, U.S. Department of the Treasury.

[FR Doc. 2023–27299 Filed 12–22–23; 8:45 am]

BILLING CODE 4810-AK-P

POSTAL SERVICE

39 CFR Part 111

Use of Foreign Return Addresses on Domestic Mailpieces

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is amending *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM®) to clarify the consequences for using a foreign return address on a domestic mailpiece.

DATES: *Effective date:* January 1, 2024.

FOR FURTHER INFORMATION CONTACT:

Catherine Knox at (202) 268–5636, Treishawna Harris at (202) 268–2965, or Garry Rodriguez at (202) 268–7281.

SUPPLEMENTARY INFORMATION: On November 6, 2023, the Postal Service published a notice of proposed rulemaking (88 FR 76162–76163) to further amend subsections 602.1.5.4 and 609.4.3 to clarify the procedures applicable to undeliverable domestic mailpieces bearing a foreign return address. The Postal Service did not receive any formal comments.

The Postal Service is revising DMM subsections 602.1.5.4, and 609.4.3, to clarify that undeliverable domestic mailpieces with a foreign return address will be handled in accordance with the Postal Service's dead mail procedures.

In a separate rule, the Postal Service will also revise a few related sections of the International Mail Manual (IMM)

including subsection 762.2, *Undeliverable Domestic Mail Bearing U.S. Postage and a Foreign Return Address.*

We believe these revisions will provide customers with a more efficient mailing experience. The Postal Service adopts the described changes to *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM), incorporated by reference in the *Code of Federal Regulations*.

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 111 is amended as follows:

PART 111—GENERAL INFORMATION ON POSTAL SERVICE

■ 1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401–404, 414, 416, 3001–3018, 3201–3220, 3401–3406, 3621, 3622, 3626, 3629, 3631–3633, 3641, 3681–3685, and 5001.

■ 2. Revise the *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM) as follows:

Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)

* * * * *

600 Basic Standards for All Mailing Services

* * * * *

602 Addressing

1.0 Elements of Addressing

* * * * *

1.5 Return Addresses

* * * * *

[Revise the heading of 1.5.4 to read as follows:]

1.5.4 Use of Foreign Return Addresses

[Revise the text of 1.5.4 to read as follows:]

When U.S. postage is applied to a domestic mailpiece, as defined under 608.2.1 and 608.2.2, only a domestic return address is authorized. An undeliverable domestic mailpiece bearing a foreign return address cannot be returned to sender and will be handled as dead mail under 507.1.9.

* * * * *

609 Filing Indemnity Claims for Loss or Damage

* * * * *

4.0 Claims

* * * * *

4.3 Nonpayable Claims

Indemnity is not paid for insured mail (including Priority Mail Express and Priority Mail), Registered Mail, COD, or Priority Mail and Priority Mail Express in these situations:

* * * * *

[Revise the text of 4.3 by adding a new item “ag” to read as follows:]

ag. An undeliverable, registered or insured domestic mailpiece bearing a foreign return address.

* * * * *

Sarah Sullivan,

Attorney, Ethics and Legal Compliance.

[FR Doc. 2023–27975 Filed 12–22–23; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 84

[EPA–HQ–OAR–2021–0643; FRL–11594–02–OAR]

Phasedown of Hydrofluorocarbons: Technology Transitions Program Residential and Light Commercial Air Conditioning and Heat Pump Subsector

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final rule and request for comments.

SUMMARY: The U.S. Environmental Protection Agency is amending a provision of the recently finalized Technology Transitions Program under the American Innovation and Manufacturing Act (AIM Act). This action allows one additional year, until January 1, 2026, solely for the installation of new residential and light commercial air conditioning and heat pump systems using components manufactured or imported prior to January 1, 2025. The existing January 1, 2025, compliance date for the installation of certain residential and light commercial air conditioning and heat pump systems may result in significant stranded inventory that was intended for new residential construction. EPA is promulgating this action to mitigate the potential for significant stranded inventory in this subsector. In addition, EPA is clarifying

that residential ice makers are not included in the household refrigerator and freezer subsector under the Technology Transitions Rule and are not subject to the restrictions for that subsector. EPA is requesting comments on all aspects of this rule.

DATES: This interim final rule is effective on December 26, 2023. Comments on this rule must be received on or before February 9, 2024.

ADDRESSES: You may send comments, identified by docket identification number EPA–HQ–OAR–2021–0643, by any of the following methods:

- **Federal eRulemaking Portal:** <https://www.regulations.gov> (our preferred method). Follow the online instructions for submitting comments.
- **Mail:** U.S. Environmental Protection Agency, EPA Docket Center, Air and Radiation Docket, Mail Code 2822T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- **Hand Delivery or Courier (by scheduled appointment only):** EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID number for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov>, including any personal information provided.

You may find the following suggestions helpful for preparing your comments: Direct your comments to specific sections of this rulemaking and note where your comments may apply to future separate actions where possible; explain your views as clearly as possible; describe any assumptions that you used; provide any technical information or data you used that support your views; provide specific examples to illustrate your concerns; offer alternatives; and, make sure to submit your comments by the comment period deadline. Please provide any published studies or raw data supporting your position. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (e.g., on the web, cloud, or other file sharing system).

Do not submit any information you consider to be Confidential Business Information (CBI) through <https://>

www.regulations.gov. For submission of confidential comments, please work with the person listed in the **FOR FURTHER INFORMATION CONTACT** section. For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Allison Cain, Stratospheric Protection Division, Office of Atmospheric Programs (Mail Code 6205A), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: 202–564–1566; email address: cain.allison@epa.gov. You may also visit EPA's website at <https://www.epa.gov/climate-hfcs-reduction> for further information.

SUPPLEMENTARY INFORMATION: EPA is taking this action as an interim final rule without prior proposal and public comment because EPA finds that the good cause exemption from the notice and comment rulemaking requirement of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, applies here.

Subsection (k)(1)(C) of the American Innovation and Manufacturing Act (AIM Act) provides that Clean Air Act (CAA) sections 113, 114, 304, and 307 apply to the AIM Act and any regulations EPA promulgates under the AIM Act as though the AIM Act were part of title VI of the CAA. However, section 307(d) does not apply to any rule referred to in subparagraphs (A) or (B) of section 553(b) of the APA. See CAA section 307(d)(1). Section 553(b)(B) of the APA, 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and comment public procedures are impracticable, unnecessary or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment.

EPA has determined there is good cause for promulgating this rule without prior proposal and opportunity for comment. After signature of EPA's October 2023 final rule that established, among other things, a prohibition beginning on January 1, 2025, of the installation of new residential and light commercial air conditioning and heat pump systems using regulated substances with a global warming potential of 700 or more, stakeholders brought to the Agency's attention that builders order equipment in this subsector well in advance of installation, often even before the

installation date is known, and that the final rule's compliance date would potentially strand a significant amount of inventory. EPA is issuing this rule to address these concerns and to mitigate the harm that would be caused by unintentionally stranding inventory as a result of the January 1, 2025, compliance date for the installation of certain air conditioning and heat pump systems. Subsection (i)(6) of the AIM Act states that “[n]o rule under this subsection may take effect before the date that is 1 year after the date on which the Administrator promulgates the applicable rule under this subsection.” In order to provide relief for entities subject to the January 1, 2025, compliance date, and in light of subsection (i)(6)'s one-year delay between promulgation and compliance date, EPA is taking this rulemaking action prior to January 1, 2024, one year in advance of the existing compliance date. It is impossible for the Agency to conclude a notice-and-comment rulemaking to provide this needed relief by January 1, 2024, and therefore EPA finds that this impracticability constitutes good cause for dispensing with the required procedures under 5 U.S.C. 553(b)(B). Nonetheless, EPA is providing 45 days for submission of public comments following today's action. EPA will consider all written comments submitted in the allotted time period to determine if any change is warranted. Because the rule revisions relieve a restriction and advance notice is not needed, the rule is effective upon publication.

Throughout this document, whenever “we,” “us,” “the Agency,” or “our” is used, we mean EPA. Acronyms that are used in this rulemaking that may be helpful include:

AC—Air Conditioning
 AHRI—Air-Conditioning, Heating, and Refrigeration Institute
 AIM Act—American Innovation and Manufacturing Act of 2020
 APA—Administrative Procedure Act
 CAA—Clean Air Act
 EPA—U.S. Environmental Protection Agency
 FR—Federal Register
 HARDI—Heating, Air-conditioning & Refrigeration Distributors International
 HFC—Hydrofluorocarbon
 OEM—Original Equipment Manufacturer
 SNAP—Significant New Alternatives Policy
 VRF—Variable Refrigerant Flow

I. Executive Summary

A. What is the purpose of this regulatory action?

The U.S. Environmental Protection Agency (EPA) is implementing provisions of the American Innovation and Manufacturing Act of 2020, codified

at 42 U.S.C. 7675 (AIM Act or the Act). Subsection (i) of the Act, entitled “Technology Transitions,” authorizes EPA, by rulemaking, to restrict the use of regulated substances (used interchangeably with “HFCs” in this document)¹ in sectors or subsectors where the regulated substances are used.

On October 24, 2023, EPA’s final rule establishing the Technology Transitions Program was published in the **Federal Register** (88 FR 73098, hereafter “Technology Transitions Rule”). That rule restricted the use of higher-GWP HFCs in over 40 subsectors in which they are used. It also prohibited, among other things, the manufacture and import of factory-completed products and the installation of certain refrigeration, air conditioning, and heat pump systems using higher-GWP HFCs. The compliance dates for these restrictions vary by subsector and range from January 1, 2025, to January 1, 2028. The rule also prohibited the sale, distribution, and export of factory-completed products that do not comply with the relevant restrictions three years after the prohibition on manufacture and import.

After issuance of the Technology Transitions Rule, manufacturers, importers, and distributors of residential and light commercial air conditioning and heat pump equipment informed EPA that the compliance date for the restriction on installation will result in substantial stranded inventory in that subsector for residential new construction, including both single-family and multi-family dwellings, where builders order heating and cooling equipment well in advance of knowing the exact date of installation. This rule narrowly addresses the unique circumstances of that particular subsector to prevent such equipment from being stranded.

B. What is the summary of this regulatory action?

This interim final rulemaking provides one additional year for the installation of new residential and light commercial air conditioning and heat pump systems when using components that were manufactured or imported before January 1, 2025. Specifically, this rule allows for pre-2025 condensing units, evaporators, and air handlers using R-410A, or other regulated substances and blends of regulated substances not meeting the Technology

Transitions Rule’s restrictions, to be assembled into new systems (*i.e.*, installed), so long as those systems are assembled prior to January 1, 2026.

We also clarify that residential ice makers are not included in the household refrigerator and freezer subsector and are not subject to the restrictions for that subsector under the Technology Transitions Rule. The preamble to the Technology Transitions Rule incorrectly included them as an example of a product in that subsector.

C. What is the summary of the costs and benefits?

This rule will reduce regulatory burden associated with the Technology Transitions Program while having a negligible environmental impact. Original equipment manufacturers (OEMs) have indicated that collectively, over \$1 billion of inventory could go unsold without an extension of the installation date. Stranding significant amounts of equipment that does not meet the new restrictions is counter to the overall approach EPA has taken in the Technology Transitions Rule. Extending the installation date for these systems will not have an impact on the benefits modeled in the Technology Transitions Rule because EPA is limiting the extension to equipment manufactured or imported before the existing compliance date of January 1, 2025.

II. General Information

A. Does this action apply to me?

You may be potentially affected by this rule if you manufacture, import, export, sell or otherwise distribute, or install residential and light commercial air conditioning and heat pump equipment. Potentially affected categories, by North American Industry Classification System code, include:

- Plumbing, Heating, and Air Conditioning Contractors (238220)
- Air Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing (333415)
- Major Household Appliance Manufacturing (335220)
- Household Appliances, Electric Housewares, and Consumer Electronics Merchant Wholesalers (423620)
- Plumbing and Heating Equipment and Supplies (Hydronics) Merchant Wholesalers (423720)
- Warm Air Heating and Air Conditioning Equipment and Supplies Merchant Wholesalers (423730)
- Appliance Stores, Household-Type (449210)

- Appliance Repair and Maintenance (811412)

This list is not intended to be exhaustive, but rather provides a guide for readers regarding entities that EPA expects could potentially be affected by this action. Other types of entities not listed could also be affected. To determine whether your entity may be affected by this action, you should carefully examine the regulatory text at the end of this notice. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

B. What is EPA’s authority for taking this action?

On December 27, 2020, the AIM Act was enacted as section 103 in Division S, Innovation for the Environment, of the Consolidated Appropriations Act, 2021 (codified at 42 U.S.C. 7675). Subsection (k)(1)(A) of the AIM Act provides EPA with the authority to promulgate necessary regulations to carry out EPA’s functions under the Act, including its obligations to ensure that the Act’s requirements are satisfied. Subsection (k)(1)(C) of the AIM Act also provides that CAA sections 113, 114, 304, and 307 apply to the AIM Act and any regulations EPA promulgates under the AIM Act as though the AIM Act were part of title VI of the CAA.

The AIM Act authorizes EPA to address HFCs by providing new authorities in three main areas: phasing down the production and consumption of listed HFCs; managing these HFCs and their substitutes; and facilitating the transition to next-generation technologies by restricting use of these HFCs in the sector or subsectors in which they are used. This rulemaking focuses on the third area: the transition to next-generation technologies by restricting use of these HFCs in the sector or subsectors in which they are used. Subsection (i) of the AIM Act, “Technology Transitions,” provides that “the Administrator may by rule restrict, fully, partially, or on a graduated schedule, the use of a regulated substance in the sector or subsector in which the regulated substance is used.” 42 U.S.C. 7675(i)(1). The Act lists 18 saturated HFCs, and by reference any of their isomers not so listed, that are covered by the statute’s provisions, referred to as “regulated substances” under the Act.² (42 U.S.C. 7675(c)(1)). Through this rule, EPA is amending recently finalized restrictions on the use

¹ The Act lists 18 saturated HFCs, and by reference any of their isomers not so listed, that are covered by the statute’s provisions, referred to as “regulated substances” under the Act.

² As noted previously in this notice, “regulated substance” and “HFC” are used interchangeably in this notice.

of certain HFCs in the residential and light commercial air conditioning and heat pump subsector.

C. How is EPA considering negotiated rulemaking?

Prior to proposing a rule, subsection (i)(2)(A) of the Act directs EPA to consider negotiating with stakeholders in the sector or subsector subject to the potential rule in accordance with negotiated rulemaking procedures established under subchapter III of chapter 5 of title 5, United States Code (commonly known as the “Negotiated Rulemaking Act of 1990”). If EPA makes a determination to use the negotiated rulemaking procedures, subsection (i)(2)(B) requires that EPA, to the extent practicable, give priority to completing that rulemaking over completing rulemakings under subsection (i) that are not using that procedure. If EPA does not use the negotiated rulemaking process, subsection (i)(2)(C) requires the Agency to publish an explanation of the decision not to use that procedure before commencement of the rulemaking process.

EPA noted in the final Technology Transitions Rule that, where appropriate, EPA will consider recent Agency actions and decisions related to restrictions on the use of HFCs in sectors and subsectors when considering using negotiated rulemaking procedures. EPA provided the example of not issuing a separate notice to consider using negotiated rulemaking for four petitions received after a first round of petitions had received public notice. EPA’s reasoning was that these petitions were received well ahead of the final action and the requested restrictions are in the same sectors and subsectors contained in petitions for which a determination had already been made. EPA stated that nothing in those four petitions caused EPA to reconsider that decision and that it was unnecessary for the Agency to reconsider whether to use negotiated rulemaking procedures.

Upon considering recent Agency action, specifically the Technology Transitions Rule, today’s interim final rulemaking does not merit a reconsideration of the prior determination not to use negotiated rulemaking procedures. This rule is a direct and immediate response to a specific concern arising from the recent agency action to establish a compliance date for the installation of certain systems within the residential and light commercial air conditioning and heat pump subsector. EPA is not addressing a new subsector nor even establishing a new restriction. Instead, this rule

provides targeted relief to address concerns about stranded inventory in a particular subsector subject to a recently finalized restriction.

Furthermore, this action has been requested through a November 13, 2023, letter signed jointly by the Air-Conditioning, Heating, and Refrigeration Institute (AHRI), the Alliance for Responsible Atmospheric Policy (the Alliance), and Heating, Air-conditioning & Refrigeration Distributors International (HARDI), which together represents a majority of the stakeholders in the subsector subject to the rule.³ EPA does not believe that the rule would benefit from the negotiated rulemaking procedure especially because timeliness is a concern universally shared by stakeholders in this subsector.

III. Final Rule

A. Addressing Stranded Inventory

The November 13, 2023, letter to the EPA from AHRI, the Alliance, and HARDI requested clarification of the provisions of the rule regarding two categories of equipment: Residential and Light Commercial Air Conditioning and Heat Pump Systems and Variable Refrigerant Flow (VRF) Systems. The letter states that these organizations understand that components for systems in these two categories manufactured or imported before January 1, 2025, and January 1, 2026, respectively, using a regulated substance with a GWP of 700 or more, cannot be installed as new systems after each such compliance date. 40 CFR 84.54(a)–(c). They note that this would be “particularly problematic for residential new construction, including both single-family and multi-family dwellings, where builders order heating and cooling equipment well in advance of knowing the exact date of install. Such equipment is not installed until construction is nearly complete, but at time of order builders do not know when this date will be.” The letter further articulates that allowing the use of components manufactured or imported prior to the compliance date to be installed as part of new systems for one year after the compliance date would provide some relief to the economic and practical burdens.

An important consideration in the final rule was avoiding the stranding of inventory of existing equipment. This includes systems that are already installed and operating as well as unsold equipment in the manufacturing

and distribution chain. EPA stated that “[w]e recognize that the production and purchase of products or components that are unable to be sold to consumers is an economic and environmental outcome no parties desire, and the proposed rule’s forward-looking compliance dates were intended to allow all parties in the market supply chain sufficient time to avoid that outcome.” 88 FR 73123. In response to concerns about stranded inventory raised during the public comment period on the proposed rule, EPA made two significant adjustments in the final rule.

First, EPA removed the applicability of the rule’s use restrictions to components. EPA explained that components are pieces of equipment that, unlike factory-completed products, do not function independently and must be assembled together in the field in order to function for its intended purpose. Components are replaceable and a faulty component can be swapped out to avoid replacing an entire system. Recognizing the ongoing need for servicing and updating previously installed systems, EPA allowed for the continued manufacture, import, sale, distribution, offer for sale and distribution, and export of components that rely on regulated substances, which would not meet the new restrictions. Components are therefore not subject to the restrictions in the Technology Transitions Rule, except insofar as those components may not be installed in new systems on or after the installation compliance dates.

Second, the rule imposed a date by which factory-completed products, more narrowly defined as an item that is functional upon completion of manufacturing, could no longer be distributed, sold, and offered for sale or distribution, and extended that date in the final rule. EPA proposed that the “sell-through” limitation for such products would be one year after the compliance date for manufacturing and importing. The Agency received many comments on this topic, including from those that considered one year to be insufficient especially for certain seasonal products. In the final rule, EPA provided a sell-through for factory-completed products for three years after the manufacture and import compliance date.

Through these two modifications in the final rule, EPA believed it had minimized the potential for stranded inventory. Specifically, with respect to components, the Agency’s view was that there would continue to be a market for components not meeting the GWP limit thresholds for new systems, because

³ This letter can be found in the docket for this interim final rule at EPA docket number EPA–HQ–OAR–2021–0643.

those components could continue to enter the market to service existing systems. However, since the rule's signature, stakeholders representing the air conditioning and heat pump subsector have raised concerns indicating that certain aspects of the rule's compliance date structure may result in unintended stranded inventory. EPA has reevaluated the specific circumstances for residential and light commercial air conditioning and heat pumps, and for the reasons articulated below is extending the installation compliance date for that subsector from January 1, 2025, to January 1, 2026, when using components that were manufactured or imported prior to January 1, 2025. In this interim final rule, the Agency is not considering the January 1, 2026, installation compliance date applicable to VRF systems; however, EPA intends to consider VRF systems in a separate notice and comment action.

EPA has evaluated the planning, purchasing, and installation timeframes for residential new construction as referenced in the November 13, 2023, letter from industry stakeholders. We recognize that it is common in the residential new construction industry for communities and dwellings to be planned well in advance, including plans for the heating and cooling systems intended to be installed in that new construction. Builders of residential new construction may order those planned heating and cooling systems in concert with the planning process without knowing when those systems will be installed. As noted by stakeholders, installation of these systems is often one of the final steps in residential construction. We acknowledge that it may therefore be the case that for new residential construction planned to occur in 2025, builders may have already taken action with respect to the heating and cooling systems that are planned to be installed in that new construction. Specifically, for construction occurring during 2025, components of residential and light commercial air conditioning and heat pump systems may have already been ordered or purchased by builders, such that leaving the January 1, 2025, installation compliance date unaltered could result in builders of new residential construction being left with stranded inventory—residential and light commercial air conditioning and heat pump components—that could not be used. In particular, because such equipment may already be well along the distribution chain, including in the possession of the end-user builder, it

would be challenging to redirect that equipment to another user who would be in a different segment of the market, such as those servicing existing systems. As discussed, EPA made changes to the final Technology Transitions Rule specifically to avoid stranding inventory, as this outcome is undesirable economically and environmentally, and the issue addressed in this rule was not brought to the Agency's attention until after the final rule was signed. This action's extension of the January 1, 2025, new installation compliance date to January 1, 2026, for components that were manufactured or imported prior to January 1, 2025, is intended to avoid stranding those components in the distribution chain.

We also acknowledge that some areas of the residential and light commercial air conditioning and heat pump subsector are experiencing rapid growth. In 2022, sales of heat pumps in the United States outpaced gas furnaces for the first time ever, following a 50% increase from 2015 to 2020. For certain technologies with extremely limited historic use in the United States, such as mini-split and multi-split systems, the final Technology Transitions Rule's continued allowance of high-GWP HFCs in components for repair and servicing only may be insufficient to absorb projected inventory of those components. Anticipated manufacture and import of mini-split systems, for example, is much larger than the stock of installed systems that are old enough to need components for repair or replacement. The nascent and rapid expansion of certain subsets of the residential and light commercial air conditioning and heat pump subsector therefore further supports the extension of the January 1, 2025, compliance date to January 1, 2026, for installation of components manufactured or imported prior to January 1, 2025.

B. Limiting the Environmental Impact of This Action

EPA is narrowly tailoring this rule to respond to stakeholder concerns about stranded inventory in this subsector while maintaining the environmental benefits of the Technology Transitions Rule. To do so, EPA is extending the installation compliance date only for new systems installed from specified components (e.g., condensing units and indoor evaporators) that were manufactured or imported prior to January 1, 2025. This restriction means that the total number of higher-GWP systems installed in 2024 and 2025 would match what the Agency modeled for installation in 2024. The extra year

for installation would not increase demand for HFCs in this subsector but rather could shift some of the demand from 2024 into 2025.

EPA is not extending the original compliance date for new installations in this subsector beyond January 1, 2025, when using components manufactured or imported on or after January 1, 2025. These components remain subject to the original restrictions of the Technology Transitions Rule. Specifically, if they contain an HFC with a GWP of 700 or greater their use is limited to servicing previously installed systems. As elaborated on more below, all the existing labeling, reporting, and recordkeeping requirements also continue to apply to components using, or intended to use, any HFC. Extending the compliance date for all installations in the subsector by one year is not warranted based on EPA's prior analysis of the availability of substitutes within this subsector, as described in the Technology Transitions Rule and supporting documents in the docket for that rule.

EPA finds that this approach effectively responds to stakeholder concerns about stranded inventory while remaining protective of the environment. This approach was suggested by industry stakeholders in their letter dated November 13, 2023, and it aligns with industry's plans to transition in this subsector.

This interim final rule provides an additional year for installation only if all “specified components” of that system are manufactured or imported prior to January 1, 2025. The term “specified component” is defined under the Technology Transitions Rule as “condensing units, condensers, compressors, evaporator units, and evaporators.” Other components of an air conditioning or heat pump system such as valves or refrigerant piping are not restricted by the Technology Transitions Rule and can be installed regardless of manufacture or import date.

C. How do the labeling, recordkeeping, and reporting provisions apply?

The Technology Transitions Rule requires labels on products and certain components that use HFCs. The labeling requirement takes effect for each subsector at the same time as the manufacture and import prohibition for products or the installation prohibition for systems. This timing reflects the primary purpose of the labels, which is for assessing compliance of products and systems in sectors and subsectors with active HFC restrictions.

This action does not require any specific labeling for components that are manufactured or imported prior to January 1, 2025. Nameplates typically include the date that a component is manufactured, which is sufficient for the purposes of this rule. Furthermore, it would be impractical to require entities that are not OEMs to relabel components that are already within the distribution chain.

This action does not change the existing labeling requirements related to components that are effective January 1, 2025. For specified components of systems, the Technology Transitions Rule required labels as of the applicable installation compliance date. This means that for specified components manufactured or imported on or after January 1, 2025, the final Technology Transition Rule's requirements continue to apply. These requirements include, among other things, that such components must be labeled with the statement "For servicing existing equipment only." This labeling is particularly important to distinguish components manufactured or imported before January 1, 2025, from those that are not.

The Technology Transitions Rule established recordkeeping and reporting requirements for any entity that manufactures or imports products or specified components that use or are intended to use HFCs in the sectors and subsectors covered in that rule. The reporting period for all sectors and subsectors starts on January 1, 2025, and the first reports must be submitted to the Agency by March 31, 2026.

This action does not add to nor modify the existing reporting and recordkeeping requirements for specified components. EPA is not establishing new reporting and recordkeeping requirements related to the sale or installation of components manufactured or imported prior to January 1, 2025. Reporting and recordkeeping is still required for specified components that are manufactured or imported on or after January 1, 2025.

D. Evaluation of the Subsection (i)(4) Factors

Subsection (i)(4) of the AIM Act directs EPA to factor in, to the extent practicable and using best available data, various considerations when carrying out a rulemaking under subsection (i). As discussed in detail in the preamble to the final Technology Transitions Rule, EPA views subsection (i)(4)(A) through (D) as providing overarching direction for setting restrictions under subsection (i). 88 FR

at 73129–73141. EPA is not in this rule reconsidering the interpretations provided in the final Technology Transitions Rule regarding how it considers the factors laid out in subsection (i)(4). Nor is the Agency revisiting its analysis of the (i)(4) factors with respect to the residential and light commercial air conditioning and heat pump subsector as set forth in the final rule preamble. 88 FR 73177–73180. However, in issuing this narrow adjustment to the January 1, 2025, compliance date for the residential and light commercial air conditioning and heat pump subsector, we have considered the (i)(4) factors to the extent practicable, as applicable to the Agency's adjustment of that compliance date.

The issue being addressed by this interim final rule was brought to the Agency's attention by stakeholders impacted by the Technology Transitions Rule. As noted in EPA's discussion of subsection (i)(4)(A), in addition to information generated by other governing bodies and agencies, the Agency does also take into account information provided by industry, environmental organizations, trade associations, and academia, to name a few. See 88 FR 73129. We acknowledge that in some cases, regulated entities may be best situated to identify best available information regarding implementation challenges. We are as part of this action providing an opportunity for comment and invite stakeholders who may have information relevant to this action to weigh in.

With respect to the Agency's evaluation of the availability of substitutes under subsection (i)(4)(B), EPA previously determined that substitutes with a GWP less than 700 are available effective January 1, 2025, for the residential and light commercial air conditioning and heat pump subsector. EPA has not changed that determination and continues to find that substitutes with a GWP less than 700 will be available January 1, 2025, across this subsector. Manufacturers and importers in this subsector are currently making air conditioning and heat pump systems and components with lower-GWP refrigerants for other markets and are prepared to meet the January 1, 2025, installation compliance date for such systems. This action is not reconsidering the Agency's prior evaluation of the availability of substitutes for meeting the use restrictions issued in the final Technology Transitions Rule for this subsector; rather, this action is narrowly tailored to address the disposition of

components manufactured or imported prior to January 1, 2025.

EPA's action to adjust the installation compliance date for certain installations within this subsector is motivated in large part by the policy goal of avoiding stranding inventory where possible. We believe this goal to be consistent with the direction in subsection (i)(4)(C), which instructs the Agency to factor in, to the extent practicable, overall economic costs and environmental impacts, as compared to historical trends. As discussed in the Technology Transitions Rule, EPA interprets (i)(4)(C) as purposefully accommodating different types and degrees of analysis of economic costs and environmental impacts, including costs and impacts that may be difficult to quantify. The narrow adjustment made in this interim final rule reduces the potential to unintentionally strand components. This action will not affect the overall consumption of HFCs and thus is not anticipated to have environmental impacts compared to the recently finalized Technology Transitions Rule. Further discussion of environmental impacts can be found in Section III.B.

EPA requests comment on the incremental costs and benefits associated with this action, including avoiding impacts such as stranded inventory (e.g., number and type of units affected) and on the incremental impacts to regulated entities regarding compliance (e.g., avoiding redistribution of equipment, avoiding revisions or new permits to replace previously secured building permits).

Finally, subsection (i)(4)(D) directs the Agency to factor in, to the extent practicable, the remaining phasedown period for regulated substances under the allowance allocation program. The reduction in the supply of HFCs is an important factor supporting compliance dates and GWP limits that are as stringent as feasible under the analysis of all the (i)(4) factors. EPA finds that this rule will not materially affect the demand for HFCs because it limits installations to components that were manufactured or imported prior to January 1, 2025. The effect of this rule is to extend the installations that EPA modeled to occur in 2024 over the two-year period of 2024 and 2025. EPA does not anticipate an increase from the total number of installed systems modeled in the Technology Transitions Rule's Regulatory Impact Assessment Addendum. Were the Agency to allow for the installation of new systems using components manufactured or imported through January 1, 2026, for instance, EPA would then find an effect on the

number of new systems and increased demand for HFCs.

IV. Other Matters

This interim rule is also providing a clarification regarding the scope of equipment within the household refrigerators and freezers subsector. For the reasons discussed below, household ice makers are not included within that subsector for purposes of the Technology Transitions Rule.

The proposed Technology Transitions Rule provided a functional description of the equipment found in each subsector and a non-exhaustive list of examples. EPA did not list all of the applications within a particular subsector given the variety of equipment types and end-uses. The proposed rule listed residential refrigeration systems as household refrigerators, freezers, and combination refrigerator/freezers and described the subsector as follows: “The designs and refrigeration capacities of equipment vary widely. Household freezers only offer storage space at freezing temperatures, while household refrigerators only offer storage space at non-freezing temperatures. Products with both a refrigerator and freezer in a single unit are most common. For purposes of this proposed rule, other small refrigerated household appliances such as chilled kitchen drawers, wine coolers, and minifridges also fall within this subsector.” 87 FR 76785.

The final rule incorrectly added “household ice makers” to the list of examples. 88 FR 73173. The functional description of this subsector in the Technology Transitions Rule remained the same between proposal and final and was equipment that offers storage space at freezing and non-freezing temperatures. Residential ice makers merit additional consideration because they are primarily designed to produce the ice in addition to providing storage for that ice at freezing temperatures. The types of ice and processes used to make them may differ from the other equipment covered by the restrictions for this subsector and additional analysis of available substitutes for household ice makers is warranted. As such, EPA does not consider residential ice makers to be within the scope of the household refrigerators and freezers subsector or the requirements of the Technology Transitions Rule.

V. Statutory and Executive Order Review

Additional information about these statutes and Executive Orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

This action is a “significant regulatory action” under Executive Order 12866, as amended by Executive Order 14094. Nevertheless, the Office of Management and Budget waived review of this action. The EPA prepared an analysis of the potential impacts associated with this action. This analysis, *Regulatory Impact Analysis of the Proposed Waste Emission Charge*, is available in docket EPA–HQ–OAR–2023–0434 to this rulemaking and is briefly summarized in Section V of this preamble.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because it does not contain any information collection activities.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, EPA concludes that the impact of concern for this rule is any significant adverse economic impact on small entities and that the agency is certifying that this rule will not have a significant economic impact on a substantial number of small entities because the rule relieves regulatory burden on the small entities subject to the rule. This rule prevents the stranding of components used to install residential and light commercial air conditioning and heat pump systems. We have therefore concluded that this action will relieve regulatory burden for all directly regulated small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. This action is narrowly tailored to prevent the stranding of certain air conditioning and heat pump equipment while not affecting the demand for HFCs. Therefore, this action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk. Since this action does not concern human health, EPA’s Policy on Children’s Health also does not apply.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This action applies to certain regulated substances and certain applications containing regulated substances, none of which are used to supply or distribute energy.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation’s Commitment to Environmental Justice for All

The EPA believes that this type of action does not concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate

and adverse effects on communities with environmental justice concerns. This action is narrowly tailored to prevent the stranding of inventory of air conditioning and heat pump equipment while not affecting the demand for HFCs.

Although this action does not concern human health or environmental conditions, the EPA identified and addressed environmental justice concerns within the Technology Transitions Rule (88 FR 73098; October 24, 2023).

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. The CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and comment rulemaking procedures are impracticable, unnecessary or contrary to the public interest (5 U.S.C. 808(2)). The EPA has made a good cause finding for this rule as discussed in the supplementary information section of the preamble where this is discussed, including the basis for that finding.

List of Subjects in 40 CFR Part 84

Environmental protection, Administrative practice and procedure, Air pollution control, Chemicals, Climate change, Emissions, Imports, Reporting and recordkeeping requirements.

Michael S. Regan,
Administrator.

For the reasons stated in the preamble, EPA amends 40 CFR part 84 as follows:

PART 84—PHASEDOWN OF HYDROFLUOROCARBONS

■ 1. The authority citation for part 84 continues to read as follows:

Authority: Pub. L. 116–260, Division S, Sec. 103.

■ 2. Amend § 84.54 by revising paragraph (c)(1) as follows:

§ 84.54 Restrictions on the use of hydrofluorocarbons.

* * * * *

(c) * * *

(1) Effective January 1, 2025, residential or light commercial air-conditioning or heat pump systems using a regulated substance, or a blend containing a regulated substance, with a global warming potential of 700 or greater, except for variable refrigerant

flow air-conditioning and heat pump systems. New residential and light commercial air-conditioning and heat pump systems using a regulated substance, or a blend containing a regulated substance, with a global warming potential of 700 or greater may be installed prior to January 1, 2026, where all specified components of that system are manufactured or imported prior to January 1, 2025.

* * * * *

[FR Doc. 2023–28500 Filed 12–22–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[RTID 0648–XD573]

Fraser River Pink Salmon Fisheries; Inseason Orders

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; inseason orders.

SUMMARY: NMFS publishes inseason orders to regulate treaty tribal and non-tribal (all citizen) commercial salmon fisheries in United States (U.S.) waters of the Fraser River Panel (Panel) Area. The orders were issued by the (Panel) of the Pacific Salmon Commission (Commission) and subsequently approved and issued by NMFS during 2023 for pink salmon fisheries within the U.S. Panel Area. These orders established fishing dates, times, and areas for the gear types of U.S. treaty tribal and all citizen commercial fisheries during the period the Panel exercised jurisdiction over these fisheries.

DATES: The effective dates for the inseason orders are set out in this document under the heading Inseason Orders.

FOR FURTHER INFORMATION CONTACT: Anthony Siniscal at 971–322–8407, email: Anthony.siniscal@noaa.gov.

SUPPLEMENTARY INFORMATION: The Treaty between the Government of the United States of America and the Government of Canada concerning Pacific salmon was signed at Ottawa on January 28, 1985, and subsequently was given effect in the United States by the Pacific Salmon Treaty Act (Act) at 16 U.S.C. 3631–3644.

Under authority of the Act, Federal regulations at 50 CFR part 300, subpart F, provide a framework for the implementation of certain regulations of the Commission and inseason orders of the Commission's Panel for U.S. sockeye and pink salmon fisheries in the Fraser River Panel Area.

The regulations close the U.S. portion of the Panel Area to U.S. sockeye and pink salmon tribal and non-tribal commercial fishing unless opened by Panel regulations that are given effect by inseason orders issued by NMFS (50 CFR 300.94(a)(1)). During the fishing season, NMFS may issue inseason orders that establish fishing times and areas consistent with the Commission agreements and regulations of the Panel. Such orders must be consistent with domestic legal obligations and are issued by the Regional Administrator, West Coast Region, NMFS. Official notification of these inseason actions is provided by two telephone hotline numbers described at 50 CFR 300.97(b)(1) and in 84 FR 19729 (May 6, 2019). The inseason orders are published in the **Federal Register** as soon as practicable after they are issued. Due to the frequency with which inseason orders are issued, publication of orders during the fishing season is impracticable.

Inseason Orders

NMFS issued the following inseason orders for U.S. fisheries within Panel Area waters during the 2023 fishing season, consistent with the orders adopted by the Panel. Each of the following inseason actions was effective upon announcement on telephone hotline numbers as specified at 50 CFR 300.97(b)(1) and in 88 FR 30235 (May 11, 2023); those dates and times are listed herein. The times listed are local times, and the areas designated are Puget Sound Management and Catch Reporting Areas as defined in the Washington State Administrative Code at Chapter 220–301–030.

Fraser River Panel Order Number 2023–01: Issued 3:30 p.m., August 18, 2023

Treaty Tribal Fishery

Areas 4B, 5, and 6C: Open for drift gillnet fishing from 12 p.m. (noon), Saturday, August 19, 2023, through 12 p.m. (noon), Tuesday, August 22, 2023.

Areas 6, 7, and 7A: Open for net fishing from 5 a.m. through 9 p.m., Sunday, August 20, 2023.

Fraser River Panel Order Number 2023–02: Issued 4:30 p.m., August 22, 2023

Treaty Tribal Fishery

Areas 4B, 5, and 6C: Extend for drift gillnet fishing from 12 p.m. (noon), Tuesday, August 22, 2023 through 12 p.m. (noon), Friday, August 25, 2023. Sockeye must be released.

Areas 6, 7, and 7A: Open for net fishing from 5 a.m. through 9 p.m., Wednesday, August 23, 2023 and 5 a.m. through 9 p.m., Friday, August 25, 2023. Sockeye must be released.

All Citizen Fishery

Areas 7 and 7A: Open for purse seine fishing from 5 a.m. through 9 p.m., Thursday, August 24, 2023 and 5 a.m. through 9 p.m., Friday, August 25, 2023. Sockeye must be released.

Areas 7 and 7A: Open for drift gillnet fishing from 8 a.m. through 11:59 p.m., Thursday, August 24, 2023 and 8 a.m. through 11:59 p.m., Friday, August 25, 2023. Sockeye must be released.

Areas 7: Open for reef net fishing 5 a.m. through 9 p.m., Wednesday, August 23, 2023, 5 a.m. through 9 p.m., Thursday, August 24, 2023, and 5 a.m. through 9 p.m., Friday, August 25, 2023. Sockeye must be released.

Fraser River Panel Order Number 2023–03: Issued 2:30 p.m., August 25, 2023

Treaty Tribal Fishery

Areas 4B, 5, and 6C: Extend for drift gillnet fishing from 12 p.m. (noon), Friday, August 25, 2023 through 12 p.m. (noon), Wednesday, August 30, 2023. Sockeye must be released.

Areas 6, 7, and 7A: Open for net fishing 5 a.m., Saturday, August 26, 2023 through 9 a.m., Wednesday, August 30, 2023. Sockeye must be released.

All Citizen Fishery

Areas 7 and 7A: Open for purse seine fishing 5 a.m. through 9 p.m., Saturday, August 26, 2023; 5 a.m. through 9 p.m., Sunday, August 27, 2023; 5 a.m. through 9 p.m., Monday, August 28, 2023; and 5 a.m. through 9 p.m., Tuesday, August 29, 2023. Sockeye must be released.

Areas 7 and 7A: Open for drift gillnet fishing from 8 a.m. through 11:59 p.m., Saturday, August 26, 2023; 8 a.m. through 11:59 p.m., Sunday, August 27, 2023; 8 a.m. through 11:59 p.m., Monday, August 28, 2023; and 8 a.m. through 11:59 p.m., Tuesday, August 29, 2023. Sockeye must be released.

Area 7: Open for reef net fishing 5 a.m. through 9 p.m., Saturday, August 26, 2023; 5 a.m. through 9 p.m., Sunday, August 27, 2023; 5 a.m. through 9 p.m., Monday, August 28, 2023; and 5 a.m.

through 9 p.m., Tuesday, August 29, 2023. Sockeye must be released.

Fraser River Panel Order Number 2023–04: 1:30 p.m., Issued August 29, 2023

Treaty Tribal Fishery

Areas 4B, 5, and 6C: Extend for drift gillnet fishing from 12 p.m. (noon), Wednesday, August 30, 2023 through 12 p.m. (noon), Friday, September 1, 2023. Sockeye must be released.

Areas 6, 7, and 7A: Extend for net fishing from 9 a.m., Wednesday, August 30, 2023 through 9 a.m., Saturday, September 2, 2023. Sockeye must be released.

All Citizen Fishery

Areas 7 and 7A: Open for purse seine fishing 5 a.m. through 9 p.m., Wednesday, August 30, 2023; 5 a.m. through 9 p.m., Thursday, August 31, 2023; and 5 a.m. through 9 p.m., Friday, September 1, 2023. Sockeye must be released.

Areas 7 and 7A: Open for drift gillnet fishing from 8 a.m. through 11:59 p.m., Wednesday, August 30, 2023; 8 a.m. through 11:59 p.m., Thursday, August 31, 2023; and 8 a.m. through 11:59 p.m., Friday, September 1, 2023. Sockeye must be released.

Area 7: Open for reef net fishing 5 a.m. through 9 p.m., Wednesday, August 30, 2023; 5 a.m. through 9 p.m., Thursday, August 31, 2023; and 5 a.m. through 9 p.m., Friday, September 1, 2023. Sockeye must be released.

Fraser River Panel Order Number 2023–05: Issued 1:30 p.m., September 1, 2023

Treaty Tribal Fishery

Areas 4B, 5, and 6C: Extend for drift gillnet fishing from 12 p.m. (noon), Friday, September 1, 2023 through 12 p.m. (noon), Wednesday, September 6, 2023. Sockeye must be released.

Areas 6, 7, and 7A: Extend for net fishing from 9 a.m., Saturday, September 2, 2023 through 9 a.m., Wednesday, September 6, 2023. Sockeye must be released.

All Citizen Fishery

Areas 7 and 7A: Open for purse seine fishing 5 a.m. through 9 p.m., Saturday, September 2, 2023; 5 a.m. through 9 p.m., Sunday, September 3, 2023; 5 a.m. through 9 p.m., Monday, September 4, 2023; and 5 a.m. through 9 p.m., Tuesday, September 5, 2023. Sockeye must be released.

Areas 7 and 7A: Open for drift gillnet fishing from 8 a.m. through 11:59 p.m., Saturday, September 2, 2023; 8 a.m. through 11:59 p.m., Sunday, September 3, 2023; 8 a.m. through 11:59 p.m., Monday, September 4, 2023; and 8 a.m.

through 11:59 p.m., Tuesday, September 5, 2023. Sockeye must be released.

Area 7: Open for reef net fishing 5 a.m. through 9 p.m., Saturday, September 2, 2023; 5 a.m. through 9 p.m., Sunday, September 3, 2023; 5 a.m. through 9 p.m., Monday, September 4, 2023; and 5 a.m. through 9 p.m., Tuesday, September 5, 2023. Sockeye must be released.

Fraser River Panel Order Number 2023–06: Issued 12:00 p.m., September 5, 2023

Treaty Tribal Fishery

Areas 4B, 5, and 6C: Extend for drift gillnet fishing from 12 p.m. (noon), Wednesday, September 6, 2023 through 12 p.m. (noon), Saturday, September 9, 2023. Sockeye must be released.

Areas 6, 7, and 7A: Extend for net fishing from 9 a.m., Wednesday, September 6, 2023 through 9 a.m., Saturday, September 9, 2023. Sockeye must be released.

All Citizen Fishery

Areas 7 and 7A: Open for purse seine fishing 5 a.m. through 9 p.m., Wednesday, September 6, 2023; 5 a.m. through 9 p.m., Thursday, September 7, 2023; and 5 a.m. through 9 p.m., Friday, September 8, 2023. Sockeye must be released.

Areas 7 and 7A: Open for drift gillnet fishing from 8 a.m. through 11:59 p.m., Wednesday, September 6, 2023; 8 a.m. through 11:59 p.m., Thursday, September 7, 2023; and 8 a.m. through 11:59 p.m., Friday, September 8, 2023. Sockeye must be released.

Area 7: Open for reef net fishing 5 a.m. through 9 p.m., Wednesday, September 6, 2023; 5 a.m. through 9 p.m., Thursday, September 7, 2023; 5 a.m. through 9 p.m., and Friday, September 8, 2023. Sockeye must be released.

Fraser River Panel Order Number 2023–07: Issued 12:00 p.m., September 8, 2023

Treaty Tribal Fishery

Areas 4B, 5, and 6C: Relinquish regulatory control effective 11:59 p.m., Saturday, September 9, 2023.

Areas 6, 7, and 7A: Extend for net fishing from 9 a.m., Saturday, September 9, 2023 through 9 a.m., Wednesday, September 13, 2023. Sockeye must be released.

All Citizen Fishery

Areas 7 and 7A: Open for purse seine fishing 5:30 a.m. through 9 p.m., Saturday, September 9, 2023; 5:30 a.m. through 9 p.m., Sunday, September 10, 2023; 5:30 a.m. through 9 p.m., Monday,

September 11, 2023; and 5:30 a.m. through 9 p.m., Tuesday, September 12, 2023. Sockeye must be released.

Areas 7 and 7A: Open for drift gillnet fishing from 8 a.m. through 9 p.m., Saturday, September 9, 2023; 8 a.m. through 9 p.m., Sunday, September 10, 2023; 8 a.m. through 9 p.m., Monday, September 11, 2023; and 8 a.m. through 9 p.m., Tuesday, September 12, 2023. Sockeye must be released.

Area 7: Open for reef net fishing 5:30 a.m. through 9 p.m., Saturday, September 9, 2023; 5:30 a.m. through 9 p.m., Sunday, September 10, 2023; 5:30 a.m. through 9 p.m., Monday, September 11, 2023; and 5:30 a.m. through 9 p.m., Tuesday, September 12, 2023. Sockeye must be released.

Fraser River Panel Order Number 2023–08: Issued 12:00 p.m., September 12, 2023

Treaty Tribal Fishery

Areas 6, 7, and 7A: Extend for net fishing from 9 a.m. through 11:59 p.m., Wednesday, September 13, 2023. Sockeye must be released.

Treaty Tribal and All Citizen Fisheries

Areas 6, 7, and 7A, excluding the Apex: Relinquish regulatory control effective 11:59 p.m., Wednesday, September 13, 2023. The Apex is those waters north and west of the Area 7A “East Point Line,” defined as a line projected from the low water range marker in Boundary Bay on the International Boundary through the east tip of Point Roberts in the state of Washington to the East Point light on Saturna Island in the Province of British Columbia.

Classification

The Assistant Administrator for Fisheries NOAA (AA), finds that good cause exists for the inseason orders to be issued without affording the public prior notice and opportunity for comment under 5 U.S.C. 553(b)(B) as such prior notice and opportunity for comments is impracticable and contrary to the public interest. Prior notice and opportunity for public comment is impracticable because of insufficient time between the time the stock abundance information is available to determine how much fishing can be allowed and the time the fishery must open or close in order to harvest the appropriate amount of fish while they are available.

The AA also finds good cause to waive the 30-day delay in the effective

date, required under 5 U.S.C. 553(d)(3), of the inseason orders. A delay in the effective date of the inseason orders would not allow fishers appropriately controlled access to the available fish at that time they are available.

This action is authorized by 50 CFR 300.97, and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 3636(b).

Dated: December 19, 2023.

Everett Wayne Baxter,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–28267 Filed 12–22–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 221223–0282; RTID 0648–XD608]

Fisheries of the Northeastern United States; Summer Flounder Fishery; Quota Transfer From NC to NJ

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notification of quota transfer.

SUMMARY: NMFS announces that the State of North Carolina is transferring a portion of its 2023 commercial summer flounder quota to the State of New Jersey. This adjustment to the 2023 fishing year quota is necessary to comply with the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan quota transfer provisions. This announcement informs the public of the revised 2023 commercial quotas for North Carolina and New Jersey.

DATES: Effective December 21, 2023, through December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Laura Deighan, Fishery Management Specialist, (978) 281–9184.

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are found in 50 CFR 648.100 through 648.111. These regulations require annual specification of a commercial quota that is apportioned among the coastal states from Maine through North Carolina. The

process to set the annual commercial quota and the percent allocated to each state is described in § 648.102 and final 2023 allocations were published on January 3, 2023 (88 FR 11).

The final rule implementing Amendment 5 to the Summer Flounder Fishery Management Plan (FMP), as published in the **Federal Register** on December 17, 1993 (58 FR 65936), provided a mechanism for transferring summer flounder commercial quota from one state to another. Two or more states, under mutual agreement and with the concurrence of the NMFS Greater Atlantic Regional Administrator, can transfer or combine summer flounder commercial quota under § 648.102(c)(2). The Regional Administrator is required to consider three criteria in the evaluation of requests for quota transfers or combinations: the transfer or combinations would not preclude the overall annual quota from being fully harvested; the transfer addresses an unforeseen variation or contingency in the fishery; and the transfer is consistent with the objectives of the FMP and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Regional Administrator has determined these three criteria have been met for the transfer approved in this notification.

North Carolina is transferring 16,690 pounds (lb; 7,570 kilograms (kg)) to New Jersey through a mutual agreement between the states. This transfer was requested to repay landings made by an out-of-state permitted vessel under a safe harbor agreement. The revised summer flounder quotas for 2023 are North Carolina, 3,131,074 lb (1,420,231 kg), and New Jersey, 2,487,110 lb (1,128,134 kg).

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR 648.102(c)(2)(i) through (iv), which was issued pursuant to section 304(b), and is exempted from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 20, 2023.

Everett Wayne Baxter,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–28423 Filed 12–21–23; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 665**

[Docket No. 231215–0306]

RIN 0648–BM34

Pacific Island Fisheries; 5-Year Extension of Moratorium on Harvest of Gold Corals

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This final rule extends the region-wide moratorium on the harvest of gold corals in the U.S. Pacific Islands through June 30, 2028. NMFS intends this final rule to prevent overfishing and to stimulate research on gold corals.

DATES: This rule is effective January 25, 2024.

ADDRESSES: Background information on Pacific Island precious coral fisheries is found in the fishery ecosystem plans (FEPs) available from the Western Pacific Fishery Management Council (Council), 1164 Bishop St., Suite 1400, Honolulu, HI 96813, telephone 808–522–8220, fax 808–522–8226, or <https://www.wpcouncil.org>. Copies of supporting documents for this action are available from <https://www.regulations.gov/docket/NOAA-NMFS-2023-0071>, or from Sarah Malloy, Acting Regional Administrator, NMFS Pacific Islands Regional Office (PIRO), 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818.

FOR FURTHER INFORMATION CONTACT: Pua Borges, NMFS PIRO Sustainable Fisheries, 808–725–5184.

SUPPLEMENTARY INFORMATION: Precious corals (also called deep-sea corals) include black, pink, red, bamboo, and gold corals, and are harvested for use in high quality jewelry. NMFS and the Council manage the fishery for precious corals in the U.S. Pacific Islands under FEPs for American Samoa, Hawaii, the Mariana Archipelago (Guam and the Northern Mariana Islands), and the Pacific Remote Island Areas. The U.S. fishery for gold corals in the Pacific Islands has been dormant since 2001.

In 2008, the Council recommended, and NMFS implemented, a 5-year moratorium on the harvest of gold corals in the Pacific Islands Region (73 FR 47098, August 13, 2008). The measure was a precautionary response to research that suggested that gold coral

growth rates and recruitment were much lower than previously known.

The Council considered additional research in 2012 that included refined gold coral growth rates and the identification of previously unknown habitat requirements. Based on that information, in 2013 the Council recommended that NMFS extend the moratorium for 5 years, which the agency did in May 2013 (78 FR 32181, May 29, 2013) and again in 2018 (83 FR 27716, June 14, 2018).

The current moratorium expired on June 30, 2023, but the Council continues to be concerned about uncertainties related to slow gold coral growth rates, taxonomy, and complex habitat requirements. Extending the moratorium another 5 years will provide additional time for further research and for the Council to develop sustainable management measures for gold corals. Based on the Council's concerns, NMFS is extending the moratorium on harvesting gold corals for 5 years, through June 30, 2028.

Additional background information on this action is in the preamble to the proposed rule (88 FR 65356, September 22, 2023).

Comments and Responses

On September 22, 2023, NMFS published a proposed rule and request for public comments (88 FR 65356). The comment period ended October 23, 2023. NMFS received comments from three individuals that generally supported the rule. One of these comments also suggested that the moratorium be made permanent. NMFS summarizes the comments and responds below.

Comment 1: The age and slow growth of gold corals make them vulnerable to exploitation, so this regulation is necessary to protect their populations, prevent overfishing and to allow time for more research.

Response: NMFS agrees and will continue to regulate Federal fisheries to ensure that they are sustainable, consistent with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the FEP and implementing regulations. Extending the moratorium another 5 years will provide additional time for further research related to gold coral growth rates, taxonomy, and complex habitat requirements.

Comment 2: The harvest of gold corals should be permanently banned.

Response: Among management alternatives considered by the Council at their 194th meeting in March 2023 was an option to permanently ban harvest of gold coral. There are

currently uncertainties and knowledge gaps in our understanding of gold coral biology, but these uncertainties do not warrant a permanent closure of the fishery at this time. Instead the Council recommended continuing a precautionary approach through a 5-year extension of the moratorium on harvest through June 30, 2028. This extension will allow the Council time to calculate maximum sustainable yield, continue to evaluate new and existing information to inform future management strategies, and consider a long-term solution for the fishery.

Changes From the Proposed Rule

This final rule contains no changes from the proposed rule.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the FEP, other provisions of the Magnuson-Stevens Act, and other applicable laws.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 665

Administrative practice and procedure, American Samoa, Deep sea coral, Fisheries, Fishing, Guam, Hawaii, Northern Mariana Islands, Pacific Remote Island Areas, Precious coral.

Dated: December 18, 2023.

Samuel D. Rauch III,
Deputy Assistant Administrator for
Regulatory Programs, National Marine
Fisheries Service.

For the reasons set out in the preamble, NMFS amends 50 CFR part 665 as follows:

PART 665—FISHERIES IN THE WESTERN PACIFIC

■ 1. The authority citation for 50 CFR part 665 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

- 2. Revise § 665.169 to read as follows:

§ 665.169 Gold coral harvest moratorium.

Fishing for, taking, or retaining any gold coral in any precious coral permit area is prohibited through June 30, 2028.

- 3. Amend § 665.269 by revising Note 2 to § 665.269 to read as follows:

§ 665.269 Annual Catch Limits (ACL).

* * * * *

Note 2 to § 665.269: A moratorium on gold coral harvesting is in effect through June 30, 2028.

- 4. Revise § 665.270 to read as follows:

§ 665.270 Gold coral harvest moratorium.

Fishing for, taking, or retaining any gold coral in any precious coral permit area is prohibited through June 30, 2028.

- 5. Revise § 665.469 to read as follows:

§ 665.469 Gold coral harvest moratorium.

Fishing for, taking, or retaining any gold coral in any precious coral permit area is prohibited through June 30, 2028.

- 6. Revise § 665.669 to read as follows:

§ 665.669 Gold coral harvest moratorium.

Fishing for, taking, or retaining any gold coral in any precious coral permit area is prohibited through June 30, 2028.

[FR Doc. 2023–28221 Filed 12–22–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230306–0065]

RTID 0648–XD597

Fisheries of the Exclusive Economic Zone Off Alaska; Inseason Adjustment to the 2024 Bering Sea and Aleutian Islands Pollock, Atka Mackerel, and Pacific Cod Total Allowable Catch Amounts

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; inseason adjustment; request for comments.

SUMMARY: NMFS is adjusting the 2024 total allowable catch (TAC) amounts for the Bering Sea and Aleutian Islands (BSAI) pollock, Atka mackerel, and Pacific cod fisheries. This action is

necessary because NMFS has determined these TACs are incorrectly specified, and will ensure the BSAI pollock, Atka mackerel, and Pacific cod TACs are the appropriate amounts based on the best scientific information available. This action is consistent with the goals and objectives of the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area.

DATES: Effective 0001 hours, Alaska local time (A.l.t.), January 1, 2024, until the effective date of the final 2024 and 2025 harvest specifications for BSAI groundfish, unless otherwise modified or superseded through publication of a notification in the **Federal Register**.

Comments must be received at the following address no later than 4:30 p.m., A.l.t., January 10, 2024.

ADDRESSES: You may submit comments on this document, identified by docket number NOAA–NMFS–2022–0094, by any of the following methods:

Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA–NMFS–2022–0094 in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments.

Mail: Submit written comments to Gretchen Harrington, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on <https://www.regulations.gov> without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Adam Zaleski, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council (Council) under authority of the Magnuson-Stevens Fishery Conservation and

Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR parts 600 and 679.

The final 2023 and 2024 harvest specifications for groundfish in the BSAI (88 FR 14926, March 10, 2023) set the 2024 Aleutian Islands (AI) pollock TAC at 19,000 metric tons (mt), the 2024 Bering Sea (BS) pollock TAC at 1,302,000 mt, the 2024 BSAI Atka mackerel TAC at 66,855 mt, the 2024 BS Pacific cod TAC at 123,295 mt, and the 2024 AI Pacific cod TAC at 8,425 mt. In December 2023, the Council recommended a 2024 BS pollock TAC of 1,300,000 mt, which is less than the 1,302,000 mt TAC established by the final 2023 and 2024 harvest specifications for groundfish in the BSAI. The Council also recommended a 2024 BSAI Atka mackerel TAC of 72,987 mt, which is more than the 66,855 mt TAC established by the final 2023 and 2024 harvest specifications for groundfish in the BSAI. Furthermore, the Council recommended a 2024 BS Pacific cod TAC of 147,753 mt, and an AI Pacific cod TAC of 8,080 mt, which is more than the BS Pacific cod TAC of 123,295 mt, and less than the AI Pacific cod TAC of 8,425 mt established by the final 2023 and 2024 harvest specifications for groundfish in the BSAI. The Council’s recommended 2024 TACs, and the area and seasonal apportionments, are based on the Stock Assessment and Fishery Evaluation report (SAFE), dated November 2023, which NMFS has determined is the best scientific information available for these fisheries.

Steller sea lions occur in the same location as the pollock, Atka mackerel, and Pacific cod fisheries and are listed as endangered under the Endangered Species Act (ESA). Pollock, Atka mackerel, and Pacific cod are a principal prey species for Steller sea lions in the BSAI. The seasonal apportionment of pollock, Atka mackerel, and Pacific cod harvest is necessary to ensure the groundfish fisheries are not likely to cause jeopardy of extinction or adverse modification of critical habitat for Steller sea lions. NMFS published regulations and the revised harvest limit amounts for pollock, Atka mackerel, and Pacific cod fisheries to implement Steller sea lion protection measures to insure that groundfish fisheries of the BSAI are not likely to jeopardize the continued existence of the western distinct population segment of Steller sea lions or destroy or adversely modify their designated critical habitat (79 FR 70286, November 25, 2014).

In accordance with § 679.25(a)(1)(iii), (a)(2)(i)(B), and (a)(2)(iv), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that, based on the November 2023 SAFE report for this fishery, the current BSAI pollock, Atka mackerel, and Pacific cod TACs are incorrectly specified. Pursuant to § 679.25(a)(1)(iii), the Regional Administrator is adjusting

the 2024 BS pollock TAC to 1,300,000 mt, the 2024 BSAI Atka mackerel TAC to 72,987 mt, the 2024 BS Pacific cod TAC to 147,753 mt, and the 2024 AI Pacific cod TAC to 8,080 mt. Therefore, table 2 of the final 2023 and 2024 harvest specifications for groundfish in the BSAI (88 FR 14926, March 10, 2023) is revised consistent with this adjustment.

Pursuant to § 679.20(a)(5)(i) and (iii), table 5 of the final 2023 and 2024 harvest specifications for groundfish in the BSAI (88 FR 14926, March 10, 2023) is revised for the 2024 BS and AI allocations of pollock TAC to the directed pollock fisheries and to the Community Development Quota (CDQ) directed fishing allowances consistent with this adjustment.

TABLE 5—FINAL 2024 ALLOCATIONS OF POLLOCK TACS TO THE DIRECTED POLLOCK FISHERIES AND TO THE CDQ DIRECTED FISHING ALLOWANCES (DFA) ¹

[Amounts are in metric tons]

Area and sector	2024 Allocations	2024 A season ¹		
		A season DFA	SCA harvest limit ²	B season DFA
Bering Sea subarea TAC ¹	1,300,000	n/a	n/a	n/a
CDQ DFA	130,000	58,500	36,400	71,500
ICA ¹	50,000	n/a	n/a	n/a
Total Bering Sea non-CDQ DFA	1,120,000	504,000	313,600	616,000
AFA Inshore	560,000	252,000	156,800	308,000
AFA Catcher/Processors ³	448,000	201,600	125,440	246,400
Catch by CPs	409,920	184,464	n/a	225,456
Catch by CVs ³	38,080	17,136	n/a	20,944
Unlisted CP Limit ⁴	2,240	1,008	n/a	1,232
AFA Motherships	112,000	50,400	31,360	61,600
Excessive Harvesting Limit ⁵	196,000	n/a	n/a	n/a
Excessive Processing Limit ⁶	336,000	n/a	n/a	n/a
Aleutian Islands subarea ABC	43,092	n/a	n/a	n/a
Aleutian Islands subarea TAC ¹	19,000	n/a	n/a	n/a
CDQ DFA	1,900	1,841	n/a	59
ICA	2,500	1,250	n/a	1,250
Aleut Corporation	14,600	14,146	n/a	454
Area harvest limit ⁷	n/a	n/a	n/a	n/a
541	12,928	n/a	n/a	n/a
542	6,464	n/a	n/a	n/a
543	2,155	n/a	n/a	n/a
Bogoslof District ICA ⁸	300	n/a	n/a	n/a

¹ Pursuant to § 679.20(a)(5)(i)(A), the Bering Sea subarea pollock TAC, after subtracting the CDQ DFA (10 percent) and the Initial Catch Allowance (ICA) (50,000 mt, 4.27 percent), is allocated as a DFA as follows: inshore sector—50 percent, catcher/processor sector (CP)—40 percent, and mothership sector—10 percent. In the Bering Sea subarea, 45 percent of the DFAs are allocated to the A season (January 20–June 10) and 55 percent of the DFAs are allocated to the B season (June 10–November 1). When the AI Pollock Acceptable Biological Catch (ABC) equals or exceeds 19,000 mt, the annual TAC is equal to 19,000 mt (§ 679.20(a)(5)(iii)(B)(1)). Pursuant to § 679.20(a)(5)(iii)(B)(2), the Aleutian Islands subarea pollock TAC, after subtracting first for the CDQ DFA (10 percent) and second for the ICA (2,500 mt), is allocated to the Aleut Corporation for a pollock directed fishery. In the Aleutian Islands subarea, the A season is allocated no more than 40 percent of the Aleutian Islands pollock ABC.

² In the Bering Sea subarea, pursuant to § 679.20(a)(5)(i)(C), no more than 28 percent of each sector's annual DFA may be taken from the Steller Sea Lion Conservation Area (SCA) before noon, April 1.

³ Pursuant to § 679.20(a)(5)(i)(A)(4), 8.5 percent of the allocation to listed CPs shall be available for harvest only by eligible catcher vessels with a CP endorsement delivering to listed CPs, unless there is a CP sector cooperative for the year.

⁴ Pursuant to § 679.20(a)(5)(i)(A)(4)(iii), the American Fisheries Act (AFA) unlisted catcher/processors are limited to harvesting not more than 0.5 percent of the catcher/processor sector's allocation of pollock.

⁵ Pursuant to § 679.20(a)(5)(i)(A)(6), NMFS establishes an excessive harvesting share limit equal to 17.5 percent of the sum of the non-CDQ pollock DFAs.

⁶ Pursuant to § 679.20(a)(5)(i)(A)(7), NMFS establishes an excessive processing share limit equal to 30.0 percent of the sum of the non-CDQ pollock DFAs.

⁷ Pursuant to § 679.20(a)(5)(iii)(B)(6), NMFS establishes harvest limits for pollock in the A season in Area 541 of no more than 30 percent, in Area 542 of no more than 15 percent, and in Area 543 of no more than 5 percent of the Aleutian Islands pollock ABC.

⁸ Pursuant to § 679.22(a)(7)(B), the Bogoslof District is closed to directed fishing for pollock. The amounts specified are for incidental catch only and are not apportioned by season or sector.

Note: Seasonal or sector apportionments may not total precisely due to rounding.

Pursuant to § 679.20(a)(8), table 7 of the final 2023 and 2024 harvest specifications for groundfish in the BSAI (88 FR 14926, March 10, 2023) is

revised for the 2024 seasonal and spatial allowances, gear shares, CDQ reserve, incidental catch allowance, jig, BSAI trawl limited access, and Amendment

80 allocations of the BSAI Atka mackerel TAC consistent with this adjustment.

TABLE 7—FINAL 2024 SEASONAL AND SPATIAL ALLOWANCES, GEAR SHARES, CDQ RESERVE, INCIDENTAL CATCH ALLOWANCE, AND AMENDMENT 80 ALLOCATIONS OF THE BSAI ATKA MACKEREL TAC

[Amounts are in metric tons]

Sector ¹	Season ^{2 3 4}	2024 allocation by area		
		Eastern Aleutian District/ Bering Sea	Central Aleutian District ⁵	Western Aleutian District
TAC	n/a	32,260	16,754	23,973
CDQ reserve	Total	3,452	1,793	2,565
	A	1,726	896	1,283
	Critical Habitat	n/a	538	770
	B	1,726	896	1,283
	Critical Habitat	n/a	538	770
Non-CDQ TAC	n/a	28,808	14,961	21,408
ICA	Total	800	75	20
Jig ⁶	Total	140		
BSAI trawl limited access	Total	2,787	1,489	
	A	1,393	744	
	Critical Habitat	n/a	447	
	B	1,393	744	
	Critical Habitat	n/a	447	
Amendment 80 sector	Total	25,081	13,398	21,388
	A	12,541	6,699	10,694
	Critical Habitat	n/a	4,019	6,416
	B	12,541	6,699	10,694
	Critical Habitat	n/a	4,019	6,416

¹ Section 679.20(a)(8)(ii) allocates the Atka mackerel TACs, after subtracting the CDQ reserves, ICAs, and jig gear allocation, to the Amendment 80 and BSAI trawl limited access sectors. The allocation of the Initial Total Allowable Catch (ITAC) for Atka mackerel to the Amendment 80 and BSAI trawl limited access sectors is established in table 33 to 50 CFR part 679 and § 679.91. The CDQ reserve is 10.7 percent of the TAC for use by CDQ participants (see § 679.20(b)(1)(ii)(C)).

² Sections 679.20(a)(8)(ii)(A) and 679.22(a) establish temporal and spatial limitations for the Atka mackerel fishery.

³ The seasonal allowances of Atka mackerel are 50 percent in the A season and 50 percent in the B season.

⁴ Section 679.23(e)(3) authorizes directed fishing for Atka mackerel with trawl gear during the A season from January 20 to June 10 and the B season from June 10 to December 31.

⁵ Section 679.20(a)(8)(ii)(C)(1)(i) limits no more than 60 percent of the annual TACs in Areas 542 and 543 to be caught inside of Steller sea lion protection areas; section 679.20(a)(8)(ii)(C)(1)(ii) equally divides the annual TACs between the A and B seasons as defined at § 679.23(e)(3); and section 679.20(a)(8)(ii)(C)(2) requires that the TAC in Area 543 shall be no more than 65 percent of ABC in Area 543.

⁶ Sections 679.2 and 679.20(a)(8)(i) requires that up to 2 percent of the Eastern Aleutian Islands District and the Bering Sea subarea TAC be allocated to jig gear after subtracting the CDQ reserve and the ICA. NMFS sets the amount of this allocation for 2024 at 0.5 percent. The jig gear allocation is not apportioned by season.

Note: Seasonal or sector apportionments may not total precisely due to rounding.

Pursuant to § 679.20(a)(7), table 9 of the final 2023 and 2024 harvest specifications for groundfish in the

BSAI (87 FR 76435, March 10, 2023) is revised for the 2024 gear shares and seasonal allowances of the BSAI Pacific

cod TAC consistent with this adjustment.

TABLE 9—FINAL 2024 SECTOR ALLOCATIONS AND SEASONAL ALLOWANCES OF THE BSAI PACIFIC COD TAC

[Amounts are in metric tons]

Sector	Percent	2024	2024	2024	
				Season	Amount
Total Bering Sea TAC	n/a	147,753	n/a	n/a	n/a
Bering Sea CDQ	n/a	15,810	n/a	See § 679.20(a)(7)(i)(B)	n/a
Bering Sea non-CDQ TAC	n/a	131,943	n/a	n/a	n/a
Total Aleutian Islands TAC	n/a	8,080	n/a	n/a	n/a
Aleutian Islands CDQ	n/a	865	n/a	See § 679.20(a)(7)(i)(B)	n/a
Aleutian Islands non-CDQ TAC	n/a	7,215	n/a	n/a	n/a
Western Aleutians Islands Limit	n/a	2,233	n/a	n/a	n/a
Total BSAI non-CDQ TAC ¹	100.0	139,159	n/a	n/a	n/a
Total hook-and-line/pot gear	60.8	84,609	n/a	n/a	n/a
Hook-and-line/pot ICA ²	n/a	n/a	500	n/a	n/a
Hook-and-line/pot sub-total	n/a	84,109	n/a	n/a	n/a
Hook-and-line catcher/processors	48.7	n/a	67,370	n/a	n/a
A-season				Jan 1–Jun 10	34,359
B-season				Jun 10–Dec 31	33,011
Hook-and-line catcher vessels ≥ 60 ft Length Overall (LOA)	0.2	n/a	277	n/a	n/a
A-season				Jan 1–Jun 10	141
B-season				Jun 10–Dec 31	136
Pot catcher/processors	1.5	n/a	2,075	n/a	n/a

TABLE 9—FINAL 2024 SECTOR ALLOCATIONS AND SEASONAL ALLOWANCES OF THE BSAI PACIFIC COD TAC—Continued
[Amounts are in metric tons]

Sector	Percent	2024	2024	2024	
				Season	Amount
A-season .....	.....	.....	.....	Jan 1–Jun 10	1,058
B-season .....	.....	.....	.....	Sept 1–Dec 31	1,017
Pot catcher vessels ≥ 60 ft LOA	8.4	n/a	11,620	n/a	n/a
A-season .....	.....	.....	.....	Jan 1–Jun 10	5,926
B-season .....	.....	.....	.....	Sept 1–Dec 31	5,694
Catcher vessels < 60 ft LOA using hook-and-line or pot gear	2.0	n/a	2,767	n/a	n/a
Trawl catcher vessels ³	22.1	30,754	n/a	n/a	n/a
A-Season ICA .....	.....	.....	.....	Jan 20–Apr 1	1,500
A-season PCTC .....	.....	.....	.....	Jan 20–Apr 1	21,258
B-season ICA .....	.....	.....	.....	Apr 1–Jun 10	700
B-season PCTC .....	.....	.....	.....	Apr 1–Jun 10	2,683
C-season trawl catcher vessels .....	.....	.....	.....	Jun 10–Nov 1	4,613
AFA trawl catcher/processors	2.3	3,201	n/a	n/a	n/a
A-season .....	.....	.....	.....	Jan 20–Apr 1	2,400
B-season .....	.....	.....	.....	Apr 1–Jun 10	800
C-season .....	.....	.....	.....	Jun 10–Nov 1 .....	.....
Amendment 80	13.4	18,647	n/a	n/a	n/a
A-season .....	.....	.....	.....	Jan 20–Apr 1	13,985
B-season .....	.....	.....	.....	Apr 1–Jun 10	4,662
C-season .....	.....	.....	.....	Jun 10–Dec 31 .....	.....
Jig	1.4	1,948	n/a	n/a	n/a
A-season .....	.....	.....	.....	Jan 1–Apr 30	1,169
B-season .....	.....	.....	.....	Apr 30–Aug 31	390
C-season .....	.....	.....	.....	Aug 31–Dec 31	390

¹ The sector allocations and seasonal allowances for BSAI Pacific cod TAC are based on the sum of the BS and AI Pacific cod TACs, after subtraction of the reserves for the CDQ Program. If the TAC for Pacific cod in either the BS or AI is or will be reached, then directed fishing will be prohibited for non-CDQ Pacific cod in that subarea, even if a BSAI allowance remains (§ 679.20(d)(1)(iii)).

² The ICA for the hook-and-line and pot sectors will be deducted from the aggregate portion of Pacific cod TAC allocated to the hook-and-line and pot sectors. The Regional Administrator approves an ICA of 500 mt based on anticipated incidental catch by these sectors in other fisheries.

³ The A and B season trawl CV Pacific cod allocation will be allocated to the Pacific Cod Trawl Cooperative Program after subtraction of the A and B season ICAs (§ 679.131(b)(1)). The Regional Administrator approves the A and B seasons ICAs of 1,500 mt and 700 mt, respectively, to account for projected incidental catch of Pacific cod by trawl catcher vessels engaged in directed fishing for groundfish other than Pacific Cod Trawl Cooperative (PCTC) Program Pacific cod.

Note: Seasonal or sector apportionments may not total precisely due to rounding.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 679, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would allow for harvests that exceed the appropriate allocations for pollock, Atka mackerel, and Pacific cod in the BSAI based on the best scientific information available. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of December 14, 2023.

Without this inseason adjustment, NMFS could not allow the fishery for pollock, Atka mackerel, and Pacific cod in the BSAI to be harvested in an expedient manner and in accordance

with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until January 10, 2024.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 19, 2023.

Everett Wayne Baxter,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–28323 Filed 12–22–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230224–0053; RTID 0648–XD295]

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher/Processors Using Hook-and-Line Gear in the Western Regulatory Area of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by catcher/processors using hook-and-line (HAL) gear in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2023 Pacific cod total allowable catch (TAC) apportioned to catcher/processors using

HAL gear in the Western Regulatory Area of the GOA.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), December 21, 2023, through 2400 hours, A.l.t., December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Adam Zaleski, 907-586-7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2023 Pacific cod TAC apportioned to catcher/processors using HAL gear in the Western Regulatory Area of the GOA is 1,439 metric tons (mt) as established by the final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023) and inseason adjustment (88 FR 76141, November 6, 2023).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the 2023 Pacific cod TAC apportioned to catcher/processors using HAL gear in the Western Regulatory Area of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 1,430 mt and is setting aside the remaining 9 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by catcher/processors using HAL gear in the Western Regulatory Area of the GOA.

While this closure is effective the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 679, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent

NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific cod by catcher/processors using HAL gear in the Western Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of December 19, 2023.

The Assistant Administrator for Fisheries, NOAA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 20, 2023.

Everett Wayne Baxter,
Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
[FR Doc. 2023-28416 Filed 12-21-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230224-0053; RTID 0648-XD598]

Fisheries of the Exclusive Economic Zone Off Alaska; Inseason Adjustment to the 2024 Gulf of Alaska Pollock and Pacific Cod Total Allowable Catch Amounts

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; inseason adjustment; request for comments.

SUMMARY: NMFS is adjusting the 2024 total allowable catch (TAC) amounts for the Gulf of Alaska (GOA) pollock and Pacific cod fisheries. This action is necessary because NMFS has determined these TACs are incorrectly specified, and will ensure the GOA pollock and Pacific cod TACs are the appropriate amount based on the best scientific information available for pollock and Pacific cod in the GOA. This action is consistent with the goals and objectives of the Fishery Management Plan (FMP) for Groundfish of the Gulf of Alaska.

DATES: Effective 0001 hours, Alaska local time (A.l.t.), January 1, 2024, until the effective date of the final 2024 and 2025 harvest specifications for GOA

groundfish, unless otherwise modified or superseded through publication of a notification in the **Federal Register**.

Comments must be received at the following address no later than 4:30 p.m., A.l.t., January 10, 2024.

ADDRESSES: You may submit comments on this document, identified by docket number NOAA-NMFS-2022-0094, by any of the following methods:

Electronic Submission: Submit all electronic public comments via the Federal eRulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA-NMFS-2022-0094 in the Search box. Click on the "Comment" icon, complete the required fields, and enter or attach your comments.

Mail: Submit written comments to Gretchen Harrington, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS. Mail comments to P.O. Box 21668, Juneau, AK 99802-1668.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on <https://www.regulations.gov> without change. All personal identifying information (*e.g.*, name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Adam Zaleski, 907-586-7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the FMP for Groundfish of the Gulf of Alaska prepared by the North Pacific Fishery Management Council (Council) under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023) set the 2024 pollock TAC at 168,416 metric tons (mt) in the GOA. In December 2023, the Council recommended a 2024 pollock TAC of 195,720 mt for the GOA, which is greater than the 168,416 mt established by the final 2023 and 2024 harvest specifications for groundfish in the GOA. The Council's recommended 2024 TAC, and the area and seasonal

apportionments, is based on the Stock Assessment and Fishery Evaluation report (SAFE), dated November 2023.

The final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023) set the 2024 Pacific cod TAC at 16,668 mt in the GOA. In December 2023, the Council recommended a 2024 Pacific cod TAC of 23,766 mt for the GOA, which is greater than the 16,668 mt established by the final 2023 and 2024 harvest specifications for groundfish in the GOA. The Council's recommended 2024 TAC, and the area and seasonal apportionments, is based on the SAFE, dated November 2023.

Steller sea lions occur in the same location as the pollock and Pacific cod fisheries and are listed as endangered

under the Endangered Species Act. Pollock and Pacific cod are principal prey species for Steller sea lions in the GOA. The seasonal apportionment of pollock and Pacific cod harvests are necessary to ensure the groundfish fisheries are not likely to cause jeopardy of extinction or adverse modification of critical habitat for Steller sea lions. The regulations at § 679.20(a)(5)(iv) specify how the pollock TAC will be apportioned and the regulations at § 679.20(a)(6)(ii) and (a)(12)(i) specify how the Pacific cod TAC will be apportioned.

In accordance with § 679.25(a)(1)(iii), (a)(2)(i)(B), and (a)(2)(iv) the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that, based on the best

scientific information available for this fishery, the current GOA pollock and Pacific cod TACs are incorrectly specified. Consequently, pursuant to § 679.25(a)(1)(iii), the Regional Administrator is adjusting the 2024 GOA pollock TAC to 195,720 mt and the 2024 Pacific cod TAC to 23,766 mt. Therefore, tables 4 and 6 of the final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023) are revised consistent with this adjustment.

Pursuant to § 679.20(a)(5)(iv), table 4 of the final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023) is revised for the 2024 TACs of pollock in the Central and Western Regulatory Area of the GOA.

TABLE 4—FINAL 2024 DISTRIBUTION OF POLLOCK IN THE WESTERN AND CENTRAL REGULATORY AREAS OF THE GULF OF ALASKA; AREA APPORTIONMENTS;¹ AND SEASONAL ALLOWANCES OF ANNUAL TAC

[Values are rounded to the nearest metric ton]

Season ²	Shumigan (Area 610)	Chirikof (Area 620)	Kodiak (Area 630)	Total ³
A (January 20–May 31)	5,422	70,918	13,862	90,202
B (September 1–November 1)	33,460	20,019	36,725	90,204
Annual Total	38,882	90,937	50,587	180,406

¹ Area apportionments and seasonal allowances may not total precisely due to rounding.

² As established by § 679.23(d)(2)(i) through (ii), the A and B season allowances are available from January 20 through May 31 and September 1 through November 1, respectively. The amounts of pollock for processing by the inshore and offshore components are not shown in this table.

³ The West Yakutat and Southeast Outside District pollock TACs are not allocated by season and are not included in the total pollock TACs shown in this table.

Pursuant to § 679.20(a)(6)(ii) and (a)(12)(i), table 6 of the final 2022 and

2023 harvest specifications for groundfish in the GOA (88 FR 13238,

March 2, 2023) is revised for the 2024 TACs of Pacific cod in the GOA.

TABLE 6—FINAL 2024 SEASONAL APPORTIONMENTS AND ALLOCATION OF PACIFIC COD TOTAL ALLOWABLE CATCH AMOUNTS IN THE GOA; ALLOCATIONS IN THE WESTERN GOA AND CENTRAL GOA SECTORS, AND THE EASTERN GOA INSHORE AND OFFSHORE PROCESSING COMPONENTS

[Values are rounded to the nearest metric ton]

Regulatory area and sector	Annual allocation (mt)	A Season		B Season	
		Sector percentage of annual non-jig TAC	Seasonal allowances (mt)	Sector percentage of annual non-jig TAC	Seasonal allowances (mt)
Western GOA:					
Jig (2.5% of TAC)	153	N/A	92	N/A	61
Hook-and-line CV	84	0.7%	42	0.70%	42
Hook-and-line CP	1,182	10.9%	651	8.90%	531
Trawl CV	2,292	31.54%	1,882	6.86%	409
Trawl CP	143	0.9%	54	1.50%	90
All Pot CV and Pot CP	2,268	19.80%	1,182	18.20%	1,086
Total	6,121	63.84%	3,902	36.16%	2,219
Central GOA:					
Jig (1.0% of TAC)	154	N/A	93	N/A	62
Hook-and-line <50 CV	2,232	9.32%	1,424	5.29%	808
Hook-and-line ≥50 CV	1,025	5.61%	858	1.10%	168
Hook-and-line CP	780	4.11%	628	1.00%	152
Trawl CV ¹	6,357	25.29%	3,867	16.29%	2,490
Trawl CP	642	2.00%	306	2.19%	335

TABLE 6—FINAL 2024 SEASONAL APPORTIONMENTS AND ALLOCATION OF PACIFIC COD TOTAL ALLOWABLE CATCH AMOUNTS IN THE GOA; ALLOCATIONS IN THE WESTERN GOA AND CENTRAL GOA SECTORS, AND THE EASTERN GOA INSHORE AND OFFSHORE PROCESSING COMPONENTS—Continued

[Values are rounded to the nearest metric ton]

Regulatory area and sector	Annual allocation (mt)	A Season		B Season	
		Sector percentage of annual non-jig TAC	Seasonal allowances (mt)	Sector percentage of annual non-jig TAC	Seasonal allowances (mt)
All Pot CV and Pot CP	4,251	17.83%	2,726	9.98%	1,525
Total	15,442	64.16%	9,901	35.84%	5,541
Eastern GOA .....	.....	Inshore (90% of Annual TAC)		Offshore (10% of Annual TAC)	
	2,203	1,983		220	

¹ Trawl catcher vessels participating in Rockfish Program cooperatives receive 3.81 percent, or 588 mt, of the annual Central GOA TAC (see table 28c to 50 CFR part 679), which is deducted from the Trawl CV B season allowance (see table 13. Final 2024 Apportionments of Rockfish Secondary Species in the Central GOA and table 28c to 50 CFR part 679).

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 679, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion, and would allow for harvests that exceed the appropriate allocation for pollock and Pacific cod based on the best scientific information available. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of December 14, 2023.

Without this inseason adjustment, NMFS could not allow the fishery for pollock and Pacific cod in the GOA to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until January 10, 2024.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 19, 2023.

Everett Wayne Baxter,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–28324 Filed 12–22–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230224–0053; RTID 0648–XD578]

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pacific Cod in the Western Regulatory Area of the Gulf of Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amount of Pacific cod from vessels using pot gear to catcher vessels using trawl gear, catcher vessels using hook-and-line gear, and vessels using jig gear in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to allow the 2023 total allowable catch (TAC) of Pacific cod to be harvested.

DATES: Effective December 21, 2023, through 2400 hours, Alaska local time (A.l.t.), December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP

appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2023 Pacific cod TAC specified for vessels using pot gear in the Western Regulatory Area of the GOA is 1,716 mt, as established by the final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023) and one reallocation (88 FR 76141, November 6, 2023).

The 2023 Pacific cod TAC specified for catcher vessels using trawl gear in the Western Regulatory Area of the GOA is 1,526 metric tons (mt), as established by the final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023) and one reallocation (88 FR 76141, November 6, 2023).

The 2023 Pacific cod TAC specified for catcher vessels using hook-and-line gear in the Western Regulatory Area of the GOA is 291 mt, as established by the final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023) and one reallocation (88 FR 76141, November 6, 2023).

The 2023 Pacific cod TAC specified for vessels using jig gear in the Western Regulatory Area of the GOA is 131 mt, as established by the final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023).

The Administrator, Alaska Region, NMFS, (Regional Administrator) has determined vessels using pot gear will not be able to harvest 232 mt of the 2023 Pacific cod TAC allocated to those vessels under § 679.20(a)(12)(i)(A)(5).

Therefore, in accordance with § 679.20(a)(12)(ii)(B), NMFS apportions 232 mt of Pacific cod from vessels using pot gear to the annual amount specified for catcher vessels using trawl gear,

catcher vessels using hook-and-line gear, and vessels using jig gear.

The harvest specifications for 2023 Pacific cod included in the final 2023 and 2024 harvest specifications for groundfish in the Western Regulatory Area of the GOA (88 FR 13238, March 2, 2023) and one reallocation (88 FR 76141, November 6, 2023) is revised as follows: 1,484 mt to vessels using pot gear, 1,531 mt to catcher vessels using trawl gear, 516 mt to catcher vessels using hook-and-line gear, and 132 mt to vessels using jig gear.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR

part 679, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would allow for harvests that exceed the originally specified apportionment of the Pacific cod TAC. NMFS was unable to publish a notice providing time for public comment because the most

recent, relevant data only became available as of December 20, 2023.

The Assistant Administrator for Fisheries, NOAA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 20, 2023.

Everett Wayne Baxter,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–28465 Filed 12–21–23; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 88, No. 246

Tuesday, December 26, 2023

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF ENERGY

10 CFR Part 460

[EERE-2009-BT-BC-0021]

RIN 1904-AF53

Energy Conservation Program: Energy Conservation Standards for Manufactured Housing; Enforcement

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Energy (DOE) is proposing to establish enforcement procedures for its energy conservation standards for manufactured housing. DOE recently amended the compliance date for these standards in a final rule to delay compliance. DOE delayed the compliance date to allow DOE more time for this rulemaking to establish enforcement procedures that provide clarity for manufacturers and other stakeholders regarding DOE's expectations of manufacturers and DOE's plans for enforcing the standards.

DATES: DOE will accept comments, data, and information regarding the notice of proposed rulemaking received no later than February 26, 2024. See section V, "Public Participation," for details.

ADDRESSES: The docket for this proposed rulemaking, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at www.regulations.gov. All documents in the docket are listed in the www.regulations.gov index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at www.regulations.gov/docket?D=EERE-2009-BT-BC-0021. The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section V for information on how to submit

comments through www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Mr. Matthew Schneider, U.S. Department of Energy, Office of the General Counsel (GC-33), 1000 Independence Avenue SW, Washington, DC 20585; Telephone: (240) 597-6265; Email: matthew.schneider@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

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- II. Discussion of Proposed Rule
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- IV. Procedural Issues and Regulatory Review
- V. Public Participation
- VI. Approval of the Office of the Secretary

I. Background

The Energy Independence and Security Act of 2007 ("EISA," Pub. L. 110-140) directs the U.S. Department of Energy ("DOE" or, in context, "the Department") to establish energy conservation standards for manufactured housing.¹ (42 U.S.C. 17071) Manufactured homes are constructed according to standards administered by the U.S. Department of Housing and Urban Development ("HUD Code"). 24 CFR part 3280. See also generally 42 U.S.C. 5401-5426. Structures, such as site-built and modular homes, that are constructed to state, local, or regional building codes are excluded from the coverage of the HUD Code.²

EISA directs DOE to base its standards on the most recent version of the International Energy Conservation Code ("IECC") and any supplements to that code, except in cases where DOE finds that the IECC is not cost-effective or where a more stringent standard would be more cost-effective, based on the impact of the IECC on the purchase price of manufactured housing and on total life-cycle construction and

¹ The National Manufactured Housing Construction and Safety Standards Act of 1974, as amended, defines "manufactured home" as a structure, transportable in one or more sections, which in the traveling mode is 8 body feet or more in width or 40 body feet or more in length or which when erected on-site is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein 42 U.S.C. 5402(6).

² See 42 U.S.C. 5403(f). See also 24 CFR 3282.12.

operating costs. (See 42 U.S.C. 17071(b)(1))

On June 17, 2016, DOE published in the **Federal Register** a notice of proposed rulemaking ("NOPR") to propose energy conservation standards for manufactured housing, including proposals recommended by the negotiated rulemaking working group for manufactured housing. 81 FR 39756 ("June 2016 NOPR"). DOE received nearly 50 comments on the proposed rule during the comment period. In addition, DOE also received over 700 substantively similar form letters from individuals.

On August 3, 2018, DOE published a Notice of Data Availability ("NODA"), stating it was examining possible alternatives to the requirements proposed in the June 2016 NOPR and seeking further input from the public, including on first-time costs related to the purchase of manufactured homes. 83 FR 38073 ("August 2018 NODA"). Prior to the NODA, in December of 2017, the Sierra Club filed a lawsuit against DOE in the U.S. District Court for the District of Columbia, alleging that DOE had failed to meet its statutory deadline for establishing energy conservation standards for manufactured housing. *Sierra Club v. Granholm*, No. 1:17-cv-02700-EGS (D.D.C. filed Dec. 18, 2017). In November 2019, the court entered a consent decree in which DOE agreed to complete the rulemaking by stipulated dates.

After evaluating the comments received in response to the June 2016 NOPR and the August 2018 NODA, DOE published a supplemental NOPR ("SNOPR") on August 26, 2021, in which DOE proposed energy conservation standards for manufactured homes based on the 2021 IECC. 86 FR 47744 ("August 2021 SNOPR"). DOE's primary proposal in the August 2021 SNOPR was a "tiered" approach based on the 2021 IECC. The "tiered" approach identifies a subset of less stringent energy conservation standards for certain manufactured homes (based on retail list price) in light of the cost-effectiveness considerations required by EISA. DOE's alternate proposal was an "untiered" approach, wherein energy conservation standards for all manufactured homes would be based on certain thermal envelope components and specifications of the 2021 IECC. Both proposals replaced the

June 2016 NOPR proposal. *Id.* DOE sought comment on these proposals, as well as alternate thresholds, including a size-based threshold (e.g., square footage, number of sections) and a region-based threshold, and alternative exterior wall insulation requirements (R-21) for certain HUD zones. *Id.*

On October 26, 2021, DOE published a NODA regarding updated inputs and results of the analyses presented in the August 2021 SNOPI (both “tiered” and “untiered” approaches), including a sensitivity analysis regarding an alternative sized-based tier threshold and an alternate exterior wall insulation requirement (R-21) for certain HUD zones. 86 FR 59042 (“October 2021 NODA”). In addition, DOE reopened the public comment period on the August 2021 SNOPI through November 26, 2021. DOE sought comments on the updated inputs and corresponding analyses, encouraged stakeholders to provide additional data to inform the analyses, and stated it might further revise the rulemaking analysis based on new or updated information. *Id.*

On May 31, 2022, DOE published a final rule codifying the proposed energy conservation standards for manufactured housing in a new part of the Code of Federal Regulations (“CFR”) under 10 CFR part 460, subparts A, B, and C (“May 2022 Final Rule”). 87 FR 32728. Subpart A of 10 CFR part 460 presents generally the scope of the rule and provides definitions of key terms. Subpart B establishes new requirements for manufactured homes that relate to climate zones, the building thermal envelope, air sealing, and installation of insulation, based on certain provisions of the 2021 IECC. Subpart C establishes new requirements based on the 2021 IECC related to duct sealing; heating, ventilation, and air conditioning (“HVAC”); service hot water systems; mechanical ventilation fan efficacy; and heating and cooling equipment sizing.

Under the energy conservation standards, the stringency of the requirements under subpart B are based on a tiered approach depending on the number of sections of the manufactured home. Accordingly, two sets of standards are established in subpart B (i.e., Tier 1 and Tier 2). Both Tier 1 and Tier 2 incorporate building thermal envelope measures based on certain thermal envelope components subject to the 2021 IECC that DOE determined applicable and appropriate for manufactured homes. Tier 1 applies these building thermal envelope provisions to single-section manufactured homes, but only includes components at stringencies that would increase the incremental purchase price

by less than \$750 in order to address affordability concerns that were raised by HUD and other stakeholders during the consultation and rulemaking process. Tier 2 applies these same building thermal envelope provisions to multi-section manufactured homes but at higher stringencies specified for site-built homes in the 2021 IECC, with an alternate exterior wall insulation requirement (R-21) for climate zones 2 and 3 based on consideration of the design and factory construction techniques of manufactured homes, as presented in the August 2021 SNOPI and October 2021 NODA. Manufacturers can comply with the building thermal envelope requirements through a prescriptive pathway (e.g., using materials with specified ratings) or a performance pathway based on overall thermal transmittance (*Uo*) performance. *See* 10 CFR 460.102(c). Further, the energy conservation standards for both tiers also include duct and air sealing, insulation installation, HVAC and service hot water system specifications, mechanical ventilation fan efficacy, and heating and cooling equipment sizing provisions, based on the 2021 IECC. DOE concluded that this approach is cost-effective based on the expected total life-cycle cost (“LCC”) savings for the lifetime of the home associated with implementation of the energy conservation standards. *See e.g.*, 87 FR 32742.

In the May 2022 Final Rule, DOE adopted a compliance date such that the standards would apply to manufactured homes that are manufactured on or after one year following the publication date of the final rule in the **Federal Register**, which is May 31, 2023. In doing so, DOE noted its belief that many manufacturers already have experience complying with efficiency requirements similar to what DOE required in the May 2022 Final Rule based on manufacturers’ previous experience with HUD *Uo* requirements and ENERGY STAR Version 2 efficiency requirements for homes produced on or after June 1, 2020. 87 FR 32759. DOE did not specify its approach for enforcement of the standards in the May 2022 Final Rule and noted that manufacturers would be able to comply with the standards as they were issued. In fact, DOE noted that many of the requirements in the standards would require minimal compliance efforts (e.g., documenting the use of materials already subject to separate Federal or industry standards, such as the R-value of insulation or U-factor values for fenestration). 87 FR 32758, 32790. Nevertheless, DOE stated in the May

2022 Final Rule that it may address compliance and enforcement issues and procedures in a future agency action (*see* 87 FR 32757–32758), which is discussed further in section II of this document.

On March 24, 2023, DOE published in the **Federal Register** a NOPR proposing to amend the compliance date for the manufactured housing energy conservation standards (88 FR 17745, “March 2023 NOPR”). In that NOPR, DOE described the need to amend the compliance date for the manufactured housing standards, noting that it had not yet issued procedures for investigating and enforcing against noncompliance with the standards, and that a delay was necessary to ensure that DOE can receive and incorporate meaningful stakeholder feedback into its enforcement procedures prior to part 460’s compliance date. Accordingly, DOE proposed to require compliance with the Tier 1 standards beginning 60 days after publication of its final enforcement procedures, and compliance with the Tier 2 standards beginning 180 days after publication of its final enforcement procedures. By final rule published on May 30, 2023 (May 2023 Final Rule) DOE amended the compliance date for part 460 consistent with its proposed compliance date in the NOPR for Tier 1 (i.e., 60 days after issuance of DOE’s enforcement procedures for part 460). However, for Tier 2, DOE amended the compliance date to July 1, 2025. 88 FR 34411. After consideration of comments on the NOPR, DOE determined that amending the compliance date to July 1, 2025, for Tier 2 homes would (1) provide greater certainty for manufacturers versus an indeterminate date, (2) ensure DOE will have enough time to develop enforcement procedures and engage in the rulemaking process, including providing adequate time for stakeholders to submit robust feedback on DOE’s proposed enforcement procedures, and (3) provide manufacturers with sufficient time to adjust their operations and practices consistent with DOE’s enforcement procedures. 88 FR 34412.

II. Discussion of Proposed Rule

Pursuant to section 413 of the Energy Independence and Security Act (“EISA”), DOE is authorized to initiate enforcement actions to ensure compliance with its energy conservation standards for manufactured housing. In this section, DOE provides a section-by-section analysis of its proposed rule to establish procedures for such enforcement actions. As discussed herein, DOE proposes to amend subpart

D to its regulations at 10 CFR part 460 to set forth prohibited acts, civil penalty amounts, investigation and enforcement procedures, recordkeeping requirements, and civil penalty collection procedures. In particular, DOE proposes that it will determine compliance by reviewing certain manufacturer records. DOE is not proposing specific test procedures to demonstrate compliance with DOE's standards. Nor is DOE proposing to require manufacturers to certify that their manufactured home models comply with DOE's standards. In addition, DOE proposes to clarify that manufacturers may demonstrate compliance with the 10 CFR 460.205 requirements for sizing of heating and cooling equipment by using either the approach in the Air Conditioning Contractors of America (ACCA) Manual J and ACCA Manual S or the approach codified in HUD's regulations at 24 CFR 3280.508.

General Counsel Responsibilities

Proposed § 460.302 provides that the Office of the DOE General Counsel may assist in investigations of alleged violations of part 460, prosecute civil enforcement actions under part 460, compromise and assess civil penalties initiated under part 460, represent DOE in any formal proceedings or hearings before an Administrative Law Judge ("ALJ") in cases involving alleged violations of part 460, and refer cases to the Attorney General for the collection of civil penalties.

Prohibited Acts and Civil Penalties

Proposed § 460.304 lists prohibited acts that will be subject to civil enforcement action under part 460. These prohibited acts include the sale, importation, or distribution into commerce in the United States of a manufactured home that is not in compliance with any energy conservation standard or requirement in part 460. (42 U.S.C. 17071) They also include any failure of a manufacturer to maintain, provide to DOE, or permit DOE access to any information, records, or documents required under part 460.

DOE also proposes in § 460.304 to clarify that certain acts relating to sizing of heating and cooling equipment comply with the energy conservation standard and do not constitute a violation under § 460.304(a)(2). Specifically, in § 460.304(d), DOE proposes to clarify that a manufacturer may use the approach codified in HUD regulations referencing the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) Handbook of Fundamentals for

determining manufactured home heat loss/heat gain. *See* 24 CFR 3280.508. DOE is proposing to clarify that this approach can be used in lieu of using Air Conditioning Contractors of America (ACCA) Manual J and ACCA Manual S for sizing of heating and cooling equipment as specified in the energy conservation standard at 10 CFR 460.205. DOE has tentatively determined that both approaches sufficiently align with the intent of 10 CFR 460.205 supporting appropriate sizing of heating and cooling equipment in manufactured housing and are not expected to impact the stringency of the energy conservation standards in § 460.205. Further, DOE understands that certain details of the final installation location, such as the house orientation, may not always be available when equipment sizing is occurring. Thus, DOE proposes to allow an alternate sizing approach to be used as specified by the ASHRAE Handbook of Fundamentals pursuant to the methodology adopted by HUD.

Proposed § 460.304 explains the potential civil penalties for prohibited acts under part 460. It provides that a manufacturer that commits a prohibited act may be subject to assessment of a civil penalty of up to one percent of the manufacturer's retail list price of the manufactured home per violation, in keeping with the maximum civil penalty for violations of provisions of DOE's energy conservation manufactured housing regulations set forth in accordance with section 413(c) of EISA.

Proposed § 460.304 also describes how DOE will calculate civil penalties for prohibited acts. It provides that each day a manufacturer fails to maintain, provide, or permit access to information, records, or documents will be considered a separate violation. It also provides that each failure to comply with a standard or requirement of part 460, per unit sold, imported, or introduced into commerce in the United States, will be considered a separate violation. For example, if a manufactured home model fails to comply with three standards in part 460, the manufacturer has sold, imported, or distributed in commerce 100 units of that model,³ and the retail

list price of that model is \$200,000, then the manufacturer will be subject to a civil penalty of up to \$600,000 (\$200,000 retail list price × 1% × 3 violations × 100 units).

DOE notes that section 413 of EISA does not specifically provide for the assessment of civil penalties for a manufacturer's failure to maintain or provide to DOE information, records, or documents. However, section 413(a) requires the Secretary, by regulation, to establish standards for energy efficiency in manufactured housing. Section 413(c) provides that any manufacturer of manufactured housing that violates a provision of the regulations issued under section 413(a) is liable to the United States for a civil penalty. DOE is proposing to add these enforcement procedures pursuant to section 413(a) to carry out its obligation under EISA to ensure that manufacturers comply with DOE's energy conservation standards. Accordingly, DOE is proposing to require manufacturers to maintain and provide information, records, and documents related to compliance with DOE's energy conservation standards, and subjecting manufacturers that fail or refuse to do so to civil penalties, so that DOE can ensure that manufacturers provide DOE with the records necessary to determine whether they are complying with the manufactured housing energy conservation standards. DOE is also evaluating and considering its subpoena authority under EISA.

In addition, the Secretary has the authority under 42 U.S.C. 7254 to prescribe procedural and administrative rules and regulations that the Secretary "may deem necessary or appropriate to administer and manage the functions now or hereafter vested in" the Secretary. Under 42 U.S.C. 7101(b), the term "function" includes reference to any duty, obligation, power, authority, responsibility, right, privilege, and activity, or the plural thereof. The Secretary has determined that the proposed recordkeeping requirements and civil penalties in this rulemaking are necessary to administer and manage the Secretary's duties and obligations under EISA.

Investigation Procedures

Proposed § 460.306 explains how DOE will conduct investigations to determine whether manufacturers are in compliance with the energy conservation standards and other requirements of part 460. DOE may initiate an investigation on its own or upon receipt of information alleging

³ As discussed in the Notice of Noncompliance section, for the first five years after the compliance date for a type of home (Tier 1 or 2), DOE will consider only units the manufacturer sold, imported, or distributed in commerce from the compliance date for that type of home (Tier 1 or 2) to the date the notice of noncompliance determination is issued. Once five years has passed from the compliance date for a type of home, DOE will consider units the manufacturer sold, imported, or distributed in commerce for the five

potential noncompliance. DOE will not require manufacturers to certify to the Department that their designs or manufactured homes comply with part 460. Rather, DOE may request that a manufacturer provide one or more of the records listed in this section so that DOE can determine whether the manufacturer is in compliance with the requirements of part 460. If DOE makes such a request of a manufacturer during an administrative action, investigation, or audit conducted by DOE pursuant to part 460, the manufacturer will be required to provide the requested records to DOE. As discussed previously, if a manufacturer fails or refuses to do so, the manufacturer will be subject to civil penalties.

Paragraph (a) of the proposed § 460.306 lists four types of records that DOE may request from a manufacturer to determine whether the manufacturer is in compliance with part 460. These are records that manufacturers must already maintain or provide to the Department of Housing and Urban Development (“HUD”) pursuant to HUD regulations in 24 CFR part 3282.⁴ Under proposed paragraph (c), DOE may request additional available records if DOE determines they are necessary as part of an administrative action, investigation, or audit. During the course of any such action, investigation, or audit, DOE also may obtain additional information and records from publicly available sources.

DOE proposes to require manufacturers to maintain the records listed in paragraph (a) in accordance with HUD requirements. DOE is also considering requiring the records it is proposing to require manufacturers to maintain in § 460.306(a) to be retained for a specific period of years. DOE requests comment on whether it should proceed with such a requirement and what period of time may be appropriate. While DOE is not proposing to require manufacturers to maintain any additional records, under paragraph (c), a manufacturer may be required to provide to DOE additional records in its possession if DOE requests such records pursuant to an administrative action, audit, or investigation conducted by DOE against the manufacturer.

Warning Letters

Proposed § 460.308 would allow DOE to dispose of a matter with a Warning Letter if DOE determines that a violation or alleged violation of part 460 does not warrant the assessment of a civil penalty. This proposed section specifies that a Warning Letter issued under this

section does not constitute a formal adjudication of the matter and is not subject to the appeal procedures proposed in this proposed rulemaking.

Notice of Noncompliance Determination

Proposed § 460.310 provides that if DOE determines that a manufactured home design or model does not conform to a standard or requirement in part 460, based on DOE’s investigation or admissions by a manufacturer, DOE may issue a notice of noncompliance determination to the manufacturer.⁵ DOE will review records to evaluate whether one or more of the aspects of a manufactured home design or model is noncompliant. If DOE determines that one or more aspects of the design or model is noncompliant, DOE may issue to the manufacturer a notice of noncompliance determination addressing each violation depending on the facts of the specific case. A manufacturer that receives a notice of noncompliance determination from DOE would be required to provide to DOE, within the 30-day time period prescribed by DOE, information pertaining to the acquisition, ordering, storage, shipment, importation, or sale of units of the design or model of manufactured home determined to be noncompliant.

As noted previously, DOE issued a final rule (88 FR 34411) to delay compliance until July 1, 2025, for Tier 2 homes, and until 60 days after issuance of enforcement procedures for Tier 1 homes. Accordingly, for the first five years after the compliance date for a type of home (Tier 1 or 2), DOE will request such information for the time from the compliance date for that type of home (Tier 1 or 2) to the date the notice of noncompliance determination is issued. Once five years has passed from the compliance date for a type of home, DOE will request such information for the five years prior to the date the notice of noncompliance is issued. For example, if DOE issues a notice of noncompliance determination for a Tier 2 manufactured home on August 1, 2027, DOE will request sales and other information for that model from July 1, 2025 (the compliance date for Tier 2 homes), through August 1, 2027. However, if DOE issues a notice of noncompliance determination for a Tier 2 home on August 1, 2031, DOE will request sales and other information for that model for the five years prior to August 1, 2031.

⁵ A determination issued by DOE under this proposed rule shall be distinct from any other notices issued to a manufacturer by other agencies under their respective enforcement authority.

DOE will give manufacturers 30 calendar days to provide the requested information. A manufacturer that fails or refuses to provide such information will be subject to civil penalties under part 460.

Civil Enforcement Procedures

Prior to imposing a civil penalty for noncompliance with part 460, DOE proposes to provide manufacturers with written notice of the proposed penalty and options for responding to the notice. Under proposed § 460.312, a manufacturer that receives a Notice of Proposed Civil Penalty will have 30 days from receipt of the notice to exercise one of the following options: (1) request that DOE issue an Order assessing the civil penalty proposed in the notice, in which case the manufacturer waives the right to request a hearing before an ALJ; (2) request a settlement conference with the DOE attorney who issued the notice, in which case the manufacturer also may submit to DOE additional information and evidence related to the alleged violations, the amount of the proposed civil penalty, and the manufacturer’s ability to pay the proposed civil penalty; or (3) request a hearing before an ALJ. DOE is also considering providing manufacturers the option of seeking judicial review of the notice of civil penalty in a U.S. District Court in lieu of a hearing before an ALJ. DOE requests public comment on whether to include this option.

DOE proposes in § 460.316 that if: a manufacturer does not respond to the notice within 30 days of receipt; the manufacturer selects option (2) but fails to attend the settlement conference; or the manufacturer selects option (2) and DOE and the manufacturer are unable to resolve the matter informally, DOE will issue a Final Notice of Proposed Civil Penalty to the manufacturer. The manufacturer will then have 15 days from receipt of the final notice to exercise one of the following options: (1) request that DOE issue an Order assessing the civil penalty proposed in the final notice, in which case the manufacturer waives the right to request a hearing before an ALJ; or (2) request a hearing before an ALJ.

If the manufacturer fails to respond to the final notice within 15 days of receipt, the manufacturer waives the right to participate in the informal procedures set forth in this subpart and the right to request a formal hearing before an ALJ, and DOE will issue to the manufacturer an Order in which DOE finds that the manufacturer committed the violations alleged, and assesses the

⁴ See 24 CFR 3282.203, 3282.417, and 3282.608.

civil penalty proposed, in the final notice.

Proposed § 460.314 would allow DOE to compromise and settle civil penalty cases brought under part 460 at any time prior to a final decision by a Federal court of competent jurisdiction. In compromising or settling a civil penalty case, DOE may consider aggravating and mitigating factors. For more information on DOE's civil penalty policy, see <https://www.energy.gov/gc/articles/civil-penalties-energy-conservation-standards-program-violations-policy-statement>.

If DOE and the manufacturer agree to compromise the proposed civil penalty at any time prior to a final decision by a Federal court of competent jurisdiction, DOE will issue to the manufacturer an Order assessing the agreed upon civil penalty. If a manufacturer requested a hearing before an ALJ, and the ALJ's initial decision recommending a civil penalty is not appealed, DOE will issue an Order assessing the civil penalty recommended by the ALJ. DOE proposes to give manufacturers 30 days after receipt of any Order assessing a civil penalty under part 460 to pay the civil penalty.

DOE believes the procedures in proposed §§ 460.312 to 460.316 are necessary to provide for the expeditious resolution of civil penalty cases under part 460, while maintaining the opportunity for manufacturers to engage with DOE to settle cases and providing due process to manufacturers, including the opportunity for hearings before an ALJ and the opportunity to appeal ALJ decisions.

Administrative Law Judge Hearing and Appeal

Proposed § 460.320 explains that if a manufacturer responds to a Notice of Proposed Civil Penalty or Final Notice of Proposed Civil Penalty by electing a formal hearing before an Administrative Law Judge, DOE will conduct such hearings in accordance with DOE's Procedures for Administrative Adjudication of Civil Penalty Actions, which are available at: <https://www.energy.gov/gc/doe-procedures-administrative-adjudication-civil-penalty-actions>.

Proposed § 460.320 provides that after considering all matters of record in a proceeding, the ALJ will issue an initial decision. The ALJ's initial decision will include a statement of the ALJ's findings and conclusions on all material issues of fact, law, and discretion, as well as the ALJ's reasons for such findings and conclusions. If the ALJ finds that a manufacturer committed a prohibited

act and that a civil penalty is warranted, the decision will include the amount of the civil penalty. DOE notes that nothing in this subpart guarantees that a case will proceed to a formal hearing, as an ALJ may issue an initial decision after considering the pleadings and any motions for decision.

Proposed § 460.320 provides that if the ALJ's initial decision includes a finding that a manufacturer committed a prohibited act and a recommended civil penalty, and the initial decision is not appealed in accordance with DOE's Procedures for Administrative Adjudication of Civil Penalty Actions, the DOE General Counsel will issue an Order assessing the civil penalty. The DOE General Counsel will include in the Order the ALJ's findings of fact, conclusions of law and discretion, and the amount of the civil penalty.

Finally, proposed § 460.320 provides that if the ALJ's initial decision is appealed in accordance with DOE's Procedures for Administrative Adjudication of Civil Penalty Actions, then the DOE Decision Maker will issue a final agency decision in accordance with those procedures. The proposed section deviates from the procedures with respect to judicial review, however, in that it provides that any such final agency decision may be appealed to a federal court with competent jurisdiction instead of to a federal circuit court of appeals. It also provides that only a final agency decision may be appealed to a federal court of competent jurisdiction.

Collection of Civil Penalties

DOE proposes that if a manufacturer fails to pay an assessed civil penalty within 30 days of receipt of the Order assessing the civil penalty, DOE may refer the debt to the U.S. Treasury Department or the Attorney General of the United States, or his or her delegate, for collection of the civil penalty. DOE proposes that in any such action, the validity and appropriateness of the Order assessing the civil penalty will not be subject to review.

III. Expected Costs to Manufacturers From the Proposed Rule

In the May 2022 Final Rule, DOE monetized the costs and benefits expected to result from the amended standards. These costs included costs to manufacturers to produce and transport compliant manufactured homes, the increased installed costs that the consumer would see when purchasing and installing a new manufactured home, along with the incremental utility bill savings and incremental maintenance costs that a consumer

would expect to experience during the lifetime operation. At the time of the May 2022 Final Rule, DOE had not determined the specific procedures it would utilize to ensure compliance with the energy conservation standards being adopted, but DOE noted its expectation that only minimal compliance efforts would be required, and that such efforts would result in minimal additional costs to manufacturers. See 87 FR 23758. Based on the procedures DOE is proposing in this document, DOE tentatively concludes, consistent with the expectations it stated in the May 2022 Final Rule, *see Id.*, that the costs of complying with DOE's enforcement mechanisms will be minimal. Specifically, in this rulemaking, DOE is not proposing to require manufacturers to conduct any testing of manufactured homes, require manufactured homes to be inspected prior to sale to consumers, or require manufacturers (or any third-party agency) to certify compliance with DOE's energy conservation standards. Rather, the proposed regulations in this document outline DOE's procedures for investigating potential instances of noncompliance, assessing civil penalties in accordance with EISA, and the associated appeals procedures. To ensure DOE is able to conduct such investigations, this proposed rule requires that a manufacturer maintain and provide to DOE information and records relevant to investigating and determining compliance with the energy conservation standards. However, the documentation that manufacturers would be required to maintain by § 460.306(a) of this proposed rule is already subject to separate, existing maintenance requirements imposed by HUD. Therefore, this proposed rule would not impose any new, additional costs beyond the costs already required by separate requirements. See 88 FR 45237. Specifically, DOE is proposing to require manufacturers to maintain the following records in accordance with HUD requirements: the information and records submitted by a manufacturer and approved by its Design Approval Primary Inspection Agency (DAPIA) pursuant to 24 CFR 3282.203(g) and 3282.361(b)(4);⁶ the approved quality assurance manual received from a DAPIA pursuant to 24 CFR

⁶ 24 CFR 3282.203(g) requires manufacturers to maintain a copy of the drawings, specifications, and sketches from each approved design received from a DAPIA under 24 CFR 3282.361(b)(4) and a copy of the approved quality assurance manual received from a DAPIA under 24 CFR 3282.361(c)(3). It requires the manufacturer to keep these materials current and readily accessible for use by the Secretary of HUD or other parties acting under the HUD regulations.

3282.361(c)(3);⁷ records related to a manufacturer's determination of noncompliance, defect, serious defect, or imminent safety hazard, as well as any corrections made by the manufacturer that the manufacturer is required to maintain under 24 CFR 3282.417;⁸ and records and reports related to on-site construction of manufactured homes that the manufacturer is required to maintain pursuant to 24 CFR 3282.608.⁹

In light of the previous, DOE tentatively concludes additional costs imposed by this proposed rule would be minimal. For this reason, the adoption of the enforcement procedures proposed in this document would not alter DOE's assessment in the May 2022 Final Rule of the costs resulting from the adoption of DOE's energy conservation standards.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866, 13563 and 14094

Executive Order ("E.O.") 12866, "Regulatory Planning and Review," 58 FR 51735 (Oct. 4, 1993), as supplemented and reaffirmed by E.O. 13563, "Improving Regulation and Regulatory Review," 76 FR 3821 (Jan. 21, 2011), and amended by E.O. 14094, "Modernizing Regulatory Review," 88 FR 21879 (April 11, 2023) requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and

equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE emphasizes as well that E.O. 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs ("OIRA") within the Office of Management and Budget (OMB) has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, this proposed regulatory action is consistent with these principles.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires the preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by E.O. 13272, *Proper Consideration of Small Entities in Agency Rulemaking*, 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. (68 FR 7990). The Department has made its procedures and policies available on the Office of General Counsel's website: www.energy.gov/gc/office-general-counsel.

The proposed rule would establish enforcement procedures for DOE's manufactured housing energy conservation standards. The proposed regulations largely outline DOE's procedures for investigating instances of noncompliance, assessing civil penalties in accordance with EISA, and associated appeals procedures. DOE expects any costs borne by manufacturers as a result of the proposed rule to be negligible. Moreover, the proposed rule would apply equally across manufacturers and does not place small entities at a significant competitive disadvantage. Accordingly, DOE certifies that this

proposed rule would not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis is required. Accordingly, DOE did not prepare an IRFA for this proposed rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

The proposed rule would impose no new information or record keeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

D. Review Under the National Environmental Policy Act of 1969

DOE is analyzing this proposed regulation in accordance with the National Environmental Policy Act of 1969 ("NEPA") and DOE's NEPA implementing regulations (10 CFR part 1021). DOE's regulations include a categorical exclusion for amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended. 10 CFR part 1021, subpart D, appendix A5. DOE anticipates that this rulemaking qualifies for categorical exclusion A5 because it is a rulemaking that is amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended, and categorical exclusion A6, because it is procedural. No extraordinary circumstances exist that require further environmental analysis, and it otherwise meets the requirements for application of a categorical exclusion. See 10 CFR 1021.410. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The E.O. also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that

⁷ *Id.*

⁸ 24 CFR 3282.417(e) requires a manufacturer to maintain records related to such determinations, notifications, and corrections.

⁹ 24 CFR 3282.608(n) requires a manufacturer to maintain the approval notification from the DAPIA, the manufacturer's final on-site inspection report and certification of completion, and the Production Inspection Primary Inspection Agency's acceptance of the final site inspection report and certification. A manufacturer is required to make these records available for review by HUD in the factory of origin. In addition, 24 CFR 3282.608(q) requires a manufacturer to maintain all records for on-site completion for each home, as required by 24 CFR 3282.608, in the unit file to be maintained by the manufacturer.

have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. (See 65 FR 13735.) DOE examined this proposed rule and determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of Government. No further action is required by E.O. 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of E.O. 12988, “Civil Justice Reform,” 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct, rather than a general standard and promote simplification and burden reduction. Section 3(b) of E.O. 12988 specifically requires that executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies its preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) specifies its retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanhood under any guidelines issued by the Attorney General. Section 3(c) of E.O. 12988 requires executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met, or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule would meet the relevant standards of E.O. 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments and the private sector. For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and tribal governments, in the aggregate, or by the

private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a) and (b)). The section of UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a proposed “significant intergovernmental mandate” and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (also available at www.energy.gov/gc/office-general-counsel). This proposed rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of \$100 million or more in any year by State, local, and tribal governments, in the aggregate, or by the private sector, so these requirements under the Unfunded Mandates Reform Act do not apply.

H. Review Under the Treasury and General Government Appropriations Act of 1999

Section 654 of the Treasury and General Government Appropriations Act of 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under E.O. 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (Mar. 18, 1988), that this proposed rule would not result in any takings which might require compensation under the Fifth Amendment to the United States Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the

public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB’s guidelines were published at 67 FR 8452 (February 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed the proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA, a Statement of Energy Effects for any proposed significant energy action. A “significant energy action” is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under E.O. 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This proposed rule establishes enforcement procedures for DOE’s manufactured housing energy conservation standards and therefore does not meet the second criterion. Additionally, OIRA has not designated this proposed rule as a significant energy action. Accordingly, the requirements of E.O. 13211 do not apply.

V. Public Participation

Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this document.

Submitting comments via www.regulations.gov. The www.regulations.gov web page will require you to provide your name and contact information. Your contact information will be viewable to DOE

Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Otherwise, persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to www.regulations.gov information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (“CBI”)). Comments submitted through www.regulations.gov cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through www.regulations.gov before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that www.regulations.gov provides after you have successfully uploaded your comment.

Submitting comments via email. Comments and documents submitted via email also will be posted to www.regulations.gov. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. No telefacsimiles (“faxes”) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, that are written in English, and that are free from any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters’ names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: one copy of the document marked “confidential” including all the information believed to be confidential, and one copy of the document marked “non-confidential” with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE’s policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed rulemaking.

List of Subjects in 10 CFR Part 460

Administrative practice and procedure, Buildings and facilities, Energy conservation, Housing standards, Reporting and recordkeeping requirements.

Signing Authority

This document of the Department of Energy was signed on December 6, 2023, by Samuel Walsh, General Counsel for the Department of Energy, pursuant to delegated authority from the Secretary of Energy. That document with the

original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 7, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons stated in the preamble, DOE proposes to amend part 460 of chapter II of title 10, Code of Federal Regulations as set forth below:

PART 460—ENERGY CONSERVATION STANDARDS FOR MANUFACTURED HOMES

■ 1. The authority citation for part 460 continues to read as follows:

Authority: 42 U.S.C. 17071; 42 U.S.C. 7101 *et seq.*

■ 2. Add subpart D to part 460 to read as follows:

Subpart D—Enforcement

Sec.	
460.300	Purpose and scope.
460.302	Office of the General Counsel Responsibilities.
460.304	Prohibited acts and civil penalties.
460.306	Investigation of compliance.
460.308	Warning letters.
460.310	Notice of noncompliance.
460.312	Notice of proposed Civil Penalty.
460.314	Compromise and settlement.
460.316	Final Notice of Proposed Civil Penalty.
460.318	Order assessing a civil penalty.
460.320	Administrative law judge hearing and appeal.
460.322	Collection of civil penalties.

§ 460.300 Purpose and scope.

This subpart describes DOE’s investigative and enforcement procedures for ensuring compliance with the energy conservation standards set forth in this part.

§ 460.302 Office of the General Counsel Responsibilities.

The Department’s Office of the General Counsel may:

(a) Assist in investigations, hold settlement conferences, issue subpoenas, require the production of relevant documents and records, and take evidence and depositions;

(b) Initiate civil penalties under 42 U.S.C. 17071 and this subpart for any alleged violations of this part;

(c) Compromise and assess civil penalties under 42 U.S.C. 17071 and this subpart for any violations of this part;

(d) Represent DOE in any proceedings or hearings before an Administrative Law Judge (ALJ) in cases involving alleged violations of this part; and

(e) Refer cases to the Attorney General of the United States, or the delegate of the Attorney General, for the collection of civil penalties.

§ 460.304 Prohibited acts and civil penalties.

(a) Each of the following acts is prohibited:

(1) Failure of a manufacturer to provide, maintain, or permit access to any information, records, or documents required to be provided to DOE under this part.

(2) Sale, importation, or distribution into commerce in the United States by a manufacturer of a manufactured home that is not in compliance with a standard or requirement under this part.

(b) A manufacturer that commits a prohibited act may be subject to assessment of a civil penalty of no more than one percent of the manufacturer's retail list price of the manufactured home per violation.

(c) For violations of § 460.302(a)(1), each day of noncompliance shall constitute a separate violation. For violations of § 460.302(a)(2), each failure to comply with a standard or requirement of this part per unit sold, imported, or introduced into commerce in the United States shall constitute a separate violation.

(d) Notwithstanding § 460.304(a)(2) of this section, use of the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) Handbook of Fundamentals as codified in HUD regulations at 24 CFR 3280.508, in lieu of Air Conditioning Contractors of America (ACCA) Manual J and ACCA Manual S for the sizing of heating and cooling equipment as specified in 10 CFR 460.205, shall not be considered noncompliance.

§ 460.306 Investigation of compliance.

(a) For the purposes of this subpart, DOE may request that a manufacturer provide information and records relevant to determining compliance with any standard or requirement under this part, including one or more of the following:

(1) The information and records submitted by a manufacturer to a Design Approval Primary Inspection Agency

(DAPIA) pursuant to 24 CFR 3282.203 and approved by the DAPIA pursuant to 24 CFR 3282.361, including design deviation reports;

(2) The approved quality assurance manual received from a DAPIA pursuant to 24 CFR 3282.361, including quality assurance manual deviation reports;

(3) Records related to a manufacturer's determination of noncompliance, defect, serious defect, or imminent safety hazard, as well as any corrections made by the manufacturer, that the manufacturer is required to maintain under 24 CFR 3282.417; and

(4) Records and reports related to on-site construction of manufactured homes that the manufacturer is required to maintain pursuant to 24 CFR 3282.606 and 608.

(b) A manufacturer must maintain the information and records described in paragraph (a) of this section in accordance with HUD requirements.

(c) A manufacturer must provide to DOE the information and records described in paragraph (a) of this section, and any additional available records DOE determines necessary to determine a manufacturer's compliance with any standard or requirement under this part, during an administrative action, investigation, or audit conducted by DOE against the manufacturer pursuant to this subpart.

§ 460.308 Warning letters.

(a) If DOE determines that a violation or an alleged violation of this part does not require the assessment of a civil penalty, DOE may dispose of the case by issuing a Warning Letter.

(b) A Warning Letter shall recite the relevant facts and information about the incident or condition and indicate that it may have been a violation of this part.

(c) A Warning Letter issued under this section does not constitute a formal adjudication of the matter and is not subject to appeal under this subpart.

§ 460.310 Notice of noncompliance.

(a) If DOE determines that a manufactured home design or model is noncompliant with a standard or requirement under this part, DOE may issue a notice of noncompliance determination to the manufacturer.

(b) A manufacturer that receives a notice of noncompliance determination from DOE must provide to DOE, within 30 days of the manufacturer's receipt of the notice of noncompliance determination, information pertaining to the acquisition, ordering, storage, shipment, importation, or sale of units

of the design or model of manufactured home determined to be noncompliant.

§ 460.312 Notice of proposed Civil Penalty.

(a) *Issuance.* The DOE General Counsel, or delegee, may initiate a civil penalty action under this part by serving a Notice of Proposed Civil Penalty on the manufacturer charged with a prohibited act.

(b) *Contents.* The Notice of Proposed Civil Penalty shall:

(1) Include a statement of the material facts constituting the alleged violation;

(2) Include the statute, regulation, standard, and/or requirement allegedly violated;

(3) Include the amount of the proposed civil penalty; and

(4) Inform the manufacturer of its options in responding to the Notice of Proposed Civil Penalty.

(c) *Response.* Not later than 30 days after receipt of the Notice of Proposed Civil Penalty, the manufacturer must submit to DOE:

(1) A written request that DOE issue an Order assessing the civil penalty proposed in the Notice of Proposed Civil Penalty without further notice, in which case the manufacturer waives the right to request a formal hearing before an ALJ, and payment of the civil penalty is due within 30 days of the manufacturer's receipt of the Order;

(2) A written request for a settlement conference, at a date agreed upon by DOE and the manufacturer, to attempt to settle the matter informally, in which case the manufacturer also may submit to DOE written information and other evidence demonstrating that the manufactured home model is in compliance with the applicable standards and requirements under this part, that the proposed civil penalty is not warranted by the circumstances, or that the manufacturer is financially unable to pay the proposed civil penalty; or

(3) A written request for a formal hearing before an ALJ in accordance with DOE's Procedures for Administrative Adjudication of Civil Penalty Actions, available at: <https://www.energy.gov/gc/doe-procedures-administrative-adjudication-civil-penalty-actions>.

§ 460.314 Compromise and settlement.

(a) DOE may compromise, modify, or remit, with or without conditions, any civil penalty (with leave of court if necessary).

(b) In exercising its authority under paragraph (a) of this section, DOE may consider the nature and seriousness of the violation, the efforts of the manufacturer to remedy the violation in

a timely manner, and other factors as justice may require.

(c) DOE's authority to compromise, modify, or remit a civil penalty may be exercised at any time prior to a final decision by a Federal court of competent jurisdiction.

(d) Notwithstanding paragraph (a) of this section, DOE or the manufacturer may propose to settle a civil penalty case. If a settlement is agreed to by the parties, the manufacturer is notified, and the case is closed in accordance with the terms of the settlement.

§ 460.316 Final Notice of Proposed Civil Penalty.

(a) *Issuance.* DOE may issue a Final Notice of Proposed Civil Penalty to a manufacturer charged with committing a prohibited act in the following circumstances:

(1) The manufacturer fails to respond to a Notice of Proposed Civil Penalty in accordance with § 460.307(c) within 30 days of receipt of the notice;

(2) The manufacturer requested a settlement conference under § 460.307(c)(2) but failed to attend the conference or provide the DOE attorney a written request to reschedule the conference; or

(3) DOE and the manufacturer have participated in a settlement conference but have not agreed to settle the action, and DOE has not agreed to withdraw the Notice of Proposed Civil Penalty.

(b) *Contents.* The Final Notice of Proposed Civil Penalty shall contain a statement of the material facts constituting the alleged violation; the statute, regulation, standard, and/or requirement allegedly violated; the amount of the proposed civil penalty; and the manufacturer's options in responding to the Final Notice of Proposed Civil Penalty. The Final Notice of Proposed Civil Penalty may reflect a modified allegation or proposed civil penalty as a result of new information submitted to DOE after the issuance of the Notice of Proposed Civil Penalty.

(c) *Response.* Not later than 15 days after receipt of the Final Notice of Proposed Civil Penalty, the manufacturer must submit to DOE:

(1) A written request that DOE issue an Order assessing the civil penalty proposed in the Final Notice of Proposed Civil Penalty without further notice, in which case the manufacturer waives the right to request a formal hearing before an ALJ, and payment of the civil penalty is due within 30 days of the manufacturer's receipt of the Order; or

(2) A written request for a formal hearing before an ALJ in accordance

with DOE's Procedures for Administrative Adjudication of Civil Penalty Actions, available at: <https://www.energy.gov/gc/doe-procedures-administrative-adjudication-civil-penalty-actions>.

(d) *Failure to respond.* If a manufacturer fails to respond to a Final Notice of Proposed Civil Penalty in accordance with this section within 15 days of the final notice, the manufacturer waives the right to participate in the informal procedures set forth in this subpart and the right to request a formal hearing before an ALJ, and DOE shall issue to the manufacturer an Order finding the violations alleged, and assessing the civil penalty proposed, in the Final Notice of Proposed Civil Penalty.

§ 460.318 Order assessing a civil penalty.

(a) *Issuance pursuant to a settlement.* DOE shall issue an Order assessing a civil penalty if DOE and the manufacturer have agreed to a civil penalty amount in compromise of a civil penalty case, in which case the manufacturer waives the right to request a formal hearing before an ALJ, and payment of the civil penalty is due within 30 days of the manufacturer's receipt of the Order, unless DOE and the manufacturer agree to extend the payment deadline.

(b) *Issuance pursuant to a manufacturer's request.* DOE shall issue an Order assessing a civil penalty upon receipt of a written request from a manufacturer that DOE issue an Order assessing the civil penalty proposed in the Notice of Proposed Civil Penalty or Final Notice of Proposed Civil Penalty without further notice, in which case the manufacturer waives the right to request a formal hearing before an ALJ, and payment of the civil penalty is due within 30 days of the manufacturer's receipt of the Order.

(c) *Issuance pursuant to a manufacturer's failure to respond to a Final Notice of Proposed Civil Penalty.* DOE shall issue an Order assessing a civil penalty if a manufacturer fails to respond to a Final Notice of Proposed Civil Penalty within 15 days of receipt of the final notice, in which case the manufacturer waives the right to request a formal hearing before an ALJ, and payment of the civil penalty is due within 30 days of manufacturer's receipt of the Order. In the Order, DOE shall find the violations alleged, and assess the civil penalty proposed, in the Final Notice of Proposed Civil Penalty.

(d) *Issuance pursuant to an ALJ initial decision.* Unless the ALJ's initial decision is appealed in accordance with DOE's Procedures for Administrative

Adjudication of Civil Penalty Actions, DOE shall issue an Order assessing a civil penalty if an ALJ finds that a manufacturer committed a prohibited act and civil penalty is warranted, in which case payment of the civil penalty is due within 30 days of the manufacturer's receipt of the Order.

§ 460.320 Administrative law judge hearing and appeal.

(a) When elected pursuant to § 460.312(c)(3) or § 460.316(c)(3), DOE shall refer a civil penalty action brought under this part to an ALJ in accordance with DOE's Procedures for Administrative Adjudication of Civil Penalty Actions.

(b) After considering all matters of record in the proceeding, the ALJ will issue an initial decision. The initial decision will include a statement of the findings and conclusions, and the reasons therefore, on all material issues of fact, law, and discretion. If the ALJ finds that a manufacturer committed a prohibited act and that a civil penalty is warranted, the initial decision will include a civil penalty.

(c) If the initial decision includes a finding that a manufacturer committed a prohibited act and a recommended civil penalty, and the initial decision is not appealed in accordance with DOE's Procedures for Administrative Adjudication of Civil Penalty Actions, the DOE General Counsel, or delegee, shall issue an Order assessing a civil penalty. The Order shall include the findings of fact, conclusions of law, the amount of the civil penalty, and the reasons therefore.

(d) If the initial decision is appealed in accordance with DOE's Procedures for Administrative Adjudication of Civil Penalty Actions, then the DOE Decision Maker will issue a final agency decision in accordance with those procedures. If the DOE Decision Maker upholds an ALJ initial decision that a manufacturer committed a prohibited act and that a civil penalty is warranted, the final agency decision and order shall assess a civil penalty. The manufacturer shall have 60 days from the date the final agency decision and order is issued to either pay the civil penalty or appeal the final agency decision and order.

(e) Exhaustion of administrative remedies. Only a final agency decision, as decided by the DOE Decision Maker, may be appealed to a Federal court of competent jurisdiction.

§ 460.322 Collection of civil penalties.

If any manufacturer fails to pay an assessment of a civil penalty in accordance with § 460.310, DOE may refer the debt for collection or may refer

the case to the Attorney General of the United States, or his or her delegate, for collection of the civil penalty. In any such action, the validity and appropriateness of the Order assessing the civil penalty shall not be subject to review.

[FR Doc. 2023–27182 Filed 12–22–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

10 CFR Part 1021

[DOE–HQ–2023–0063]

RIN 1990–AA48

National Environmental Policy Act Implementing Procedures; Extension of Comment Period

AGENCY: Office of the General Counsel, Department of Energy.

ACTION: Notice of proposed rulemaking; extension of comment period.

SUMMARY: On November 16, 2023, the U.S. Department of Energy (DOE or the Department) published a notice of proposed rulemaking proposing to amend its implementing procedures (regulations) governing compliance with the National Environmental Policy Act (NEPA). DOE requested public comments by January 2, 2024. DOE is now extending the comment period until January 16, 2024, to allow the public additional review and submission time for any comments on the proposed changes.

DATES: The comment period for the notice of proposed rulemaking published on November 16, 2023 (88 FR 78681) is extended. DOE must receive comments by January 16, 2024, to ensure consideration.

ADDRESSES: Documents relevant to this proposed rulemaking are posted at www.regulations.gov (Docket: DOE–HQ–2023–0063). Documents posted to this docket include: the notice of proposed rulemaking and DOE’s Technical Support Document, which provides additional information regarding certain proposed changes and a redline/strikeout version of affected sections of the DOE NEPA regulations indicating the changes in the proposed rule.

Submit comments, labeled “DOE NEPA Implementing Procedures, RIN 1990–AA48,” by one of the following methods:

1. www.regulations.gov: Enter “Docket ID DOE–HQ–2023–0063” in the search box. Click on “Comment” to submit comments, which you may enter directly on the web page or by uploading in a file.

2. *Postal Mail:* Mail comments to NEPA Rulemaking Comments, Office of NEPA Policy and Compliance (GC–54), U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585. Because security screening may delay mail sent through the U.S. Postal Service, DOE encourages electronic submittal of comments through www.regulations.gov.

3. *Email:* send comments to DOE–NEPA–Rulemaking@hq.doe.gov.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Participation—Submission of Comments” (section IV) of the **SUPPLEMENTARY INFORMATION** section of DOE’s notice of proposed rulemaking.

FOR FURTHER INFORMATION CONTACT: For questions concerning how to comment on this proposed rule, contact Ms. Carrie Abravanel, Office of NEPA Policy and Compliance, at DOE–NEPA–Rulemaking@hq.doe.gov or (202) 586–4600.

SUPPLEMENTARY INFORMATION: On November 16, 2023, the U.S. Department of Energy (DOE or the Department) published a notice of proposed rulemaking proposing to amend its implementing procedures (regulations) governing compliance with the National Environmental Policy Act (NEPA) (88 FR 78681). The proposed changes would add a categorical exclusion for certain energy storage systems and revise categorical exclusions for upgrading and rebuilding transmission lines and for solar photovoltaic systems, as well as make conforming changes to related sections of DOE’s NEPA regulations.

DOE has decided to extend the public comment period for 14 days to allow for additional review and submission time. Therefore, the public comment period for the notice of proposed rulemaking will now close on January 16, 2024.

Signing Authority

This document of the Department of Energy was signed on December 20, 2023, by Samuel T. Walsh, General Counsel, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in

no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 20, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2023–28429 Filed 12–22–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–2360; Airspace Docket No. 23–AEA–24]

RIN 2120–AA66

Amendment of Class D and Class E Airspace; Huntington, WV

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class D airspace and E airspace extending upward from 700 feet above the surface for Tri-State/Milton J. Ferguson Field, Huntington, WV, and removes unnecessary verbiage from the descriptor header.

DATES: Comments must be received on or before February 9, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2023–2360 and Airspace Docket No. 23–AEA–24 using any of the following methods:

* *Federal eRulemaking Portal:* Go to www.regulations.gov and follow the online instructions to send your comments electronically.

* *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

* *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except for Federal holidays.

* *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Docket: Background documents or comments received may be read at www.regulations.gov anytime. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building

Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except for Federal holidays.

FAA Order JO 7400.11H Airspace Designations and Reporting Points and subsequent amendments can be viewed online at www.faa.gov/air_traffic/publications/. You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783.

FOR FURTHER INFORMATION CONTACT:

Justin T. Rhodes, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; Telephone: (404) 305-5478.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority, as it would amend Class D and E airspace in Huntington, WV. An airspace evaluation determined that this update is necessary to support IFR operations in the area.

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the proposal's overall regulatory, aeronautical, economic, environmental, and energy-related aspects. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only once if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives and a report summarizing each substantive public contact with FAA personnel concerning

this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

Privacy: In accordance with 5 U.S.C. 553(c), the DOT solicits comments from the public to improve its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

Availability of Rulemaking Documents

An electronic copy of this document may be downloaded through the internet at www.regulations.gov. Recently published rulemaking documents can be accessed through the FAA's web page at www.faa.gov/air_traffic/publications/airspace_amendments/.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except for Federal holidays. An informal docket may also be examined between 8:00 a.m. and 4:30 p.m., Monday through Friday, except on federal holidays at the office of the Eastern Service Center, Federal Aviation Administration, Room 350, 1701 Columbia Avenue, College Park, GA 30337.

Incorporation by Reference

Class D and Class E airspace designations are published in Paragraphs 5000 and 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 annually. This document proposes to amend the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, effective September 15, 2023. These updates will be published in the next FAA Order JO 7400.11 update. That order is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA proposes an amendment to 14 CFR part 71 to amend Class D

airspace by adding that airspace extending upward from the surface within 1 mile on each side of the Tri-State/Milton J. Ferguson Field 112° bearing extending from the 4-mile radius to 5.7 southeast of the airport and 292° bearing from the airport extending from the 4-mile radius to 5.8 miles northwest of the airport.

The Class E airspace extending from 700 feet above the surface would be amended by increasing the radius to 8.3 miles (previously 8.2 miles) and adding that airspace within 2 miles on each side of the Tri-State/Milton J. Ferguson Field 112° bearing extending from the 8.3-mile radius to 10.2 miles southeast of the airport.

The Tri-State/Milton J. Ferguson Field Class D and Class E airspace would be amended, in accordance with the 7400.2, by removing the city name from the descriptor header.

Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area.

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis per FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures," before any FAA final regulatory action.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

AEA WV D, Huntington, WV [Amended]

Tri-State/Milton J. Ferguson Field, WV
(Lat. 38°22'00" N, long. 82°33'29" W)

That airspace extending upward from the surface to and including 3,400 feet MSL within a 4-mile radius of Tri-State/Milton J. Ferguson Field and 1 mile each side of the airport's 292° bearing extending from the 4-mile radius to 5.8 miles northwest of the airport and 1 mile each side of the airport's 112° bearing extending from the 4-mile radius to 5.7 miles southeast of the airport.

* * * * *

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AEA WV E5, Huntington, WV [Amended]

Tri-State/Milton J. Ferguson Field, WV
(Lat. 38°22'01" N, long. 82°33'31" W)

That airspace extending upward from 700 feet above the surface within an 8.3-mile radius of the Tri-State/Milton J. Ferguson Field Airport and 2 miles on each side of the airport's 112° bearing extending from the 8.3-mile radius to 10.2 miles southeast of the airport.

* * * * *

Issued in College Park, Georgia, on December 18, 2023.

Andree C. Davis,

Manager, Airspace & Procedures Team South, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2023-28308 Filed 12-22-23; 8:45 am]

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GENERAL SERVICES ADMINISTRATION

48 CFR Parts 502, 538, and 552

[GSAR Case 2022–G517; Docket No. GSAR–2023–0028; Sequence No. 1]

RIN 3090–AK60

General Services Administration Acquisition Regulation; Reduction of Single-Use Plastic Packaging

AGENCY: Office of Acquisition Policy, General Services Administration (GSA).
ACTION: Proposed rule.

SUMMARY: The General Services Administration is proposing to amend the General Services Administration Acquisition Regulation (GSAR) to add a new provision and clause to identify single-use plastic free (SUP-free) packaging availability for products under the Federal Supply Schedules with the goal of reducing single-use plastic packaging.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before February 26, 2024 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to GSAR Case 2022–G517 to: Regulations.gov: <https://www.regulations.gov> via the Federal eRulemaking portal by searching for “GSAR Case 2022–G517”. Select the link “Comment Now” that corresponds with GSAR Case 2022–G517. Follow the instructions provided at the “Comment Now” screen. Please include your name, company name (if any), and “GSAR Case 2022–G517” on your attached document. If your comment cannot be submitted using <https://www.regulations.gov>, call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite GSAR Case 2022–G517, in all correspondence related to this case. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Adina Torberntsson, Procurement Analyst, at gsarpolicy@gsa.gov or 720–475–0568. For information pertaining to status or publication schedules, contact

the Regulatory Secretariat at gsaregsec@gsa.gov or 202–501–4755. Please cite GSAR Case 2022–G517.

SUPPLEMENTARY INFORMATION:

I. Background

As one of the largest Federal purchasing agencies, the General Services Administration (GSA) purchases an enormous variety of different products. Despite product diversity, one element that is consistent across these acquisitions is the presence of product packaging and shipment packaging. Single-use plastic packaging has an additional cost that is often built into the proposed price, or the price is later realized in the cost of waste management. In addition, the cost of cleaning up environmental pollution and the cost of impacts to human health created by single-use plastics are often not accounted for in the price of the product.

A large portion of plastic waste comes from plastic packaging alone, and much of this packaging is designed to be used only once. This rule represents a small step in addressing the larger problem of too much plastic waste.

GSA amended internal policy guidance in the GSA Acquisition Manual (GSAM) Change 138, Case 2021–G528¹ to address acquisition planning as it relates to waste, sourcing, efficiency, and content management. GSA is now seeking a regulatory action that will be applied to its Federal Supply Schedules (FSS).

Multiple factors contributed to the decision to propose this regulatory action. These factors include: (a) existing policy and guidance, (b) GSA Acquisition Policy Federal Advisory Committee (GAP FAC) recommendations, (c) Advanced Notice of Proposed Rule (ANPR) public comments, and (d) current industry practices. More detailed information is provided below on the various information reviewed in the development of this rule.

Objectives

This proposed rule addresses the following:

- Defines SUP-free packaging and single-use plastic packaging in 502.101 *Definitions*.
- Adds a new FSS provision to identify SUP-free packaging at 552.238–XXX. This provision requires the offeror to identify whether they do or do not offer SUP-free packaging. If the offeror provides SUP-free packaging, it will also identify whether the SUP-free packaging

¹ <https://www.acquisition.gov/archives/change-138-gsam-case-2021-g528>.

is standard or must be specified by the ordering official.

- Adds a new FSS SUP-free Packaging Availability clause at 552.238-YYY. This clause includes a requirement to identify whether SUP-free packaging is available as the standard shipping practice, or at a premium or discount rate. Contractors that offer SUP-free packaging are encouraged to highlight SUP-free packaging in their price list and marketing materials.

GSA encourages ordering activities, when placing FSS orders and establishing blanket purchase agreements (BPAs), to include a preference for sustainable solutions such as SUP-free packaging. GSA will also highlight industry partners that make SUP-free packaging by utilizing a new product icon in its ordering systems, such as GSA Advantage![®]. The overall intent is to encourage industry partners who collaborate with GSA to reduce this critical waste stream, and to be acknowledged for their efforts in furtherance of this endeavor.

GSA will examine further ways to update its e-tools. This may include tools such as the environmental aisle, green procurement compilation tool, and others to include an icon or other identifier for SUP-free packaging.

Existing Policy and Guidance

Executive Order 14057 (December 8, 2021)

Executive Order (E.O.) 14057, *Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability*, Section 207, specifically addresses plastic pollution by referencing the Save Our Seas Act, Public Law 116-224, and promoting a circular economy.

In February of 2022, the GAP FAC referenced E.O. 14057 when recommending that GSA take action in addressing single-use plastics in federal acquisitions.

Federal Sustainability Plan (December 2021)

The Federal Sustainability Plan outlines the path for Federal Operations to achieve net-zero emission procurements by 2050. To do this, the plan directs the federal government to maximize procurement of sustainable products, as well as reduce waste. As a petrochemical product primarily manufactured using petrochemicals, single-use plastic is a product type whose reduction would address the plan's goals to reduce emissions.²

Environmental Protection Agency (EPA) Draft National Strategy To Prevent Plastic Pollution (April 21, 2023)

The EPA published a draft national strategy to prevent plastic pollution,³ which consists of three overarching goals: reduce pollution during plastic production, improve post-use materials management, and prevent trash and micro/nanoplastics from entering waterways and remove escaped trash from the environment. GSA can support this national strategy through this rulemaking to reduce single-use plastic packaging.

Other State and Local Government Policy Efforts

In planning the approach to this rule, GSA reviewed state and local government policies on reducing waste from single-use plastics such as California's Plastic Pollution Prevention and Packaging Producer Responsibility Act (SB 54).⁴ This statute requires removal of all single use plastic packaging that is non-recyclable and non-compostable within the statutory timeframe. As the fifth largest economy,⁵ California's legislation is a great indicator that the market can react to a reduction in single-use plastic packaging. Multiple states have followed suit with similar legislative actions to reduce single-use plastic packaging, including Connecticut, Delaware, Hawaii, Maine, New York, Oregon, and Vermont.⁶

GSA Acquisition Policy Federal Advisory Committee (GAP FAC)

Recommendations

The GAP FAC was established to provide recommendations specific to GSA to drive regulatory, policy, and process changes in acquisition.⁷ The GAP FAC is comprised of multiple stakeholders to include academics, non-profit organizations, industry, and government employees.

The policy subcommittee initially focused on steps GSA can take to ensure climate and sustainability issues are fully considered in the acquisition

process, specifically researching the topic of single-use plastics.

The GAP FAC identified risks associated with single-use plastics, including the use of redundant packaging, the cost for disposal, as well as the environmental justice issues raised by production, use, and waste management disposal of single-use plastics. The GAP FAC advised GSA that many single-use plastics and packaging are difficult or impossible to recycle or compost and end up in landfills or other waste management facilities, which are often located in or near disadvantaged communities. The advisory memo provided by the GAP FAC also highlights the Federal Sustainability Plan and discusses a net-zero procurement goal by 2050 established by E.O. 14057.

The GAP FAC recommended⁸ that GSA pursues rulemaking to reduce plastic waste. They highlighted that 36% of all plastic produced is packaging material.⁹ The overall recommendation to pursue rulemaking aligns with public feedback received during the ANPR that was open for public comment from September through November of 2022. The rulemaking recommendations include developing pre-award incentives or post-award rewards to suppliers for reducing unnecessary plastic packaging in shipping materials, or product packaging materials, demonstrated through waste reduction plans or third-party ecolabels.

Advanced Notice of Proposed Rule Public Comments

An advanced notice of proposed rulemaking (ANPR) was published in July of 2022 (87 FR 40476) with a 60 day response deadline, which was then extended an extra 3 weeks to meet the demands of all interested parties (87 FR 54937). The results of the ANPR were overall favorable with thousands of people signing statements of approval and submitting those as comments to the agency.

Some comments reflect a misunderstanding of GSA's role and the objective of the ANPR. As an acquisition agency, GSA is looking to leverage the acquisition system to reduce incoming single-use plastics packaging when Federal agencies use GSA contracts to acquire products.

Multiple respondents raised concerns about the environmental impact of products that are predominantly biobased, but may have either a plastic

³ EPA Draft National Strategy Prevent Plastic Pollution.

⁴ Allen, Chapter 75, Statutes of 2022, was signed into law on June 30, 2022.

⁵ <https://www.bloomberg.com/opinion/articles/2022-10-24/california-poised-to-overtake-germany-as-world-s-no-4-economy>.

⁶ <https://www.ncsl.org/environment-and-natural-resources/state-plastic-bag-legislation#:~:text=Eight%20states%E2%80%94California%2C%20Connecticut%2C,banned%20single%2Duse%20plastic%20bags>.

⁷ <https://www.gsa.gov/policy-regulations/policy/acquisition-policy/gsa-acquisition-policy-federal-advisory-committee>.

⁸ <https://www.gsa.gov/system/files/GAP%20FAC%20RECOMMENDATION%20REPORT%202023-01%20%283%29.pdf>.

⁹ <https://www.science.org/doi/10.1126/sciadv.1700782>.

² Federal Sustainability Plan.

coating (for waterproofing), or might be a biobased plastic where it is unclear how to compost it. While these concerns do present real challenges to packaging, the intent of this rule is not to address biobased products or regulate packaging but rather to build conditions to reduce the single-use plastic waste stream associated with purchases through GSA's Federal Supply Schedule.

Some comments focused on recycling policies. While important, many of these comments are outside of GSA's control and mission. Additionally, only 8.7% of plastic waste was recycled¹⁰ in 2018, and that rate dropped to 5–6% in 2021. Given the low percentage of plastic recycled,¹¹ and the challenges with GSA affecting change in this area, GSA did not include recycling policies in the scope of this rulemaking.

Multiple ANPR respondents provided feedback identifying concern if a product is not properly packaged and is thereafter damaged that would pose a greater environmental impact. To address those concerns, GSA is incentivizing the use of SUP-free packaging, as defined by the agency, not mandating it. The proposed rule encourages GSA's industry partners to promote their Federal Supply Schedule contract through a new GSA Advantage![®] SUP-free packaging product icon. Additionally, GSA will encourage its customers to consider packaging when making purchasing decisions through training and customer outreach.

Industry Practices and Consumer Trends

Overall review of applicable online articles, as well as review of companies' available shareholders reports, indicates that a reduction in single-use plastic is positive for marketability of a company, or displaying the company's values.

One historic high-profile case for a corporate change to packaging was McDonald's Corporation in 1990. Customers were concerned with the amount of polystyrene trash that was being produced. McDonald's pursued a change in packaging materials, rather than polystyrene¹² recycling because it was not economically advantageous to do so. In making this change it highlighted that the company could be

economically successful on a global scale, while still acting in the interest of the environment and the consumer.

Online reviews of companies that sell a predominantly plastic product, such as electronic companies, have also shown positive trends in reducing single-use plastic packaging with the goal of reducing such packaging to zero. An example of this is Apple Computers. In the company's 2022 environmental report the company highlighted a 75% reduction in plastic packaging as seen in 2021 when compared to where the company was at in 2015.¹³ This indicates that not only is such a reduction achievable. Under this circumstance it makes sense for GSA to identify ways to encourage the move towards SUP-free packaging.

Apple disclosed in the report that in 2021 they moved away from molded foam packaging to corrugated cardboard to absorb the shock of transport, and were able to continue with their current suppliers to make this change. Apple stated that they saved 400 metric tons of single-use plastic by changing their packaging alone.¹⁴ The report continues that Apple is making these decisions to not only be environmentally conscientious but to also remain competitive in the market.

Small businesses are also adopting this trend for product specific packaging. An example of this is Monadnock Paper Mill (MPM),¹⁵ which is the oldest operational papermill in the United States. Located outside of Bennington, New Hampshire.¹⁶ The mill has maintained operations by adapting over time, but also by promoting sustainability in their products to include packaging. The MPM business strategy highlights that to stay competitive over 200 years, you have to adapt and be forward thinking. The MPM looks to replace traditionally plastic products with paper ones.¹⁷

In addition, small businesses that sell on behalf of a large business manufacturer can make their packaging

options a value-added component, thus adding competition where previous waivers were required.¹⁸

Survey data has shown that overall, customers' do not want plastic packaging,¹⁹ and studies²⁰ find that people prefer sustainable brands.²¹ Overall 72% of consumers²² worldwide are actively buying more sustainable products, with this trend continuing.

These industry examples highlight that reducing single-use plastic packaging can be accomplished, without negatively impacting the product or the customer's experience.

II. Discussion and Analysis

In review of existing legislation, agency regulations, GAP FAC recommendations, ANPR public comments, and market data, GSA determined that reduction is the best starting point for the agency, as well as our industry partners, in addressing single-use plastics.

Although there could be multiple opportunities during an acquisition's lifecycle to address product packaging, GSA decided encouraging industry partners to offer SUP-free packaging, to include either product or shipping packaging, for products awarded on a FSS contract was the best starting point. The FSS program is a long-term governmentwide contract with commercial companies that provide access to millions of commercial products and services at the best value, in terms of cost, quality and service.

The Federal Supply Schedules makes buying easy and efficient with the use of modern technology to connect government buyers and industry. This rule will provide flexibility for contracting officers to determine if this is a competitive element specific to what they are procuring.

In review of current GSA acquisition supplemental policies, there is a need to address single-use plastic waste as it relates to packaging and single-use plastic product waste, and trends around this topic. To reduce this waste-stream, GSA is proposing to revise its

¹³ https://www.apple.com/environment/pdf/Apple_Environmental_Progress_Report_2022.pdf.

¹⁴ Apple Environmental Report, page 42, https://www.apple.com/environment/pdf/Apple_Environmental_Progress_Report_2022.pdf.

¹⁵ For NAICs Code 322120 for paper mills the size standard is 1250 employees. MPM is designated as a small business per that NAICs. <https://www.encyclopedia.com/books/politics-and-business-magazines/monadnock-paper-mills-inc#:~:text=Monadnock%20Paper%20Mills%20C%20Inc.%20is,small%20paper%20mill%20in%20America.>

¹⁶ <https://www.mbtmag.com/global/article/13215337/inside-americas-oldest-continuously-operating-paper-mill>.

¹⁷ <https://www.forbes.com/sites/jimvinoski/2019/07/10/monadnock-paper-mills-celebrates-200-years-of-continuous-operation/?sh=3a2e73d44c1>.

¹⁰ <https://www.smithsonianmag.com/smart-news/the-us-recycled-just-5-percent-of-its-plastic-in-2021-180980052/#:~:text=Of%20the%2040%20million%20tons,and%20The%20Last%20Beach%20Cleanup.>

¹¹ <https://www.smithsonianmag.com/smart-news/the-us-recycled-just-5-percent-of-its-plastic-in-2021-180980052/>.

¹² <https://www.nytimes.com/1990/11/02/business/packaging-and-public-image-mcdonalds-fills-a-big-order.html>.

¹⁸ See Federal Acquisition Regulations (FAR) 19.505(c) for additional information.

¹⁹ <https://www.forbes.com/sites/solitaretownsend/2018/11/21/consumers-want-you-to-help-them-make-a-difference/?sh=474c27d46954>.

²⁰ The Elusive Green Consumer, Harvard Business Review, Aug. 2019 <https://hbr.org/2019/07/the-elusive-green-consumer>.

²¹ <https://www.barrons.com/articles/two-thirds-of-north-americans-prefer-eco-friendly-brands-study-finds-51578661728>.

²² <https://www.forbes.com/sites/blakemorgan/2021/04/19/customers-hate-plastic-packaging-so-why-do-companies-keep-using-it/?sh=7664ce9192c6>.

regulations when establishing Federal Supply Schedule contracts as further described below.

GSAR Part 502 Definitions

The regulatory changes include providing definitions for single-use plastic packaging as well as SUP-free packaging. The definitions for single-use plastic packaging and SUP-free packaging take into account the needs of the agency, market trends to include consumer demand, and guidance received from both the ANPR and the GAP FAC.

These definitions were developed by adopting what some state legislatures have done, such as California in defining single-use plastic packaging. Additional guidance in developing these definitions came from reviewing both the Federal Trade Commissions (FTC) Green Guides²³ on product packaging and the International Organization for Standardization (ISO) ISO 18601:2013,²⁴ which addresses packaging.

GSAR Part 538 Federal Supply Schedule Contracting

To implement the proposed clause and provision for the Federal Supply Schedule, the prescription language in Part 538 has been updated to accommodate this change and require the new clause and provision to be included at the Federal Supply Schedule contract level.

GSAR Part 552 Solicitation Provisions and Contract Clauses

The intent of this rule is to encourage FSS contractors to adopt and promote SUP-free packaging instead of single-use plastic packaging. To do this, an existing clause needs to be amended, and a new clause and provision introduced.

GSAR Clause 552.238–88 GSA Advantage!®

The change to 552.238–88 GSA Advantage!® highlights the GSA SUP-free packaging icon that is being implemented in support of this case.

GSAR Provision 552.238–XX Single-Use Plastic (SUP) Free Packaging Identification

This new provision provides the opportunity for GSA industry partners to identify if: (1) they are able to provide

SUP free packaging; and (2) SUP free packaging is a standard part of their offering or must be specified by the ordering activity. The provision also identifies potential for a single-use plastic free packaging preference based on the proposed packaging label in GSA's online catalogs to promote sales.

GSAR Clause 552.238–YYY Single-Use Plastic (SUP) Free Packaging Availability

The new clause includes general statements of behaviors that GSA wants to encourage industry partners to adopt, the definitions that apply to the clause, and applicable procedures for SUP-free packaging.

GSA is defining SUP-free packaging as it relates to the agency and the Federal Supply Schedule. This definition will be incorporated into different electronic system enhancements in the form of an online icon that identifies those contractors on GSA Advantage!®. Industry partners are invited to identify any price premiums or discounts for SUP-free packaging.

III. Expected Impact of the Rule

This analysis includes both the cost and benefit impacts to both the public and GSA. The analysis includes identifying relevant products, developing a distinguishable icon, and developing internal guidance to help contracting activities learn how to apply searching for the icon to procure the environmentally preferable products.

The rule is specific to GSA's FSS program, with the intent of significantly reducing the single-use plastic waste stream. When voluntarily pursued, this action will reduce the Government's waste consumption, and potentially save industry partners money by having them reduce unnecessary packaging as described in some of the high-profile case studies mentioned in section I.D. Industry Practices and Consumer Trends.

It is expected that by reducing the packaging's overall bulk, industry will be better positioned to ship their items efficiently and effectively. Reducing excessive bulk packaging has proven effective in increasing the amount of goods that can be loaded for transportation and is therefore helpful in the distribution of products.

General Compliance Requirements

Focusing the regulatory changes on FSS contractors will enable GSA to incentivize contractors to voluntarily provide SUP-free packaging information through GSA's online system. The estimated cost per contractor is \$1,796.14. The calculations as to how

GSA got to this estimate are further described in section III.C.

The SUP-free packaging identification provision allows FSS contractors to identify products that are either packaged or shipped without single-use plastic packaging. The rule also includes a clause for the contractor that allows for either a price premium or discount for SUP-free packaging when such a premium or discount is consistent with their commercial practice.

Benefits

This rule is intended to benefit GSA and customer agencies by reducing the single-use plastic waste stream, and also FSS industry partners by providing a new opportunity to showcase their responsible environmental stewardship.

The Federal Government is the world's single largest purchaser of goods and services, spending over \$694 billion²⁵ in contracts in Fiscal Year 2022 alone. Public procurement can shift markets, drive innovation, and be a catalyst for adoption of new norms and global standards. Since the Federal Supply Schedules are the premiere entry point for commercial contractors to sell products (and services and solutions) to the Federal Government, the goal is to encourage the adoption of a new procurement norm to reduce single-use, unrecyclable, difficult to recycle, or frequently littered products plastic waste. Practices introduced or highlighted for the Federal Supply Schedules can easily be adopted into other Government contracts.

Overall, the proposed rule is intended to benefit the public by encouraging positive behaviors in reducing waste, and reducing product costs by building in efficiencies. The rule is an initial step to continue to work with industry partners in addressing the intersection of waste materials and logistical efficiency in providing better packaging. It is critical that GSA take this first step in working with our suppliers in developing sustainable solutions together to meet mutual future goals.

Estimated Public Costs

The following is a summary of the estimated cost impacts to the public in addressing this new requirement to reduce single-use plastic packaging. These costs are incurred one-time upfront and are not recurring to participating contractors.

²⁵ A Snapshot of Government-Wide Contracting for FY, April 15, 2023, <https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2022>.

²³ Federal Trade Commission, www.ftc.gov, Part 260 Guides for the Use of Environmental Marketing Claims.

²⁴ ISO 18601:2013 Packaging and the environment—General requirements for the use of ISO standards in the field of packaging and the environment <https://www.iso.org/obp/ui/#iso:std:iso:18601:ed-1:v1:en>.

1. Regulatory Familiarization

Regulatory familiarization includes the amount of time and effort it takes a company to become familiar with the requirements of the rule. The identification provision and availability clause speak to the behaviors that GSA wants to see industry adopt when doing business under GSA contracts. The time to read over and digest the information provided in this rule is negligible. The provision is similar to other self-identifying provisions utilized in Government acquisition.

For this reason, the proposed regulations require more of a familiarization in learning how to register in the etool; the assumption is 1 hour of time. GSA calculated the time based on the agency's subject matter expertise. We utilized the total number of Federal Supply Schedule contracts. The formula to calculate this cost is 14,000 contracts²⁶ multiplied by 1 hour at a GS-12²⁷ equivalent rate. The total for this would equal \$1,083,880.

2. SUP-Free Packaging Identification

The costs to comply with the SUP-free packaging identification provision includes time for the offeror to analyze their product catalog, identify existing SUP-free offerings, identify potential new (SUP) packaging offerings, and complete the provision questions.

The anticipated average time, based on GSA's knowledge of the schedule programs, to analyze the existing product catalog is 1 hour, however if this assertion is incorrect the agency welcomes industry feedback on this calculation or the following time calculations. The anticipated average time to identify existing and potential new SUP-free packaging offerings is 1 hour. The anticipated time to answer the provision is 0.1 hours. The formula to calculate this cost is 14,000 contracts multiplied by 2.1 hours at a GS-12²⁸ equivalent rate. The total for this would equal \$2,276,148.

3. SUP-Free Packaging Availability

The costs to comply with the SUP-free Packaging Availability clause includes time for the offeror to research and

determine price premiums or discounts for SUP-free offerings and submit the information.

The anticipated average time to research and determine the applicable pricings is 20 hours. The anticipated time to complete the submission is 0.1 hours. The formula to calculate this cost is 14,000 contracts multiplied by 20.1 hours at a GS-12²⁹ equivalent rate. The total for this would equal \$21,785,988.

4. Summary of Public Costs

The total estimated public cost of compliance with this rule, if all FSS contractors adopted this voluntary requirement, would be \$25,146,016. The 14,000 participants are a conservative estimate since the offeror's may choose if they want to provide SUP-free packaging as defined. The 14,000 represents if all contractors were to comply, with an average cost per contractor of \$1,796.14.

Once recorded, there is no anticipated additional cost during subsequent years of performance unless the offeror is providing additional SUP-free packaging options. However, this cost would be absorbed with the cost the contractor would experience any time that they modified their Federal Supply Schedule price list, which they would do regardless if the rule was issued.

With the Schedule contractors' identification of SUP-free packaging being voluntary, the indirect benefits to adopting this change far outweigh the costs. FSS Contractors who voluntarily comply will have a competitive advantage by being able to market themselves utilizing the new SUP-free packaging icon on GSA Advantage![®]. Schedule contractors are able to invest in this change which may provide greater visibility on GSA's electronic tools to Federal buyers. With the market trending in this direction, accepting this change may assist GSA Schedule contractors in their overall marketing efforts within the private sector as well.

GSA Costs

1. Update to GSA e-Tools

GSA reviewed various electronic tools that could support this rule. At this time the agency plans to utilize existing online tools such as GSA Advantage![®] which has the benefit of keeping costs low by utilizing IT infrastructure that already exists, and the added benefit of industry partners knowing how to utilize the system. If there are alternative GSA tools that would be

more beneficial to utilize, then please provide that feedback.

Capitalizing on the user interface knowledge, for both the GSA and industry, is pivotal in being able to implement the rule quickly.

The estimated hours to update the existing systems is 800 hours (assuming 5 employees working full time on this project for 4 weeks) at a GS-12³⁰ equivalent rate. The total for this effort would equal \$61,936 (800 × \$77.42).

2. Workforce Familiarization

GSA contracting officers will need to become familiar with the new policy at GSAR 502, 538, and 552. The GSA contracting officers will need to review these changes, interpret them, and apply them as prescribed.

GSA contracting officers are required to remain current on policies for procurement, such as changes to the GSAR. Review of such policy changes are considered a part of the normal duties of contracting personnel. As such, this analysis does not quantify the time and effort for contracting officers to become familiar with the rule. It is acknowledged that there is time and effort involved for the acquisition workforce to become familiar with the rule or the tools available and to assist contractors with compliance, though those potential burden hours and costs are minimal.

3. SUP-Free Packaging Material Costs

GSA estimates that price premiums and discounts for SUP-free packaging will average out to zero additional cost.

4. Summary of GSA Costs

The total estimated GSA cost of implementation of this rule would be \$61,936.

Alternatives Considered

When researching how to address this rule, several solutions were considered. After publishing the ANPR, it was determined that a rule that focused on reduction is preferable to alternatives such as recycling or mandatory elimination of plastic packaging.

GSA's mission is unrelated to environmental regulated programs such as recycling. Additionally, the recycling programs that GSA utilizes vary and are governed at local, municipal levels where the agency's offices are located.

Further, a rule seeking a mandatory elimination of plastic packaging may not be a feasible solution depending on what is being procured. For some supplies, such as healthcare products,

²⁶ This number is derived from a rolling average of data from the FAS Schedules Sales Query (SSQ) dashboard for all FSS contractors (<https://d2d.gsa.gov/report/fas-schedule-sales-query-plus-ssq>). Baseline for FY20 was 14,145; FY21 was 14,109; FY22 was 14,343. Average number of FSS contractors for FY20 through FY22 is 14,199, rounded to 14,000.

²⁷ 2023 Rest of US, 12 Step 5 × 2.0 fringe = \$77.42; the rate is adjusted upward by 100% to adjust for overhead and benefits.

²⁸ 2023 Rest of US, 12 Step 5 × 2.0 fringe = \$77.42; the rate is adjusted upward by 100% to adjust for overhead and benefits.

²⁹ 2023 Rest of US, 12 Step 5 × 2.0 fringe = \$77.42; the rate is adjusted upward by 100% to adjust for overhead and benefits.

³⁰ 2023 Rest of US, 12 Step 5 × 2.0 fringe = \$77.42; the rate is adjusted upward by 100% to adjust for overhead and benefits.

plastic packaging can be a beneficial material. This rule is not seeking plastic elimination as users of Federal Supply Schedules may have a need for a product packaged with single use plastic, so a broad elimination may not be beneficial.

While there are identified alternatives to reach a sustainable outcome regarding packaging, GSA is cognizant to not issue a broad rule without providing space for industry to pivot, and is interested in public feedback. Given the different types of products that GSA procures, a rule asking for changes to packaging that provides flexibility is the best method to keep costs down, while reaching a sustainable solution.

Questions for the Public

GSA is seeking public comment, including, as indicated above, regarding the potential impact of this rule on industry seeking to do business with the Federal Government through the FSS program.

Questions that GSA are asking the public about are as follows:

1. Are the definitions as currently described in the proposed rule clear?
2. Are the identification questions described in the proposed provision clear?
3. If you are a small business, do you foresee any potential impacts from the proposed rule? If yes please clarify if you anticipate either positive or negative impacts.
4. Are the time estimates provided in the current analysis accurate? Current analysis is 1 hour to learn how to register in the e-tool, 2.1 hours for SUP-free packaging identification, and 20.1 hours for the SUP-free packaging research?

IV. Executive Orders 12866, 13563, and 14094

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. E.O. 14094 (*Modernizing Regulatory Review*) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in E.O. 12866 and E.O. 13563.

OIRA has determined this rule to be a significant regulatory action. As a significant rule, this action is subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Regulatory Flexibility Act

GSA does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* because the rule change allows for many different solutions to the offeror as to how to propose a solution that considers transitioning from plastic packaging to SUP-free packaging.

Furthermore, the rule change does not dictate how to determine what is redundant packaging or not, as discussed throughout the above analysis. Industry partners, to include small entities, have flexibility to provide solutions that meet their business needs, as well as potentially save cost by reducing redundant packaging. However, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared consistent with 5 U.S.C. 603 and is summarized below.

The proposed rule will apply to large and small businesses. For purposes of this assessment, information generated from the FAS Schedule Sales Query Plus (SSQ+) has been used as the basis for estimating the number of contractors that may be involved. There are approximately 14,000 FSS contractors, of which over 12,000 (85%) were small business entities.

The rule includes a provision for offerors to self-identify if they include single-use plastic (SUP) free packaging. The manner in which the offeror is answered, is then visible in a GSA electronic tool, which is provided by the agency. There are no fees associated with the identification tool, and the provision consists of two questions.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known alternatives to this rule which would accomplish the stated objectives. Rule alternatives that could meet similar objectives are not advantageous to either the GSA or industry due to excessive cost and burden. An alternative would be to mandate specific types of packaging. Depending on the industry, there may be unintended cost consequences for a total change in packaging (for example transitioning from plastic to glass, the unintended cost might be due to transportation of a heavier product). For this reason the rule provides flexibility to industry to offer the Government solutions on reducing waste.

The Regulatory Secretariat will be submitting a copy of the Initial Regulatory Flexibility Analysis (IRFA) to the Chief Counsel for Advocacy of the Small Business Administration. A copy

of the IRFA may be obtained from the Regulatory Secretariat Division. GSA invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

GSA will consider comments from small entities as they relate to existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (GSAR Case 2022–G517) in correspondence.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 3501) does apply because the proposed rule contains information collection requirements. The existing Office of Management and Budget (OMB) Control Number 3090–0303 titled “Federal Supply Schedule Solicitation Information” will be updated to reflect the information to be collected through GSAR 552.238–XXX and GSAR 552.238–YYY.

A. Public Reporting Burden

Public reporting burden specific to this proposed rule and the revision to collection of information previously approved is voluntary and includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

GSAR 552.238–XXX

The annual reporting burden is estimated as follows:

Respondents: 3,500.

Responses per Respondent: 1.

Total Responses: 3,500.

Hours per Response: 2.

Total Burden Hours: 7,000.

GSAR 552.238–YYY

The annual reporting burden is estimated as follows:

Respondents: 3,500.

Responses per Respondent: 1.

Total Responses: 3,500.

Hours per Response: 2.

Total Burden Hours: 7,000.

B. Public Comments

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate and based on valid assumptions and methodology; and ways to enhance the quality, utility, and clarity of the information to be collected.

Requesters may obtain a copy of the information collection documents from

the GSA Regulatory Secretariat Division, by calling 202–501–4755 or emailing GSARegSec@gsa.gov. Please cite “Information Collection 3090–0303”, in all correspondence.

List of Subjects in 48 CFR Parts 502, 538, and 552

Government procurement.

Jeffrey A. Koses,

Senior Procurement Executive, Office of Acquisition Policy, Office of Government-wide Policy, General Services Administration.

Therefore, GSA proposes amending 48 CFR parts 502, 538 and 552 as set forth below:

- 1. The authority citation for 48 CFR parts 502, 538 and 552 continue to read as follows:

Authority: 40 U.S.C. 121(c).

PART 502—DEFINITIONS OF WORDS AND TERMS

- 2. Amend section 502.101 by adding in alphabetical order the definitions of “Packaging”, “Plastic”, “Single use plastic (SUP)”, and “Single-use plastic (SUP) free packaging” to read as follows:

502.101 Definitions.

* * * * *

Packaging is the material used to protect an item. Packaging includes, but is not limited to: brand packaging, ancillary packaging, grouped packaging, and redundant packaging.

(1) Brand packaging, sales packaging or primary packaging is packaging intended to provide the user or consumer with the individual unit of the product, such as plastic casing.

(2) Shipping packaging, serves as protection for the goods to ensure safe transport to the end customer, including:

(i) Ancillary packaging or transport packaging is packaging intended to secure the product, such as packing peanuts, wrapping materials, or molded materials.

(ii) Grouped packaging or secondary packaging is packaging intended to bundle, sell in bulk, brand, or market/display products.

(iii) Redundant packaging or unnecessary packaging is packaging that does not add any measurable protection to the supply being shipped, such as multiple layers of bubble wrap to an already durable product that is encased in a cardboard box. An example of this is a home testing kit with all plastic components already packaged in a cardboard box with cardboard inserts to absorb shock, that is then shipped in multiple layers of bubble wrap. In this

example the bubble wrap is the redundant single-use plastic packaging.

Plastic means a synthetic or semisynthetic material chemically synthesized by the polymerization of organic substances that can be shaped into various rigid and flexible forms, and includes coatings and adhesives. “Plastic” excludes natural rubber or naturally occurring polymers such as proteins or starches.

Single-use plastic (SUP) packaging means any plastic used for the containment, protection, handling, delivery, or presentation of goods by a producer for a consumer with the intent of being disposed of immediately after use. Disposal of the product meaning that it is routinely recycled, disposed of, or discarded after its contents have been used or unpackaged, and typically not refilled or otherwise reused by the producer. Packaging includes, but is not limited to ancillary packaging, brand/sales packaging, grouped packaging, and redundant packaging.

Single-use plastic (SUP) free packaging means product or shipping containment materials free of single-use plastic. Examples may include, but are not limited, to corrugated cardboard, paper products, and paper backed tape.

PART 538—FEDERAL SUPPLY SCHEDULE CONTRACTING

- 3. Amend section 538.273 by—

■ a. Adding paragraph (a)(4);

■ b. Removing from paragraph (b) the phrase “to 52.212–1” and adding “to FAR 52.212–1” in its place;

■ c. Removing from paragraph (c) the phrase “to 52.212–2” and adding “to FAR 52.212–2” in its place;

■ d. Removing from paragraph (d) the phrase “to Clause 52.212–4” and adding “to FAR 52.212–4” in its place;

■ e. Adding paragraph (d)(38); and

■ f. Removing from paragraph (e) the word “clause”.

The additions read as follows:

538.273 FSS solicitation provisions and contract clauses.

* * * * *

(a) * * *

(4) 552.238–XXX, Single-use Plastic Free Packaging Identification.

* * * * *

(d) * * *

(38) 552.238–YYY, Single-use Plastic Free Packaging Availability.

* * * * *

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 4. Amend section 552.238–88 by—

■ a. Revising the date of the clause; and

- b. Adding paragraph (c).

The revision and addition read as follows:

552.238–88 GSA Advantage!®.

* * * * *

GSA Advantage!® (DATE)

* * * * *

(c) *Single use plastic (SUP) free packaging icon*. Contractors are encouraged to utilize the GSA Advantage!® single-use plastic (SUP) free packaging icon when applicable (see 552.238–XXX). The offeror may include in their price list if the contractor is providing SUP-free packaging (either for shipping or as part of the product packaging) at either a price premium or discount (see 552.238–YYY).

(End of clause)

- 5. Add section 552.238–XXX and 552.238–YYY to read as follows:

552.238–XXX Single-use Plastic (SUP) Free Packaging Identification.

As prescribed in 538.273(a), insert the following provision:

Single-use Plastic Free Packaging Identification (DATE).

(a) *Single-use plastic free packing promotions*. Ordering activities may focus their GSA Advantage!® search on the designated icons and price to meet climate objectives. Contractors who want to be considered must include SUP-free packaging as defined in 502.101.

(b) *Procedures*. Offerors may complete the information in paragraph (c) when the resulting contract includes supplies.

(1) *SUP-free brand packaging*. Schedule contractors may incorporate this information as part of their Schedule price list once the products that utilize SUP-free brand packaging are incorporated under their Schedule contract, prior to competing for an order for the identified product.

(2) *SUP-free shipping packaging*. If the offeror is a reseller who is unable to address the brand packaging, but would like to pursue the icon for SUP-free shipping packaging, they may identify this availability.

If already identified, notify the Schedule contract's contracting officer with your response.

(c) *Optional identification requirements*. In order to be considered for the designated icons noted in paragraph (d), the offeror must provide the following information.

(1) *SUP-free brand packaging*. The offeror identifies that some or all supplies delivered under a contract resulting from this solicitation _____ will use SUP-free brand packaging. SUP-free brand packaging where applicable should be included in the offer's price list.

(2) *SUP-free shipping packaging*.

(i) The offeror identifies that some or all the supplies to be delivered under a contract resulting from this solicitation _____ will use SUP-free shipping packaging. SUP-free shipping packaging where applicable should be included in the offer's price list.

(ii) If the offeror responded “will” in paragraph (c)(i) of this provision, the offeror identifies that the SUP-free shipping

packaging__ does need to be requested by the ordering official.

(d) *Identification standards.* SUP-free packaging icons for the types identified in paragraph (c), will be available on GSA Advantage!®, as applicable.

(e) *Verification of SUP-free packaging.* An offeror, in identifying an item with SUP-free packaging, must possess evidence or rely on a reasonable basis to substantiate the claim. The Government will accept an offeror's claim of SUP-free packaging on the basis of possession of competent and reliable evidence. For any test, analysis, research, study, or other evidence to be "competent and reliable," it must have been conducted and evaluated in an objective manner, using procedures generally accepted in the profession to yield accurate and reliable results.

(End of Provision)

552.238-YYY Single-use Plastic (SUP) Free Packaging Availability.

As prescribed in 538.273(d), insert the following clause:

Single-use Plastic Free Packaging Availability (DATE).

(a) *Definitions. As used in this clause—*

Single-use plastic (SUP) packaging means any plastic used for the containment, protection, handling, delivery, or presentation of goods by a producer for a consumer with the intent of being disposed of immediately after use. Disposal of the product meaning that it is routinely recycled, disposed of, or discarded after its contents have been used or unpackaged, and typically not refilled or otherwise reused by the producer. Packaging includes, but is not limited to ancillary packaging, brand/sales packaging, grouped packaging, and redundant packaging.

Single-use plastic (SUP) free packaging means product or shipping containment

materials free of single-use plastic. Examples may include, but are not limited to, corrugated cardboard, paper products, and paper backed tape.

(b) *General.* The Contractor, in connection with this contract, is encouraged to—

(1) Evaluate their products for redundant or unnecessary packaging that can be eliminated without affecting quality.

(2) Package all products for shipment according to the Government's instructions or, if there are no instructions, in a manner sufficient to ensure that the products are delivered in undamaged condition with as little plastic waste material as possible.

(3) Limit the use of plastic packaging materials that have a high likelihood of not being reused or recycled, as appropriate (e.g., plastic casing or wrapping).

(4) Adopt SUP-free packaging to the maximum extent practicable, as appropriate.

(c) *Procedures.*

(1) *Price premiums and discounts.* For any single-use plastic (SUP) free packaging identified per 552.238-XXX, SUP-Free Packaging Identification the Contractor may include in the submitted price list (see the MAS solicitation instructions for submitting price list, including I-FSS-600) SUP-free packaging. The submitted price list may include a separate means of displaying information regarding product packaging. If the contractor is providing SUP-free packaging at either a price premium or discount, this should be clearly identified in the submitted price list.

(2) *Submission requirements.* As additional SUP-free packaging becomes available, the Contractor is encouraged to notify GSA of these changes, and is responsible for keeping all electronic catalog data current.

(3) *Identification of SUP-free packaging.* For easy identification of SUP free packaging, once available, GSA will use a SUP-free packaging icon in GSA Advantage!®.

(i) Offerors who provide SUP-free packaging and want to benefit from the GSA Advantage!® SUP-free packaging icon must provide the information required in 552.238-XXX, Single-use Plastic (SUP) Free Packaging Identification.

(ii) The Contractor is encouraged to place the GSA logo and GSA Advantage!® SUP-free packaging icon on their website and FSS price list for applicable supplies, see <https://www.gsa.gov/logos>. If the Contractor elects to use the GSA logo or icon, the website must clearly distinguish between those items awarded on the GSA contract and any other items offered by the Contractor on an open market basis.

(d) *Reliability.* Accuracy of information and computation of prices for this clause is the responsibility of the Contractor. In addition to the other remedies available in the contract, the remedies may include, but are not limited to, the following:

(1) If SUP-free packaging is provided at a higher rate but different packaging is received, the Government may pursue corrective action.

(2) If SUP-free packaging is utilized, but the product received is damaged, the Contractor shall replace the item, or the Government may pursue corrective action.

(3) Inclusion of incorrect information in the price list regarding SUP-free packaging may cause the Contractor to correct and resubmit the price list.

(4) Failure to correct applicable information for this clause, may constitute sufficient cause for termination, pursuant to FAR 52.212-4, Contract Terms and Condition-Commercial Products and Commercial Services, or remedies as provided by law.

(End of clause)

[FR Doc. 2023-27942 Filed 12-22-23; 8:45 am]

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Notices

Federal Register

Vol. 88, No. 246

Tuesday, December 26, 2023

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request; Reinstatement

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and reinstatement under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding: whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments regarding these information collections are best assured of having their full effect if received by January 25, 2024. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it

displays a currently valid OMB control number.

Agricultural Marketing Service

Title: Fruit Crops.

OMB Control Number: 0581–0189.

Summary of Collection: Marketing orders and marketing agreements are authorized by the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601–674; Act). This legislation permits the regulation of certain agricultural commodities for the purpose of providing orderly marketing conditions in interstate and intrastate commerce and improving returns to producers. The Act provides in section 608(d)(1) that information necessary to determine the extent to which an order has effectuated the declared policy of the Act shall be furnished at the request of the Secretary of Agriculture (Secretary). Marketing orders and marketing agreements become effective only after public hearings are held in accordance with formal rulemaking procedures specified by the Act. The Federal programs can authorize the issuance of grade, size, quality, maturity and inspection requirements; pack and container requirements; and pooling and volume regulations. Some provide authority for research and development, including paid advertising. Pursuant to section 608(e)(1) of the Act, certain grade and condition requirements are imposed on 14 commodities imported into the United States for which Orders regulate domestic production.

Need and Use of the Information: The information collection requirements in this request are essential to carry out the intent of the Act, to provide the respondents the type of service they request, and to administer the marketing orders. The Agricultural Marketing Service (AMS) requires several forms to be filed to enable the administration of each marketing order. These include forms covering the selection process for industry members to serve on a marketing order's committee or board and ballots used in referenda to amend or continue marketing orders. If this information collection was not conducted, not only would the Secretary lose his ability to administer the marketing orders, but the respective committees also would have no way of monitoring industry compliance with their respective marketing order and agreement. They would also not be able to determine the assessments due from

industry handlers and growers, which would negatively impact any market research and promotion activities.

Description of Respondents: Business or other for-profit; Farms.

Number of Respondents: 21,858.

Frequency of Responses: Recordkeeping; Reporting; on occasion, Quarterly; Biennially; Weekly; Semi-annually; Monthly; Annually.

Total Burden Hours: 6,595.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–28379 Filed 12–22–23; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding: whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by January 25, 2024 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information

displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Assessment of Mobile Technologies for Using Supplemental Nutrition Assistance Program (SNAP) Benefits.

OMB Control Number: 0584–NEW.

Summary of Collection: The Supplemental Nutrition Assistance Program (SNAP) provides monthly benefits to low-income households to reduce food insecurity and improve health and well-being. Benefits are delivered via electronic benefit transfer (EBT), which is accepted at more than 250,000 authorized retailers nationwide. For nearly two decades, SNAP participants have used EBT in person at retailers, where they swipe their card at checkout using a point of sale (POS) terminal and enter their personal identification number (PIN) to pay for their purchases.

The Agricultural Act of 2018 (2018 Farm Bill) authorized the use of mobile payments from devices like cell phones, tablets, and smart watches, as an alternate option to a physical electronic benefit transfer (EBT) card to conduct a SNAP transaction. This authorization was subject to the result of five mobile payment pilot projects. Mobile payments may improve the customer experience; save participant and retailer time; reduce potential stigma of using EBT; reduce costs; and prevent benefit fraud, loss, or theft.

Need and Use of the Information: The Mobile Payment Pilot Evaluation will assess the effects of the pilots, using information obtained from FNS, selected State SNAP agencies, retailers, and SNAP participants. The evaluation has four objectives: (1) assessing the implementation of the pilots, (2) examining the adoption and use of mobile technologies, (3) understanding implications for program integrity, and (4) assessing replicability and costs. In each of the five sites, the evaluation will conduct three rounds of semi-structured interviews with State SNAP agencies, EBT processors, retailers, and other partners. Interviews will occur during the pilot planning period and once the pilots are implemented, and will collect information about the pilot design and implementation.

Description of Respondents: State and Local Government, Individuals and

Households, Businesses or other For-Profit and Not-for-Profit.

Number of Respondents: 33,746.

Frequency of Responses: Reporting: Once.

Total Burden Hours: 8,726.87.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–28334 Filed 12–22–23; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Foreign Agricultural Service

Notice of Solicitation for the Agricultural Policy Advisory Committee (APAC) and the Related Agricultural Technical Advisory Committees (ATACs) for Trade and Continuation of Requests for Nominations for the Agricultural Trade Advisory Committees

AGENCY: Foreign Agricultural Service, Department of Agriculture.

ACTION: Solicit for nominations.

SUMMARY: Pursuant to section 135 of the Trade Act of 1974 and the Federal Advisory Committee Act, as amended, notice is hereby given that the Secretary of Agriculture (Secretary), in coordination with the United States Trade Representative (Trade Representative or USTR), is soliciting nominations for the Agricultural Policy Advisory Committee (APAC) and the related Agricultural Technical Advisory Committees (ATACs) for Trade to provide detailed policy and technical advice, information, and recommendations regarding trade barriers, negotiation of trade agreements, and implementation of existing trade agreements affecting food and agricultural products, including the performance of other advisory functions relevant to U.S. agricultural trade policy matters. The Foreign Agricultural Service (FAS) continues to welcome nominations for persons to serve on APAC and ATACs. The APAC and ATACs charters were renewed on June 13, 2023, and the committees are in the public interest in connection with the duties of USDA imposed by the Trade Act of 1974, as amended.

DATES: We will accept nominations for membership on the APAC and six ATACs until January 31, 2024, for the July 2024–2028 term. New applicants are considered approximately every 12–18 months.

ADDRESSES: Electronic copies of the nomination materials should be sent to ATACs@usda.gov.

All nomination materials may also be mailed in a single, complete package to: Office of the Secretary, U.S. Department of Agriculture, 1400 Independence Ave., SW, Room 200A Jamie L. Whitten Building, Washington, DC 20250–1001, Attn: APAC/ATACs.

FOR FURTHER INFORMATION CONTACT:

Darlene Maginnis, Group Federal Officer, Foreign Agricultural Service, U.S. Department of Agriculture at 202–868–7059; or by email at ATACs@usda.gov. You can find additional information about the APAC and ATACs on the Foreign Agricultural Service website at www.fas.usda.gov/atacs.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to Section 135 of the Trade Act of 1974 (19 U.S.C. 2155 (c)) and the Federal Advisory Committee Act, as amended, (5 U.S.C. 10), notice is hereby given that the Secretary of Agriculture (Secretary), in coordination with the United States Trade Representative (Trade Representative or USTR), is soliciting nominations for the Agricultural Policy Advisory Committee (APAC) and the related Agricultural Technical Advisory Committees (ATACs) for Trade. In 1974, Congress established a private-sector advisory committee system to ensure that U.S. trade policy and negotiation objectives adequately reflect U.S. commercial and economic interests.

As provided for in the law and their charters, the APAC has the following responsibilities:

(A) The Committee will advise, consult with, and make recommendations to the Secretary and Trade Representative concerning the trade policy of the United States and the matters arising in the administration of such policy; (B) The Committee will provide information and advice regarding the following: negotiating objectives and bargaining positions of the United States before the United States enters into trade agreements, the operation of any trade agreement once entered into, and matters arising in connection with the administration of the trade policy of the United States; and (C) The Committee will furnish such other advisory opinions and reports as the Secretary and Trade Representative deem necessary; and the ATACs have similar responsibilities:

General Committee Information

Each committee has a chairperson, who is elected from the membership of that committee. Committees meet as needed, and all committee meetings are

typically held in Washington, DC or by telephone or video conference. Committee meetings may be closed if USDA or USTR determines that a committee will be discussing issues that justify closing a meeting or portions of a meeting, in accordance with 19 U.S.C. 2155(f). Throughout the year, members are requested to review sensitive trade policy information and provide comments regarding trade negotiations. In addition to their other advisory responsibilities, at the conclusion of negotiations of any trade agreement, all committees are required to provide a report on each agreement to the President, Congress, USTR and USDA.

Committee Membership Information

All committee members are appointed by and serve at the discretion of the Secretary and Trade Representative. Committee appointments are typically for a period of four years but may be renewed for an additional term. Each committee member must be a U.S. citizen and must represent a U.S. entity with an interest in agricultural trade and must not be registered with the Department of Justice under the Foreign Agents Registration Act. To attend most meetings, committee members must have a current security clearance. New members will be guided in how to apply for a security clearance and their appointment will be contingent on successful completion of the investigation. Committee members serve without compensation and are not reimbursed for their travel expenses. No person may serve on more than one USDA advisory committee at the same time unless a specific exception is granted by the USDA Committee Management Officer. No entity may have more than one representative on any single trade advisory committee.

Nominations and Appointments of Members

Eligibility: Nominations for APAC and ATAC membership are open to individuals representing U.S. entities with an interest in agricultural trade without regard to race, color, religion, sex, national origin, age, mental or physical handicap, marital status, or sexual orientation. Equal opportunity practices in accordance with U.S. Government policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee reflect the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women, and persons with disabilities. Members should have expertise and knowledge of

agricultural trade as it relates to policy and commodity specific issues. Members will normally come from an entity with an interest in agriculture, and will serve as a Representative, presenting the views and interests of a particular U.S. entity that has an interest in the subject matter of the committee. However, should a member be appointed primarily for his or her expertise, and not as a representative of an interest group, he or she shall be designated as a Special Government Employee (SGE). SGEs are subject to specific provisions of the ethics laws, including disclosure of financial interests, if they are appointed because of their personal knowledge, background, or expertise. USDA will assist SGEs in disclosing their financial interest and will provide ethics training on an annual basis.

Appointments are made of individuals only and are not transferrable. No person, company, producer, farm organization, trade association, or other entity has a right to membership on a committee. In making appointments, every effort will be made to maintain balanced representation on the committees with representation from producers, farm and commodity organizations, processors, traders, and consumers. Geographical diversity on each committee will also be sought.

Nominations: Nominating a person to serve on any of the committees requires submission of a current resume for the nominee and the USDA AD-755 (Advisory Committee Membership Background Information, OMB Number 0505-0001), available on the internet at: <http://www.fas.usda.gov/trade-advisorycommittees-applying-membership>. A cover letter should also be submitted indicating the specific committee for which the individual is being nominated, why the nominee wants to be a committee member, and his or her qualifications for membership, and how the submitter learned about this call for nominations. The cover letter should also include the statements required below related to Federally Registered Lobbyists and Foreign Firms. If applicable, the application should include a sponsor letter on the non-Federal governmental entity letterhead containing a brief description of the manner in which international trade affects the entity and why the applicant should be considered for membership. Forms may also be requested by sending an email to ATACs@usda.gov, or by phone at (202) 868-7059.

Federally Registered Lobbyists: All nominees must provide a statement confirming their lobbyist status.

Pursuant to the Revised Guidance on Appointment of Lobbyists to Federal Advisory Committees, Boards, and Commissions, published by the Office of Management and Budget (OMB) on August 13, 2014, "federally registered lobbyists are no longer prohibited from serving on the advisory committees in a representative capacity." OMB's revised guidance clarifies that the eligibility restriction does not apply to advisory committee members who are specifically appointed to represent the interests of a nongovernmental entity, a recognizable group of persons or nongovernmental entities (an industry sector, labor unions, environmental groups, etc.), or state or local governments. The lobbyist prohibition continues to apply to persons serving on advisory committees in their individual capacity (e.g., SGEs).

Foreign Firms: If the nominee is to represent an entity or corporation with ten percent or greater non-U.S. ownership, the nominee must state the extent to which the organization or interest to be represented by the nominee is owned by non-U.S. citizens, organizations, or interests and demonstrate at the time of nomination that this ownership interest does not constitute control and will not adversely affect his or her ability to serve as an advisor on the U.S. agriculture advisory committee for trade.

Dated: December 18, 2023.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2023-28407 Filed 12-22-23; 8:45 am]

BILLING CODE 3410-10-P

DEPARTMENT OF AGRICULTURE

Forest Service

Ouachita National Forest, Scott and Sebastian Counties, Arkansas; Heavener Coal Leasing Project; Environmental Impact Statement

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The USDA Forest Service (FS) is preparing an environmental impact statement (EIS) as the lead Federal agency with support from Federal cooperating agencies, the U.S. Department of Interior (DOI) Bureau of Land Management (BLM) and Office of Surface Mining Reclamation and Enforcement (OSMRE). The purpose of the analysis is to respond to a Federal coal Lease by Application (LBA) submitted to the BLM from the Emera

Corporation on behalf of Ouro Mining Inc. The application seeks approval to access and recover Federal metallurgical coal resources from approximately 3,077 acres that underly lands on the Ouachita National Forest (ONF). No surface mining is proposed on National Forest System (NFS) lands. The FS and BLM have consent and leasing determinations to be made based in association with this EIS. The OSMRE does not have a decision to be made at this time but may tier to this analysis in the future.

DATES: Comments concerning the scope of the analysis for the EIS must be received by January 25, 2024. The draft environmental impact statement (DEIS) is expected in July 2024. The final EIS is expected to be available for review in June 2025.

ADDRESSES: Documents pertinent to this proposal are available for review on the project website at: <https://www.fs.usda.gov/project/?project=64897>.

Send electronic comments to: <https://cara.fs.usda.gov/Public/CommentInput?Project=64897>.

Send written comments to: Forest Supervisor, Heavener Project, P.O. Box 1270, Hot Springs, AR 71902.

FOR FURTHER INFORMATION CONTACT:

Contact FS Project Manager Michelle Davalos via email at

SM.FS.HeavCoalProj@usda.gov or by phone at 276–220–1670. For the BLM, contact Robert Swithers, District Manager via email at

SM.FS.HeavCoalProj@usda.gov or by phone at 601–919–4650. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339, 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: On December 21, 2012, a Federal coal LBA was submitted to the BLM Eastern States Office by Emera Corporation on behalf of Ouro Mining, Inc. On March 7, 2014, the BLM accepted the lease application. The application requests access to extract Federal metallurgical coal resources under lands managed by the ONF on the Poteau-Cold Springs Ranger District in Arkansas. The proposed lease area is in T3N, R32W, Sections 8–11, 14, 15, 17–19 and T3N, R33W, Section 13 in Scott and Sebastian Counties, Arkansas. The proposed Federal lease area is located adjacent and directly to the north of current coal leases held by Ouro Mining on private lands near Bates, Arkansas. The Emera Corporation's application involves a mix of reserved public domain lands and acquired lands on the ONF.

BLM is responsible for considering whether a coal lease would be offered through the competitive bid process and what stipulations would be required for surface resource protection. Because the lease would involve minerals underlying the ONF, the FS administrative unit with jurisdiction for managing surface resources, the BLM must have FS consent prior to deciding whether to offer the lease for sale.

Purpose and Need for Action

The purpose of the project is to respond to the Federal coal LBA submitted to the BLM Eastern States Office by Emera Corporation on behalf of Ouro Mining Inc. to extract metallurgical coal from 3,077 acres beneath the ONF. Under the Mineral Leasing Act of 1920 (MLA), as amended, 30 U.S.C. 181 *et seq.*, and the Mineral Leasing Act for Acquired Lands of 1947 (MLAAL), as amended, 30 U.S.C. 351 *et seq.* The BLM is responsible for leasing Federal coal and regulation of the development of that coal on approximately 570 million acres of the 700 million acres of mineral estate that is owned by the Federal Government. This responsibility encompasses Federal mineral rights on Federal lands and Federal mineral rights located under surface lands with non-Federal ownership. Under the authority of the MLA and MLAAL, the BLM administers leasing and monitors coal production.

Under the MLA, the BLM has responsibility for reviewing the Emera Corporation application and determining if it will approve the application and offer the lease for sale through a competitive bid process. The BLM takes into consideration whether leasing the applied for lands would be in the public interest (30 U.S.C. 181–287, 351–359; 43 CFR 3425.1 and 3472.1). The BLM regulations state the BLM must reject an application if “leasing of the land covered by the application, environmental or other sufficient reasons, would be contrary to the public interest” (43 CFR 3425.1–8(a)(3)). Many, often competing, interests must be considered in arriving at a public interest determination, including, but not limited to, the applicant's request; the environmental impacts; the economic benefit to the local, state, and national economy; rights of qualified surface owners; ensuring a fair return for the use of the public resources; and conservation of the public resource (BLM Manual 3435). Further, because the lease would involve minerals underlying the ONF, the BLM must have FS consent prior to deciding whether to offer the lease for sale (43 CFR 3461.5). The ONF is an

administrative unit of the FS and as such FS has the jurisdiction for managing surface resources. FS will determine whether to provide consent to the BLM under the applicable statutory standards.

The 2005 Ouachita National Forest Revised Land and Resource Management Plan (ONF Revised Forest Plan) does not address metallurgical coal leasing. For this reason, the FS will determine whether the proposed lease area on NFS lands is suitable for coal leasing. A forest plan amendment that provides additional direction for managing coal may be needed. If needed, the scope of the plan amendment would be limited to the 3,077 acres proposed for Federal metallurgical coal leasing. However, it would be programmatic in nature and plan direction would apply to future projects (36 CFR 219.13(b)). As part of its consent analysis, the Forest Service will consider, but not limit it to, the unsuitability criteria that the BLM applies on its own lands as outlined in 43 CFR 3461.5.

In association with the Federal coal lease application, the Forest Service will respond to a special use permit application received from Arkansas Valley Electric Cooperative to construct and operate approximately 3.0 miles (out of 9 total miles) of 161kV transmission powerline and 2.0 miles of associated new powerline access roads across NFS lands on the ONF for the purpose of providing electricity to the coal operation. The approximately 6.0 miles of powerline not on NFS lands would be addressed in the EIS cumulative effects analysis.

Proposed Action

The FS will assess whether the proposed lease area on NFS lands is suitable for coal leasing and if so, whether to consent to leasing 3,077 acres of Federal coal underlying the Ouachita National Forest as described in the Emera Corporation application. As part of assessing consent, the FS will develop lease stipulations that protect surface resources. The stipulations will be included with any FS consent decision to lease. The BLM would include these stipulations in the coal lease.

Additionally, connected actions associated with the lease include the:

- Construction, operation, and maintenance of a 161kV powerline on 3.0 miles of NFS lands and the construction of approximately 2.0 miles of powerline access roads.
- Issuance of a special use permit that authorizes a 100-foot right of way (ROW) for the 161kV powerline.

Issuance of the permit would be contingent on the metallurgical coal lease being sold, and the mining plan approved and permitted.

- If needed, a forest plan amendment that may add management direction for the leasing of metallurgical coal on 3,077 acres.

Expected Impacts

Disclosure of potential adverse impacts to NFS lands includes subsidence, which means the land surface is lowered as a result of mining activities. Resources potentially affected include, but are not limited to, vegetation, soil, and water. The EIS will address the potential for impacts from increased carbon emissions. Whether greenhouse gas emissions could approach significance over the life of the project is unknown at this time. Construction and maintenance of the electrical powerline and its associated roads would be designed to comply with the ONF Revised Forest Plan; significant impacts to vegetation, water, and soil resources are not expected.

Lead and Cooperating Agencies

The FS is the lead agency for the preparation and development of the EIS. The BLM and OSMRE are cooperating agencies. The FS will coordinate with BLM and OSMRE as cooperating agencies during preparation of the EIS, during the public review process, and throughout the decision-making process. The FS and BLM will be making separate decisions. The OSMRE does not have a decision to be made at time but may tier to this analysis for future decisions.

Responsible Officials

The official responsible for the Forest Service consent determination is the Ouachita Forest Supervisor. This authority was delegated by the Southern Region Regional Forester on October 16, 2023. The official responsible for the BLM leasing decision is the BLM Eastern States State Director.

Scoping Comments and the Objection Process

This notice of intent initiates the scoping process, which guides the development of the EIS. In this process the FS and BLM are requesting comments on the plan amendment, potential alternatives and impacts, and identification of any relevant information, studies or analyses of any kind concerning impacts affecting the quality of the human environment. Additional opportunities for public comment will be provided when the draft EIS is available. Whether virtual or

in-person meetings will be hosted during the scoping period is to be determined. It is important that reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the final EIS; therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions. Commenting during the opportunity to comment provided by the FS Responsible Official as prescribed by the applicable regulations will also govern eligibility to object once the final EIS and Draft Record of Decision has been published. Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, they will not be used to establish eligibility for the objection process.

The site-specific FS decisions (consent and the powerline) will be subject to the FS's predecisional administrative review procedures established in 36 CFR part 218. Those wishing to object to the site-specific decisions must meet the requirements at 36 CFR part 218, subparts A and B, for the project.

If a forest plan amendment is needed, that decision will be subject to the plan-level administrative review procedures established in 36 CFR part 219. Those wishing to object to the forest plan amendment must meet the requirements at 36 CFR part 219, subpart B (per 36 CFR 219.54). (See 36 CFR 219.59(b).) It is possible that the 36 CFR parts 218 and 219 objection process would run concurrently.

Permits, Licenses or Other Authorizations Required

Should the BLM decide to sell the Federal metallurgical coal lease through the competitive bid process, OSMRE will be the permitting authority for the 3,077 acres of Federal land for coal leasing. OSMRE would approve and enforce the operator's subsidence control plan and ensure that mining-related impacts on the hydrological balance or acid mine discharge would be minimized. The Federal lease holder would be required to provide OSMRE with a final mine plan that provides details on how the underground mine and any surface infrastructure would be constructed, operated, and maintained.

OSMRE would prepare a mine plan decision document and make a recommendation to the DOI Assistant Secretary of the Interior for Land and

Minerals Management (ASLM) whether to approve, approve with conditions, or disapprove the mine plan. OSMRE would request FS consent on the terms and conditions of the mine plan approval prior to submitting its recommendation to ASLM.

An additional finding is required by the Secretary of the Interior on whether Federal lands within the national forest have significant recreational, timber, economic, or other values that may be incompatible with coal mining operations. That finding, as required by section 522(e)(2) of the Surface Mining Control and Reclamation Act (30 CFR 761.11(b)), would rely on a recommendation of compatibility and determination of compliance (1990 OSMRE and FS memorandum of understanding (MOU)) from the FS, and a subsequent compatibility determination from OSMRE. Operation and reclamation of the metallurgical coal mine would be under the permitting jurisdiction of OSMRE.

Nature of Decision To Be Made

Among other considerations, the responsible officials will review the proposed action, other alternatives, environmental consequences, in order to make the following decisions:

For the BLM the decisions to be made are whether:

- (1) The proposed metallurgical coal lease area is acceptable for coal leasing (43 CFR part 3461).

- (2) Areas unsuitable for surface mining of coal have been identified as required by 43 CFR 3461.5.

- (3) There are special conditions designed to protect resources that would be required for a future coal lease.

- (4) The amount of coal recoverable has been identified and is acceptable for a future consideration of leasing.

- (5) The screening process has been completed in accordance with 43 CFR 3420.1–4(e). If the BLM determines the proposed lease area is suitable and can be made available for a Federal coal lease, the lease would be offered for sale through the competitive bid process. The BLM decision for a lease to utilize Federal lands would be documented in a record of decision (ROD) issued by the BLM.

For the FS the decisions to be made are whether:

- (1) The lands underlying the ONF are suitable for coal leasing;

- (2) To provide consent, with appropriate lease stipulations to protect surface resources, to the BLM concerning a Federal coal Lease by Application (LBA) submitted to the BLM from the Emera Corporation on behalf of Ouro Mining Inc.;

(3) To approve the powerline and associated access roads and issue a special use permit with terms and conditions; and

(4) If needed, to approve a forest plan amendment that may provide management direction for coal leasing on 3,077 acres within the ONF.

The FS decision on suitability, consent with surface leasing stipulations, the powerline and access roads special use permit, and a forest plan amendment (if needed) would be documented in a Record of Decision issued by the FS. Consent to the BLM would be issued through correspondence.

Substantive Provisions

The FS's Land Management Planning Rule at 36 CFR 219.13(b)(2) requires the responsible official to provide notice of which substantive requirements of 36 CFR 219.8 through 219.11 are likely to be directly related to the amendment. Whether a rule provision is directly related to an amendment is determined by the purpose for the amendment and the effects (beneficial or adverse) of the amendment, and is informed by the best available scientific information, scoping, effects analysis, monitoring data or other rationale (36 CFR 219.13(b)(5)). Based on those criteria, the Planning Rule provision likely to be directly related to the forest plan amendment (if needed) is: § 219.10(a)(2) (multiple use).

Additional Information

The EIS will identify, analyze, and consider mitigation to address the reasonably foreseeable impacts to surface resources from the LBA, the electrical powerline, and the associated access roads. In accordance with 40 CFR 1502.14(e), the agencies will evaluate appropriate mitigation measures not already included in the LBA. Mitigation may include avoidance, minimization, rectification, reduction or elimination over time, and compensation; and may be considered at multiple scales, including the landscape scale. The agencies will utilize and coordinate the National Environmental Policy Act (NEPA) and land use planning processes to help support compliance with applicable procedural requirements under the Endangered Species Act (16 U.S.C. 1536) and section 106 of the National Historic Preservation Act (54 U.S.C. 306108) as provided in 36 CFR 800.2(d)(3), including public involvement requirements of section 106. The information about historic and cultural resources and threatened and endangered species within the area potentially affected by the LBA and

proposed plan amendment will assist the agencies in identifying and evaluating impacts to such resources.

Indian Tribal Nations will be consulted on a government-to-government basis in accordance with Executive Order 13175, BLM MS 1780, and other Departmental policies. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources, will be given due consideration. Federal, state, and local agencies, along with Indian Tribal Nations and other stakeholders that may be interested in or affected by the proposed Federal coal LBA for the Heavener project, the amendment to the ONF Revised Forest Plan, and powerline-associated actions. They are invited to participate in the scoping process and, if eligible, may request or be requested by the agencies to participate in the development of the EIS as a cooperating agency.

Additional opportunities for government-to-government consultation will be provided during the NEPA process.

Dated: December 19, 2023.

Gregory Smith,

Associate Deputy Chief, National Forest System.

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–970]

Multilayered Wood Flooring From the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review, Preliminary Determination of No Shipments, and Rescission of Review, in Part; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. (Senmao) did not make sales of subject merchandise at less than normal value (NV), and that certain companies had no shipments of subject merchandise during the period of review (POR) December 1, 2021, through November 30, 2022. In addition, we are rescinding the review with respect to one company. We invite interested parties to comment on these preliminary results.

DATES: Applicable December 26, 2023.

FOR FURTHER INFORMATION CONTACT:

Rebecca Trainor, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; phone: (202) 482–4007.

SUPPLEMENTARY INFORMATION:

Background

Commerce is conducting an administrative review of the antidumping duty order on multilayered wood flooring (MLWF) from the People's Republic of China (China).¹ The review covers 48 companies, including mandatory respondent, Senmao.

For events that occurred since the *Initiation Notice* and the analysis behind our preliminary results herein, see the Preliminary Decision Memorandum.² The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at <https://access.trade.gov>. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at <https://access.trade.gov/public/FRNoticesListLayout.aspx>. A list of topics discussed in the Preliminary Decision Memorandum is included as Appendix I to this notice.

Scope of the Order³

The product covered by the *Order* is MLWF from China. For a complete description of the scope of this administrative review, see the Preliminary Decision Memorandum.

Partial Rescission of Review

On May 1, 2023, Kahrs International Inc. (Kahrs) timely withdrew its request for review of the Fusong Jinlong Group

¹ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 88 FR 7060 (February 2, 2023) (*Initiation Notice*).

² See Memorandum, “Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review: Multilayered Wood Flooring from the People's Republic of China; 2021–2022,” dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

³ See *Multilayered Wood Flooring from the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less than Fair Value and Antidumping Duty Order*, 76 FR 76690 (December 8, 2011), as amended in *Multilayered Wood Flooring from the People's Republic of China*, 77 FR 5484 (February 3, 2012) (collectively, *Order*).

(Jinlong).⁴ No other parties requested a review of this company.⁵ Accordingly, Commerce is rescinding the administrative review with respect to Jinlong.⁶

Preliminary Determination of No Shipments

Based on an analysis of information from U.S. Customs and Border Protection (CBP), no shipment certifications, and other record information, we preliminarily determine that 23 companies had no shipments of subject merchandise during the POR. For a listing of these companies, *see* Appendix II of this notice. Consistent with our practice in non-market economy (NME) cases, we are not rescinding this review with respect to these companies but, rather, intend to complete the review and issue appropriate instructions to CBP based on the final results of the review.⁷

Separate Rates

We preliminarily determine that, in addition to Senmao, two companies not individually-examined are eligible for separate rates in this administrative review, Dalian Deerfu Wooden Product Co., Ltd. (Deerfu) and Dalian Jaenmaken Wood Industry Co., Ltd. (Jaenmaken).⁸ The Tariff Act of 1930, as amended (the Act), and Commerce's regulations do not address the establishment of a separate rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for separate-rate respondents which Commerce did not examine individually in an administrative review. For the preliminary results of this review, Commerce has determined the estimated dumping margin for Senmao to be zero.⁹ For the reasons explained in

the Preliminary Decision Memorandum, we are assigning this rate to Deerfu and Jaenmaken, *i.e.*, the non-examined respondents which qualify for a separate rate in this review.

The China-Wide Entity

Commerce's policy regarding conditional review of the China-wide entity applies to this administrative review.¹⁰ Under this policy, the China-wide entity will not be under review unless a party specifically requests, or Commerce self-initiates, a review of the entity. Because no party requested a review of the China-wide entity, the entity is not under review, and the entity's rate (*i.e.*, 85.13 percent) is not subject to change. *See* the Preliminary Decision Memorandum for further discussion.

Aside from the companies for which we preliminarily find no shipments and the company for which the review is being rescinded, Commerce considers all other companies for which a review was requested and did not demonstrate separate rate eligibility to be part of the China-wide entity.¹¹ For the preliminary results of this review, we consider 21 companies to be part of the China-wide entity. For a listing of these companies, *see* Appendix II of this notice.

Methodology

We are conducting this administrative review in accordance with sections 751(a)(1)(B) of the Act and 19 CFR 351.213. We calculated export prices for Senmao in accordance with section 772(a) of the Act. Because China is an NME country within the meaning of section 771(18) of the Act, we calculated NV in accordance with section 773(c) of the Act.

Preliminary Results of Review

We preliminarily determine that the following weighted-average dumping margins exist for the POR December 1, 2021, through November 30, 2022:

Industry Co., *Assessment Ltd.*," dated concurrently with this notice.

¹⁰ *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 FR 65963 (November 4, 2013).

¹¹ *See Initiation Notice* ("All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate rate application or certification, as described below."). Companies that are subject to this administrative review that are considered to be part of the China-wide entity are listed in Appendix II.

Exporters	Weighted-average dumping margin (percent)
Jiangsu Senmao Bamboo and Wood Industry Co., Ltd.	00.00
Dalian Deerfu Wooden Product Co., Ltd.	00.00
Dalian Jaenmaken Wood Industry Co., Ltd.	00.00

Disclosure and Public Comment

We intend to disclose the calculations performed for these preliminary results to interested parties with an Administrative Protective Order within five days after the date of publication of these preliminary results.¹²

Pursuant to 19 CFR 351.309(c)(1)(ii), interested parties may submit case briefs no later than 30 days after the date of publication of this notice.¹³ Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.¹⁴ Interested parties who submit case briefs or rebuttal briefs in this proceeding must submit: (1) a table of contents listing each issue; and (2) a table of authorities.¹⁵ As provided under 19 CFR 351.309(c)(2) and (d)(2), in prior proceedings we have encouraged interested parties to provide an executive summary of their brief that should be limited to five pages total, including footnotes. In this administrative review, we instead request that interested parties provide at the beginning of their briefs a public, executive summary for each issue raised in their briefs.¹⁶ Further, we request that interested parties limit their executive summary of each issue to no more than 450 words, not including citations. We intend to use the executive summaries as the basis of the comment summaries included in the issues and decision memorandum that will accompany the final results in this administrative review. We request that interested parties include footnotes for relevant citations in the executive summary of each issue. Note that Commerce has amended certain of its requirements

¹² *See* 19 CFR 351.224(b).

¹³ *See also* 19 CFR 351.303 (for general filing requirements).

¹⁴ *See* 19 CFR 351.309(d); *see also Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings*, 88 FR 67069, 67077 (September 29, 2023) (*APO and Service Final Rule*).

¹⁵ *See* 19 CFR 351.309(c)(2) and (d)(2).

¹⁶ We use the term "issue" here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

⁴ *See* Kahrs' Letter, "Notice of Withdrawal of Request for 2021–2022 Administrative Review," dated May 1, 2023.

⁵ Jinlong consists of the following companies: Fusong Jinlong Wooden Group Co., Ltd.; Fusong Qianqiu Wooden Product Co., Ltd.; Dalian Qianqiu Wooden Product Co., Ltd.; and Fusong Jinqiu Wooden Product Co., Ltd.

⁶ *See* 19 CFR 351.213(d)(1).

⁷ *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694, 65694–95 (October 24, 2011); *see also* the "Assessment Rates" section, below.

⁸ *See* Preliminary Decision Memorandum at the "Separate Rate Determinations" section for more details.

⁹ *See* Memorandum, "Preliminary Results Margin Calculation for Jiangsu Senmao Bamboo and Wood

pertaining to the service of documents in 19 CFR 351.303(f).¹⁷

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. An electronically-filed hearing request must be received successfully in its entirety by Commerce's electronic system, ACCESS, by 5 p.m. Eastern Time within 30 days after the date of publication of this notice.¹⁸

Final Results

Unless the deadline is extended, we intend to issue the final results of this administrative review, which will include the results of our analysis of the issues raised in the case briefs, within 120 days of publication of these preliminary results in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h).

Assessment Rates

Upon issuance of the final results, Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review, in accordance with 19 CFR 351.212(b).

If Senmao's *ad valorem* weighted-average dumping margin is not zero or *de minimis* (*i.e.*, less than 0.50 percent) in the final results of this review, Commerce will calculate importer-specific assessment rates on the basis of the ratio of the total amount of dumping calculated for the importer's examined sales and the total quantity of those sales, in accordance with 19 CFR 351.212(b)(1).¹⁹ Commerce will also calculate (estimated) *ad valorem* importer-specific assessment rates with which to assess whether the per-unit assessment rate is *de minimis*. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific *ad valorem* assessment rate

calculated in the final results of this review is not zero or *de minimis*.

For Deerfu and Jaenmaken, *i.e.*, the respondents that were not selected for individual examination in this administrative review that qualified for a separate rate, the assessment rate will be the separate rate established in the final results of this administrative review. If, in the final results, the respondents' weighted-average dumping margins continue to be zero or *de minimis* (*i.e.*, less than 0.5 percent), Commerce will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.²⁰

For entries that were not reported in the U.S. sales databases submitted by Senmao during this review, and for the 21 companies that do not qualify for a separate rate, Commerce will instruct CBP to liquidate such entries at the China-wide rate (*i.e.*, 85.13 percent).²¹ In addition, if we continue to find no shipments of subject merchandise for the 23 companies for which we preliminarily find no such shipments during the POR,²² any suspended entries of subject merchandise associated with those companies will be liquidated at the China-wide rate.²³

For Jinlong, *i.e.*, the company for which the administrative review is rescinded, antidumping duties shall be assessed at a rate equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i).

We intend to issue appropriate assessment instructions with respect to Jinlong, *i.e.*, the company for which this administrative review is rescinded, to CBP 35 days after the publication of the preliminary results in the **Federal Register**. For all other companies that continue to be subject to review, we intend to issue appropriate assessment instructions to CBP 35 days after the publication of the final results in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.*, within 90 days of publication).

²⁰ See 19 CFR 351.106(c)(2).

²¹ See *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2016–2017*, 84 FR 38002 (August 5, 2019).

²² See Appendix II for a list of these companies.

²³ See *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694, 65695 (October 24, 2011).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this review for all shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) for the companies listed above that have a separate rate, the cash deposit rate will be the rate established in the final results of this review (except, if the rate is *de minimis*, then a cash deposit rate of zero will be required); (2) for previously investigated or reviewed Chinese and non-Chinese exporters for which a review was not requested and that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for the China-wide entity (*i.e.*, 85.13 percent); and (4) for all non-Chinese exporters of subject merchandise that have not received their own rate, the cash deposit rate will be the rate applicable to Chinese exporter that supplied that non-Chinese exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties, and/or increase in the amount of antidumping duties by the amount of the countervailing duties.

Notification to Interested Parties

We are issuing and publishing the preliminary results of this review in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

¹⁷ See *APO and Service Final Rule*.

¹⁸ See 19 CFR 351.310(c).

¹⁹ In these preliminary results, Commerce applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification*, 77 FR 8101 (February 14, 2012).

Dated: December 19, 2023.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

- I. Summary
- II. Background
- III. Period of Review
- IV. Scope of the Order
- V. Selection of Respondents
- VI. Preliminary Determination of No Shipments
- VII. Discussion of the Methodology
- VIII. Recommendation

Appendix II

No Shipments

Anhui Longhua Bamboo Product Co., Ltd.
Benxi Flooring Factory (General Partnership)
Dalian Shengyu Science and Technology Development Co., Ltd.
Dongtai Fuan Universal Dynamics, LLC
Dun Hua Sen Tai Wood Co., Ltd.
Dunhua City Dexin Wood Industry Co., Ltd.
Dunhua Shengda Wood Industry Co., Ltd.
HaiLin LinJing Wooden Products Co., Ltd.
Hunchun Xingjia Wooden Flooring Inc.
Huzhou Sunergy World Trade Co., Ltd.
Jiangsu Keri Wood Co., Ltd.
Jiangsu Mingle Flooring Co., Ltd.
Jiangsu Simba Flooring Co., Ltd.
Jiashan On-Line Lumber Co., Ltd.
Kingman Wood Industry Co., Ltd.
Linyi Youyou Wood Co., Ltd.
Pinge Timber Manufacturing (Zhejiang) Co., Ltd.
Power Dekor Group Co., Ltd.
Sino-Maple (Jiangsu) Co., Ltd.
Suzhou Dongda Wood Co., Ltd.
Zhejiang Dadongwu Greenhome Wood Co., Ltd.
Zhejiang Longsen Lumbering Co., Ltd.
Zhejiang Shiyou Timber Co., Ltd.

China-Wide Entity

Benxi Wood Company
Dalian Jiahong Wood Industry Co., Ltd.
Dalian Penghong Floor Products Co., Ltd./
Dalian Shumaike Floor Manufacturing Co., Ltd.
Dunhua City Hongyuan Wood Industry Co., Ltd.
Huzhou Chenghang Wood Co., Ltd.
Huzhou Fulinmen Imp. & Exp. Co., Ltd.
Jiangsu Guyu International Trading Co., Ltd.
Jiangsu Yuhui International Trade Co., Ltd.
Jiashan HuiJiaLe Decoration Material Co., Ltd.
Jiaxing Hengtong Wood Co., Ltd.
Lauzon Distinctive Hardwood Flooring, Inc.
Linyi Anying Wood Co., Ltd.
Metropolitan Hardwood Floors, Inc.
Muchsee Wood (Chuzhou) Co., Ltd.
Tongxiang Jisheng Import and Export Co., Ltd.
Yekalon Industry Inc.
Yihua Lifestyle Technology Co., Ltd.
(successor-in-interest to Guangdong Yihua Timber Industry Co., Ltd.)
Yingyi-Nature (Kunshan) Wood Industry Co., Ltd.
Zhejiang Fuerjia Wooden Co., Ltd.

Zhejiang Shuimojiangnan New Material Technology Co., Ltd.

Zhejiang Simite Wooden Co., Ltd.

Rescissions

Dalian Qianqiu Wooden Product Co., Ltd.,
Fusong Jinlong Wooden Group Co., Ltd.,
Fusong Jinqiu Wooden Product Co., Ltd.,
and Fusong Qianqiu Wooden Product Co., Ltd. (collectively, Fusong Jinlong Group)

[FR Doc. 2023-28417 Filed 12-22-23; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

Notice of Scope Ruling Applications Filed in Antidumping and Countervailing Duty Proceedings

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) received scope ruling applications, requesting that scope inquiries be conducted to determine whether identified products are covered by the scope of antidumping duty (AD) and/or countervailing duty (CVD) orders and that Commerce issue scope rulings pursuant to those inquiries. In accordance with Commerce's regulations, we are notifying the public of the filing of the scope ruling applications listed below in the month of November 2023.

DATES: Applicable December 26, 2023.

FOR FURTHER INFORMATION CONTACT:

Terri Monroe, AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482-1384.

Notice of Scope Ruling Applications

In accordance with 19 CFR 351.225(d)(3), we are notifying the public of the following scope ruling applications related to AD and CVD orders and findings filed in or around the month of November 2023. This notification includes, for each scope application: (1) identification of the AD and/or CVD orders at issue (19 CFR 351.225(c)(1)); (2) concise public descriptions of the products at issue, including the physical characteristics (including chemical, dimensional and technical characteristics) of the products (19 CFR 351.225(c)(2)(ii)); (3) the countries where the products are produced and the countries from where the products are exported (19 CFR 351.225(c)(2)(i)(B)); (4) the full names of the applicants; and (5) the dates that the

scope applications were filed with Commerce and the name of the ACCESS scope segment where the scope applications can be found.¹ This notice does not include applications which have been rejected and not properly resubmitted. The scope ruling applications listed below are available on Commerce's online e-filing and document management system, Antidumping and Countervailing Duty Electronic Service System (ACCESS), at <https://access.trade.gov>.

Scope Ruling Applications

Boltless Steel Shelving Units
Prepackaged for Sale from the People's Republic of China (China) (A-570-018); headphone/speaker retail display shelves (Retail Display Shelves);² produced in and exported from China; submitted by Fasteners for Retail, Inc. dba siffon. (siffon); November 8, 2023; ACCESS scope segment "siffon Retail Display Shelves."

Passenger Vehicle and Light Truck Tires from Taiwan (A-583-869); Certain Light Truck Spare Tires (LTST);³ produced in and exported from Taiwan; submitted by Cheng Shin Rubber Ind. Co. Ltd. (Cheng Shin); November 13,

¹ See *Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws*, 86 FR 52300, 52316 (September 20, 2021) (*Final Rule*) ("It is our expectation that the **Federal Register** list will include, where appropriate, for each scope application the following data: (1) identification of the AD and/or CVD orders at issue; (2) a concise public summary of the product's description, including the physical characteristics (including chemical, dimensional and technical characteristics) of the product; (3) the country(ies) where the product is produced and the country from where the product is exported; (4) the full name of the applicant; and (5) the date that the scope application was filed with Commerce.")

² The retail display shelves are made of steel components welded together. The shelves are not designed to provide structural support to the gondola or wall brackets and lacks vertical uprights and horizontal supports necessary to install the headphone/speaker shelves. While shelf quantities, shelf sizes, and display accessories included with headphone/speaker retail display shelves can vary to meet the retail customer's specifications, the custom designed, made to order headphone/speaker retail display shelves do not contain vertical or horizontal supports that lock together to form a frame, and are not designed to be placed on the floor/ground. The shelves lack a base. Once the headphone/speaker retail display shelves are assembled, they are hung on the retail customer's existing slotted steel vertical supports of a gondola or wall brackets. Steel/pegboard gondola units upon which the headphone/speaker retail display shelves may be installed, are not included in the Fasteners for Retail dba siffon's (siffon) product. The country of production is China. It is classified under HTSUS heading 9403, HTSUS subheading 9403.20.0086.

³ This product covered by this request is a light truck spare tire with a 265/70R17 size designation, a "temporary use only" molding on the sidewall, and a tread depth no greater than 6.2 mm. The product does not have a Uniform Tire Quality Grade Standard rating molded on the sidewall.

2023; ACCESS scope segment “SCO—LTST 2023.”

Notification to Interested Parties

This list of scope ruling applications is not an identification of scope inquiries that have been initiated. In accordance with 19 CFR 351.225(d)(1), if Commerce has not rejected a scope ruling application nor initiated the scope inquiry within 30 days after the filing of the application, the application will be deemed accepted and a scope inquiry will be deemed initiated the following day—day 31.⁴ Commerce’s practice generally dictates that where a deadline falls on a weekend, Federal holiday, or other non-business day, the appropriate deadline is the next business day.⁵ Accordingly, if the 30th day after the filing of the application falls on a non-business day, the next business day will be considered the “updated” 30th day, and if the application is not rejected or a scope inquiry initiated by or on that particular business day, the application will be deemed accepted and a scope inquiry will be deemed initiated on the next business day which follows the “updated” 30th day.⁶

In accordance with 19 CFR 351.225(m)(2), if there are companion AD and CVD orders covering the same merchandise from the same country of origin, the scope inquiry will be conducted on the record of the AD proceeding. Further, please note that pursuant to 19 CFR 351.225(m)(1), Commerce may either apply a scope ruling to all products from the same country with the same relevant physical characteristics, (including chemical, dimensional, and technical characteristics) as the product at issue, on a country-wide basis, regardless of the producer, exporter, or importer of those products, or on a company-specific basis.

For further information on procedures for filing information with Commerce through ACCESS and participating in

scope inquiries, please refer to the Filing Instructions section of the Scope Ruling Application Guide, at https://access.trade.gov/help/Scope_Ruling_Guidance.pdf. Interested parties, apart from the scope ruling applicant, who wish to participate in a scope inquiry and be added to the public service list for that segment of the proceeding must file an entry of appearance in accordance with 19 CFR 351.103(d)(1) and 19 CFR 351.225(n)(4). Interested parties are advised to refer to the case segment in ACCESS as well as 19 CFR 351.225(f) for further information on the scope inquiry procedures, including the timelines for the submission of comments.

Please note that this notice of scope ruling applications filed in AD and CVD proceedings may be published before any potential initiation, or after the initiation, of a given scope inquiry based on a scope ruling application identified in this notice. Therefore, please refer to the case segment on ACCESS to determine whether a scope ruling application has been accepted or rejected and whether a scope inquiry has been initiated.

Interested parties who wish to be served scope ruling applications for a particular AD or CVD order may file a request to be included on the annual inquiry service list during the anniversary month of the publication of the AD or CVD order in accordance with 19 CFR 351.225(n) and Commerce’s procedures.⁷

Interested parties are invited to comment on the completeness of this monthly list of scope ruling applications received by Commerce. Any comments should be submitted to James Maeder, Deputy Assistant Secretary for AD/CVD Operations, Enforcement and Compliance, International Trade Administration, via email to CommerceCLU@trade.gov.

This notice of scope ruling applications filed in AD and CVD proceedings is published in accordance with 19 CFR 351.225(d)(3).

Dated: December 20, 2023.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2023–28420 Filed 12–22–23; 8:45 am]

BILLING CODE 3510–DS–P

⁴ In accordance with 19 CFR 351.225(d)(2), within 30 days after the filing of a scope ruling application, if Commerce determines that it intends to address the scope issue raised in the application in another segment of the proceeding (such as a circumvention inquiry under 19 CFR 351.226 or a covered merchandise inquiry under 19 CFR 351.227), it will notify the applicant that it will not initiate a scope inquiry, but will instead determine if the product is covered by the scope at issue in that alternative segment.

⁵ See Notice of Clarification: Application of “Next Business Day” Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended, 70 FR 24533 (May 10, 2005).

⁶ This structure maintains the intent of the applicable regulation, 19 CFR 351.225(d)(1), to allow day 30 and day 31 to be separate business days.

⁷ See Scope Ruling Application; Annual Inquiry Service List; and Informational Sessions, 86 FR 53205 (September 27, 2021).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD595]

Gulf of Mexico Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will hold a 2 day in-person meeting of its Ad Hoc Charter For-hire Data Collection Advisory Panel.

DATES: The meeting will convene on Wednesday, January 10, 2024, 9 a.m.–5 p.m. and Thursday, January 11, 2024, 9 a.m.–2 p.m., EST.

ADDRESSES: The meeting will be held in-person at the Gulf Council office. Please visit the Gulf Council website at <https://www.gulfcouncil.org> for meeting materials.

Council address: Gulf of Mexico Fishery Management Council, 4107 W Spruce Street, Suite 200, Tampa, FL 33607; telephone: (813) 348–1630.

FOR FURTHER INFORMATION CONTACT: Dr. Lisa Hollensead, Fishery Biologist, Gulf of Mexico Fishery Management Council; lisa.hollensead@gulfcouncil.org, telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION:

Wednesday, January 10, 2024, 9 a.m.–5 p.m., EST.

The meeting will begin with member and staff introductions, overview of Advisory Panel (AP) Meeting Process, election of chair and vice chair, adoption of agenda and review the charge of the AP and overview of Meeting Scope.

The committee will review past discussions from charter-for-hire data collection including presentation and background materials from original Southeast For-Hire Integrated Electronic Reporting (SEFHIER) amendment and technical document of program recommendations. The AP will discuss new charter for-hire data collection program goals and objectives and receive presentations for considerations for a data collection program and summary of SEFHIER program data. The AP will discuss recommendations for a New For-hire Data Collection Program and receive public comments, if any.

Thursday, January 11, 2024, 9 a.m.–2 p.m., EST.

The committee will reconvene and continue discussions on

Recommendations for a New For-hire Data Collection Program, revisit the AP charge, evaluate desired program goals and objectives and wrap-up recommendations to Council.

The committee will discuss Other Business items, and receive Public Comments before the meeting adjourns.

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on <https://www.gulfcouncil.org>.

Although other non-emergency issues not on the agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take-action to address the emergency.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 20, 2023.

Alyssa Lynn Weigers,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023-28411 Filed 12-22-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD515]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Trident Seafoods Bunkhouse Dock Replacement Project, Kodiak, Alaska

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; proposed incidental harassment authorization; request for comments on proposed authorization and possible renewal.

SUMMARY: NMFS has received a request from Trident Seafoods Corporation (Trident) for authorization to take marine mammals incidental to pile driving and removal activities associated with the Bunkhouse Dock replacement project in Kodiak, Alaska. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to

issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-time, 1-year renewal that could be issued under certain circumstances and if all requirements are met, as described in Request for Public Comments at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorization and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than January 25, 2024.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service and should be submitted via email to ITP.wachtendonk@noaa.gov. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>. In case of problems accessing these documents, please call the contact listed above.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>. All personal identifying information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Rachel Wachtendonk, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the "take" of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not

intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed IHA is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other "means of effecting the least practicable adverse impact" on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as "mitigation"); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action (*i.e.*, the issuance of an IHA) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NAO 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On June 15, 2023, NMFS received a request from Trident for an IHA to take marine mammals incidental to vibratory

and impact pile driving to replace the Bunkhouse Dock at their facility in Kodiak, Alaska. Following NMFS' review of the application, Trident submitted a revised version on September 1, 2023. The application was deemed adequate and complete on October 26, 2023. Trident's request is for take of six species of marine mammals by Level B harassment only. Neither Trident nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

Description of Proposed Activity

Overview

Trident proposes to remove and replace the Bunkhouse Dock on the shore of Near Island Channel in Kodiak,

Alaska. The purpose of this project is to remove the degraded dock and replace it with a new structure to provide safe housing and waterfront infrastructure for seafood processing. The activity includes the removal of existing piles and the installation of both temporary and permanent piles of various sizes. Takes of marine mammals by Level B harassment would occur due to down-the-hole (DTH) drilling and vibratory pile driving and removal. This project would occur Kodiak, Alaska along the western shore of Near Island Channel within Township 27S. Construction activities are expected to occur over 8 weeks starting in March 2024.

Dates and Duration

The proposed activities are expected to start in March 2024 and last 8 weeks. It is expected to take 94 hours over 55 non-consecutive days. All pile driving and removal would be completed during daylight hours.

Specific Geographic Region

The proposed activities would take place at the Trident Seafoods facility along the City of Kodiak's downtown working waterfront. It is located on the western shore of Near Island Channel in Kodiak, Alaska within Township 27S. All construction would occur within the footprint of the existing Trident-owned Bunkhouse Dock. The timing of this work is planned to not interfere with the commercial fishing season.

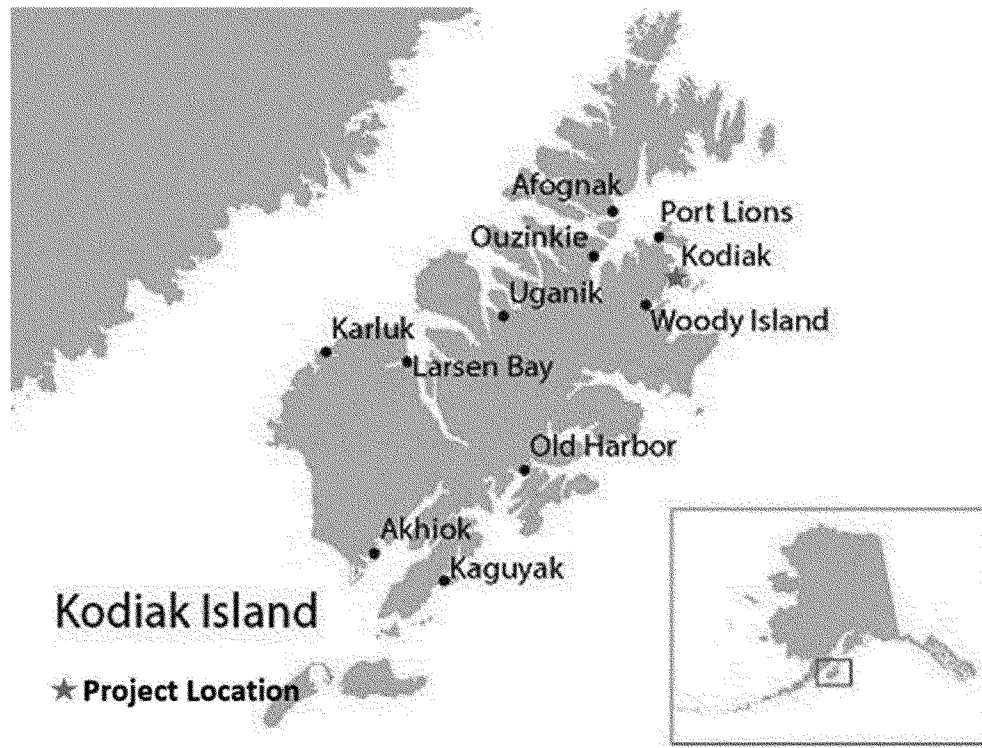


Figure 1-- Project Location

Detailed Description of the Specified Activity

The Bunkhouse Dock replacement will include the removal of 100 14-inch (in) (36 centimeter (cm)) diameter timber piles, 75 14-in (36-cm) steel H-piles, and 60 16-in (41 cm) diameter steel pipe piles. Once the existing piles are removed, 26 16-in (41 cm) diameter

steel pipe piles and 52 24-in (61 cm) diameter steel pipe piles would be installed to support the new pier. The installation and removal of 52 temporary 24-in (61 cm) diameter steel pipe piles would be completed to support permanent pile installation. All piles will be removed with the deadpull method with the vibratory hammer

being used if the deadpull method is unsuccessful. Temporary and permanent piles will be initially installed with the vibratory hammer followed by the DTH drill to embed them to their final depth. The work would be completed within the footprint of the existing Bunkhouse Dock in Kodiak, Alaska.

TABLE 1—NUMBER AND TYPE OF PILES TO BE INSTALLED AND REMOVED

	Existing pipe pile removal (steel)	Existing H-pile removal (steel)	Existing pile removal (timber)	Temporary pile installation (steel)	Temporary pile removal (steel)	Permanent pipe pile installation (steel)	Permanent pipe pile installation (steel)
Pile Diameter size (in)	16	14	14	24	24	16	24
Vibratory Pile Driving/Removal							
Total Quantity	60	75	100	20	20	26	52
Max # of Piles per day	20	20	25	6	8	5	4
Vibratory time per pile (min)	2	2	2	2	2	2	2
Number of Days	3	4	4	3	3	5	13
Down the Hole Drilling							
Total Quantity	n/a	n/a	n/a	20	n/a	26	52
Piles per day	n/a	n/a	n/a	6	n/a	6	4
Duration time per pile (min)	n/a	n/a	n/a	30	n/a	45	60
Number of Days	n/a	n/a	n/a	3	n/a	4	13

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see Proposed Mitigation and Proposed Monitoring and Reporting).

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions, instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments>) and more general information about

these species (e.g., physical and behavioral descriptions) may be found on NMFS' website (<https://www.fisheries.noaa.gov/find-species>).

Table 2 lists all species or stocks for which take is expected and proposed to be authorized for this activity and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is anticipated or proposed to be authorized here, PBR and annual serious injury and mortality from anthropogenic sources are

included here as gross indicators of the status of the species or stocks and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. 2022 SARs. All values presented in table 2 are the most recent available at the time of publication and are available online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments>.

TABLE 2—MARINE MAMMAL SPECIES⁴ LIKELY TO OCCUR NEAR THE PROJECT AREA THAT MAY BE TAKEN BY TRIDENT'S ACTIVITIES

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) ¹	Stock abundance (CV, N _{min} , most recent abundance survey) ²	PBR	Annual M/SI ³
Order Artiodactyla—Cetacea—Mysticeti (baleen whales)						
<i>Family Balaenopteridae</i> (rorquals):						
Humpback Whale	<i>Megaptera novaeangliae</i>	Hawai'i ⁵	- , - , N	11,278 (0.56, 7,265, 2020)	127	27.09
		Mexico-North Pacific ⁶	T, D, Y	N/A (N/A, N/A, 2006)	UND	0.57
Odontoceti (toothed whales, dolphins, and porpoises)						
<i>Family Delphinidae</i> :						
Killer Whale	<i>Orcinus orca</i>	Eastern North Pacific Alaska Resident ⁷ .	- , - , N	1,920 (N/A, 1,920, 2019)	19	1.3
		Eastern North Pacific Gulf of Alaska, Aleutian Islands and Bering Sea Transient ⁷ .	- , - , N	587 (N/A, 587, 2012)	5.9	0.8
<i>Family Phocoenidae</i> (porpoises):						
Dall's Porpoise	<i>Phocoenoides dalli</i>	AK ⁸	- , - , N	UND (UND, UND, 2015)	UND	37
Harbor Porpoise	<i>Phocoena phocoena</i>	Gulf of Alaska	- , - , Y	31,046 (0.21, N/A, 1998)	UND	72

TABLE 2—MARINE MAMMAL SPECIES⁴ LIKELY TO OCCUR NEAR THE PROJECT AREA THAT MAY BE TAKEN BY TRIDENT'S ACTIVITIES—Continued

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) ¹	Stock abundance (CV, N _{min} , most recent abundance survey) ²	PBR	Annual M/SI ³
Order Carnivora—Pinnipedia						
<i>Family Otariidae (eared seals and sea lions):</i>						
Steller Sea Lion	<i>Eumetopias jubatus</i>	Western ⁹	E, D, Y	52,932 (N/A, 52,932, 2019) ...	318	254
<i>Family Phocidae (earless seals):</i>						
Harbor Seal	<i>Phoca vitulina</i>	South Kodiak	- , - , N	26,448 (N/A, 22,351, 2017) ...	939	127

¹ Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

² NMFS marine mammal stock assessment reports online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>. CV is coefficient of variation; Nmin is the minimum estimate of stock abundance. In some cases, CV is not applicable.

³ These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (e.g., commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

⁴ Information on the classification of marine mammal species can be found on the web page for The Society for Marine Mammalogy's Committee on Taxonomy (<https://marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies/>; Committee on Taxonomy (2022)).

⁵ New SAR in 2022 following North Pacific humpback whale stock structure changes.

⁶ Abundance estimates are based upon data collected more than 8 years ago and, therefore, current estimates are considered unknown.

⁷ Nest is based upon counts of individuals identified from photo-ID catalogs.

⁸ The best available abundance estimate is likely an underestimate for the entire stock because it is based upon a survey that covered only a small portion of the stock's range. ⁹ Nest is best estimate of counts, which have not been corrected for animals at sea during abundance surveys.

⁹ Nest is best estimate of counts, which have not been corrected for animals at sea during abundance surveys.

As indicated above, all six species (with eight managed stocks) in table 2 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur. All species that could potentially occur in the proposed project area are included in table 5 of the IHA application. While gray whales, North Pacific right whales, minke whales, fin whales, Cuvier's beaked whales, sperm whales, Pacific white-sided dolphins, and northern fur seals in the area, the temporal and/or spatial occurrence of these species is such that take is not expected to occur, and they are not discussed further beyond the explanation provided here. These species are all considered to be rare (no sightings in recent years) within the project area. Take of these species has not been requested nor is proposed to be authorized and these species are not considered further in this document.

Additional information relevant to our analyses (beyond that included above, in the application, and on NMFS website) is included below, as appropriate.

Humpback Whale

On September 8, 2016, NMFS divided the once single species into 14 distinct population segments (DPS) under the ESA, removed the species-level listing as endangered, and, in its place, listed 4 DPSs as endangered and one DPS as threatened (81 FR 62259, September 8, 2016). The remaining nine DPSs were not listed. There are four DPSs in the North Pacific, including Mexico, which

is listed as threatened, and Hawaii, which is not listed.

The 2022 Alaska and Pacific SARs described a revised stock structure for humpback whales which modifies the previous stocks designated under the MMPA to align more closely with the ESA-designated DPSs (Caretta *et al.*, 2023; Young *et al.*, 2023). Specifically, the three previous North Pacific humpback whale stocks (Central and western North Pacific stocks and a CA/OR/WA stock) were replaced by five stocks, largely corresponding with the ESA-designated DPSs. These include Western North Pacific and Hawaii stocks and a Central America/Southern Mexico-CA/OR/WA stock (which corresponds with the Central America DPS). The remaining two stocks, corresponding with the Mexico DPS, are the Mainland Mexico-CA/OR/WA and Mexico-North Pacific stocks (Caretta *et al.*, 2023; Young *et al.*, 2023). The former stock is expected to occur along the west coast from California to southern British Columbia, while the latter stock may occur across the Pacific, from northern British Columbia through the Gulf of Alaska and Aleutian Islands/Bering Sea region to Russia.

The Hawai'i stock consists of one demographically independent population (DIP)—Hawai'i-southeast Alaska/northern British Columbia DIP and one unit—Hawai'i-north Pacific unit, which may or may not be composed of multiple DIPs (Wade *et al.*, 2021). The DIP and unit are managed as a single stock at this time, due to the

lack of data available to separately assess them and lack of compelling conservation benefit to managing them separately (NMFS, 2023; NMFS, 2019; NMFS, 2022b). The DIP is delineated based on two strong lines of evidence: genetics and movement data (Wade *et al.*, 2021). Whales in the Hawai'i-southeast Alaska/northern British Columbia DIP winter off Hawai'i and largely summer in southeast Alaska and northern British Columbia (Wade *et al.*, 2021). The group of whales that migrate from Russia, western Alaska (Bering Sea and Aleutian Islands), and central Alaska (Gulf of Alaska excluding southeast Alaska) to Hawai'i have been delineated as the Hawai'i-North Pacific unit (Wade *et al.*, 2021). There are a small number of whales that migrate between Hawai'i and southern British Columbia/Washington, but current data and analyses do not provide a clear understanding of which unit these whales belong to (Wade *et al.*, 2021; Caretta *et al.*, 2023; Young *et al.*, 2023).

The Mexico-North Pacific unit is likely composed of multiple DIPs, based on movement data (Martien *et al.*, 2021; Wade, 2021, Wade *et al.*, 2021). However, because currently available data and analyses are not sufficient to delineate or assess DIPs within the unit, it was designated as a single stock (NMFS, 2023a; NMFS, 2019; NMFS, 2022c). Whales in this stock winter off Mexico and the Revillagigedo Archipelago and summer primarily in Alaska waters (Martien *et al.*, 2021; Carretta *et al.*, 2023; Young *et al.*, 2023).

Wild *et al.* (2023) identified the waters around and to the East of Kodiak Island (including the proposed project area) as a Biologically Important Area (BIA) for humpback whales for feeding during the months of May through September, with an importance score of 1 (the lowest of three possible scores (1, 2, or 3), reflecting an Intensity score of 2 (indicating an area of moderate comparative significance) and a Data Support score of 1 (lower relative confidence in the available supporting data). While the majority of sightings occur outside of the Near Island Channel, a singular humpback whale was documented transiting the channel during the Kodiak Ferry Terminal construction in March 2016 (NMFS 2017).

Steller Sea Lion

Steller sea lions were listed as threatened range-wide under the ESA on November 26, 1990 (55 FR 49204). Steller sea lions were subsequently partitioned into the western and eastern Distinct Population Segments (DPSs; western and eastern stocks) in 1997 (62 FR 24345, May 5, 1997). The eastern DPS remained classified as threatened until it was delisted in November 2013. The western DPS (those individuals west of the 144° W longitude or Cape Suckling, Alaska) was upgraded to endangered status following separation of the DPSs, and it remains endangered today. There is regular movement of both DPSs across this 144° W longitude boundary (Jemison *et al.*, 2013) however, due to the distance from this DPS boundary, it is likely that only western DPS Steller sea lions are present in the project area. Therefore,

animals potentially affected by the project are assumed to be part of the western DPS. Sea lions from the eastern DPS, are not likely to be affected by the proposed activity and are not discussed further.

Steller sea lions do not follow traditional migration patterns, but will move from offshore rookeries in the summer to more protected haulouts closer to shore in the winter. They use rookeries and haulouts as resting spots as they follow prey movements and take foraging trips for days, usually within a few miles of their rookery or haulout. They are generalist marine predators and opportunistic feeders based on seasonal abundance and location of prey. Steller sea lions forage in nearshore as well as offshore areas, following prey resources. They are highly social and are often observed in large groups while hauled out but alone or in small groups when at sea (NMFS 2022).

Steller sea lions are frequent in the proposed project area as many have become habituated to the human activity at the seafood processing facilities. Steller sea lions regularly haul out on the Dog Bay float in St. Herman Harbor, which is approximately 792 m (2,600 ft) from the proposed project area. A bi-weekly census of Steller sea lions at the Dog Bay float conducted from November 2015 to June 2016, in association with the Kodiak Ferry Terminal project, revealed maximum numbers (>100) from mid-March through mid-June, with 5,111 total observations from November 2015 to June 2016 (NMFS 2019a). The highest average hourly number (11–15/hour) of sea lions within the entire Kodiak Ferry

Terminal observation area occurred from February through April 2016 (NMFS 2019a).

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (*e.g.*, Richardson *et al.*, 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, *etc.*). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.*, low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in table 3.

TABLE 3—MARINE MAMMAL HEARING GROUPS
(NMFS, 2018)

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, <i>Kogia</i> , river dolphins, Cephalorhynchid, <i>Lagenorhynchus cruciger</i> & <i>L. australis</i>)	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.*, all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.*, 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range

(Hemilä *et al.*, 2006; Kastelein *et al.*, 2009; Reichmuth and Holt, 2013).
For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat
This section provides a discussion of the ways in which components of the specified activity may impact marine mammals and their habitat. The Estimated Take section later in this

document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and whether those impacts are reasonably expected to, or reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Description of Sound Sources

The marine soundscape is comprised of both ambient and anthropogenic sounds. Ambient sound is defined as the all-encompassing sound in a given place and is usually a composite of sound from many sources both near and far. The sound level of an area is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (e.g., waves, wind, precipitation, earthquakes, ice, atmospheric sound), biological (e.g., sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (e.g., vessels, dredging, aircraft, construction).

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise “ambient” or “background” sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10 to 20 dB from day to day (Richardson *et al.*, 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

In-water construction activities associated with the project would include vibratory pile driving, vibratory pile removal, and DTH drilling. The sounds produced by these activities fall into one of two general sound types:

impulsive and non-impulsive. Impulsive sounds (e.g., explosions, gunshots, sonic booms, impact pile driving) are typically transient, brief (less than 1 second), broadband, and consist of high peak sound pressure with rapid rise time and rapid decay (ANSI, 1986; NIOSH, 1998; ANSI, 2005; NMFS, 2018). Non-impulsive sounds (e.g., aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems) can be broadband, narrowband or tonal, brief or prolonged (continuous or intermittent), and typically do not have the high peak sound pressure with rapid rise/decay time that impulsive sounds do (ANSI, 1995; NIOSH, 1998; NMFS, 2018). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (e.g., Ward, 1997; Southall, *et al.* 2007).

Vibratory hammers install piles by vibrating them and allowing the weight of the hammer to push them into the sediment. Vibratory hammers produce significantly less sound than impact hammers. Peak sound pressure levels (SPLs) may be 180 dB or greater, but are generally 10 to 20 dB lower than SPLs generated during impact pile driving of the same-sized pile (Oestman, *et al.*, 2009). Rise time is slower, reducing the probability and severity of injury, and sound energy is distributed over a greater amount of time (Nedwell and Edwards, 2002; Carlson, *et al.*, 2005).

DTH systems would also be used during the proposed construction. A DTH hammer is essentially a drill bit that drills through the bedrock using a rotating function like a normal drill, in concert with a hammering mechanism operated by a pneumatic (or sometimes hydraulic) component integrated into the DTH hammer to increase speed of progress through the substrate (*i.e.*, it is similar to a “hammer drill” hand tool). The sounds produced by the DTH methods contain both a continuous non-impulsive component from the drilling action and an impulsive component from the hammering effect. Therefore, NMFS treats DTH systems as both impulsive and continuous, non-impulsive sound source types simultaneously.

The likely or possible impacts of Trident’s proposed activities on marine mammals could involve both non-acoustic and acoustic stressors. Potential non-acoustic stressors could result from the physical presence of the equipment and personnel; however, given there are no known pinniped haul-out sites in the vicinity of the proposed project site, visual and other

non-acoustic stressors would be limited, and any impacts to marine mammals are expected to primarily be acoustic in nature.

Acoustic Effects

The introduction of anthropogenic noise into the aquatic environment from pile driving or drilling is the primary means by which marine mammals may be harassed from the Haines Borough specified activity. In general, animals exposed to natural or anthropogenic sound may experience physical and psychological effects, ranging in magnitude from none to severe (Southall *et al.*, 2007; Southall *et al.*, 2019). In general, exposure to pile driving or drilling noise has the potential to result in auditory threshold shifts and behavioral reactions (e.g., avoidance, temporary cessation of foraging and vocalizing, changes in dive behavior). Exposure to anthropogenic noise can also lead to non-observable physiological responses, such as an increase in stress hormones. Additional noise in a marine mammal’s habitat can mask acoustic cues used by marine mammals to carry out daily functions, such as communication and predator and prey detection. The effects of pile driving or drilling noise on marine mammals are dependent on several factors, including, but not limited to, sound type (e.g., impulsive vs. non-impulsive), the species, age and sex class (e.g., adult male vs. mom with calf), duration of exposure, the distance between the pile and the animal, received levels, behavior at time of exposure, and previous history with exposure (Wartzok *et al.*, 2004; Southall *et al.*, 2007). Here we discuss physical auditory effects (threshold shifts) followed by behavioral effects and potential impacts on habitat.

Auditory Effects

NMFS defines a noise-induced threshold shift (TS) as a change, usually an increase, in the threshold of audibility at a specified frequency or portion of an individual’s hearing range above a previously established reference level (NMFS, 2018). The amount of threshold shift is customarily expressed in dB. A TS can be permanent or temporary. As described in NMFS (2018a), there are numerous factors to consider when examining the consequence of TS, including, but not limited to, the signal temporal pattern (e.g., impulsive or non-impulsive), likelihood an individual would be exposed for a long enough duration or to a high enough level to induce a TS, the magnitude of the TS, time to recovery (seconds to minutes or hours to

days), the frequency range of the exposure (*i.e.*, spectral content), the hearing and vocalization frequency range of the exposed species relative to the signal's frequency spectrum (*i.e.*, how animal uses sound within the frequency band of the signal; *e.g.*, Kastelein *et al.*, 2014), and the overlap between the animal and the source (*e.g.*, spatial, temporal, and spectral). When considering auditory effects for Trident's proposed activities, vibratory pile driving is considered a non-impulsive source, while DTH drilling are considered to have both non-impulsive and impulsive components.

Permanent Threshold Shift (PTS)—NMFS defines PTS as a permanent, irreversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). PTS does not generally affect more than a limited frequency range, and an animal that has incurred PTS has incurred some level of hearing loss at the relevant frequencies; typically animals with PTS are not functionally deaf (Richardson *et al.*, 1995; Au and Hastings, 2008). Available data from humans and other terrestrial mammals indicate that a 40 dB threshold shift approximates PTS onset (Ward *et al.*, 1958; Ward *et al.*, 1959; Ward, 1960; Kryter *et al.*, 1966; Miller, 1974; Ahroon *et al.*, 1996; Henderson *et al.*, 2008). PTS criteria for marine mammals are estimates, as with the exception of a single study unintentionally inducing PTS in a harbor seal (Kastak *et al.*, 2008), there are no empirical data measuring PTS in marine mammals largely due to the fact that, for various ethical reasons, experiments involving anthropogenic noise exposure at levels inducing PTS are not typically pursued or authorized (NMFS, 2018).

Temporary Threshold Shift (TTS)—A temporary, reversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS, 2018). Based on data from cetacean TTS measurements (Southall *et al.*, 2007; Southall *et al.*, 2019), a TTS of 6 dB is considered the minimum threshold shift clearly larger than any day-to-day or session-to-session variation in a subject's normal hearing ability (Schlundt *et al.*, 2000; Finneran *et al.*, 2000; Finneran *et al.*, 2002). As described in Finneran (2015), marine mammal studies have shown the amount of TTS increases with cumulative SEL (SEL_{cum}) in an accelerating fashion: at low exposures with lower SEL_{cum} , the amount of TTS

is typically small and the growth curves have shallow slopes. At exposures with higher SEL_{cum} , the growth curves become steeper and approach linear relationships with the noise SEL.

Depending on the degree (elevation of threshold in dB), duration (*i.e.*, recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in auditory masking, below). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during time when communication is critical for successful mother/calf interactions could have more serious impacts. We note that reduced hearing sensitivity as a simple function of aging has been observed in marine mammals, as well as humans and other taxa (Southall *et al.*, 2007), so we can infer that strategies exist for coping with this condition to some degree, though likely not without cost.

Many studies have examined noise-induced hearing loss in marine mammals (see Finneran (2015) and Southall *et al.* (2019) for summaries). TTS is the mildest form of hearing impairment that can occur during exposure to sound (Kryter, 2013). While experiencing TTS, the hearing threshold rises, and a sound must be at a higher level in order to be heard. In terrestrial and marine mammals, TTS can last from minutes or hours to days (in cases of strong TTS). In many cases, hearing sensitivity recovers rapidly after exposure to the sound ends. For cetaceans, published data on the onset of TTS are limited to captive bottlenose dolphin (*Tursiops truncatus*), beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiaticorientalis*) (Southall *et al.*, 2019). For pinnipeds in water, measurements of TTS are limited to harbor seals, elephant seals (*Mirounga angustirostris*), bearded seals (*Erignathus barbatus*), and California sea lions (*Zalophus californianus*) (Kastak *et al.*, 1999; Kastak *et al.*, 2007; Kastelein *et al.*, 2019b; Kastelein *et al.*, 2019c; Reichmuth *et al.*, 2019; Sills *et al.*, 2020; Kastelein *et al.*, 2021; Kastelein *et al.*, 2022a; Kastelein *et al.*, 2022b). These studies examine hearing thresholds measured in marine mammals before and after exposure to

intense or long-duration sound exposures. The difference between the pre-exposure and post-exposure thresholds can be used to determine the amount of threshold shift at various post-exposure times.

The amount and onset of TTS depends on the exposure frequency. Sounds at low frequencies, well below the region of best sensitivity for a species or hearing group, are less hazardous than those at higher frequencies, near the region of best sensitivity (Finneran and Schlundt, 2013). At low frequencies, onset-TTS exposure levels are higher compared to those in the region of best sensitivity (*i.e.*, a low frequency noise would need to be louder to cause TTS onset when TTS exposure level is higher), as shown for harbor porpoises and harbor seals (Kastelein *et al.*, 2019a; Kastelein *et al.*, 2019c). Note that in general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species (Finneran, 2015). In addition, TTS can accumulate across multiple exposures, but the resulting TTS will be less than the TTS from a single, continuous exposure with the same SEL (Mooney *et al.*, 2009; Finneran *et al.*, 2010; Kastelein *et al.*, 2014; 2015). This means that TTS predictions based on the total, cumulative SEL will overestimate the amount of TTS from intermittent exposures, such as sonars and impulsive sources. Nachtigall *et al.* (2018) describe measurements of hearing sensitivity of multiple odontocete species (bottlenose dolphin, harbor porpoise, beluga, and false killer whale (*Pseudorca crassidens*) when a relatively loud sound was preceded by a warning sound. These captive animals were shown to reduce hearing sensitivity when warned of an impending intense sound. Based on these experimental observations of captive animals, the authors suggest that wild animals may dampen their hearing during prolonged exposures or if conditioned to anticipate intense sounds. Another study showed that echo-locating animals (including odontocetes) might have anatomical specializations that might allow for conditioned hearing reduction and filtering of low-frequency ambient noise, including increased stiffness and control of middle ear structures and placement of inner ear structures (Ketten *et al.*, 2021). Data available on noise-induced hearing loss for mysticetes are currently lacking (NMFS, 2018). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species.

Relationships between TTS and PTS thresholds have not been studied in marine mammals, and there is no PTS data for cetaceans, but such relationships are assumed to be similar to those in humans and other terrestrial mammals. PTS typically occurs at exposure levels at least several decibels above (a 40-dB threshold shift approximates PTS onset; *e.g.*, Kryter *et al.*, 1966; Miller, 1974) that inducing mild TTS (a 6-dB threshold shift approximates TTS onset; *e.g.*, Southall *et al.*, 2007). Based on data from terrestrial mammals, a precautionary assumption is that the PTS thresholds for impulsive sounds (such as impact pile driving pulses as received close to the source) are at least 6 dB higher than the TTS threshold on a peak-pressure basis and PTS cumulative sound exposure level thresholds are 15 to 20 dB higher than TTS cumulative sound exposure level thresholds (Southall *et al.*, 2007). Given the higher level of sound or longer exposure duration necessary to cause PTS as compared with TTS, it is considerably less likely that PTS could occur.

Furthermore, installing piles for this project requires a combination of vibratory pile driving and DTH drilling. For the project, these activities would not occur at the same time and there would likely be pauses in activities producing the sound during each day. Given these pauses and that many marine mammals are likely moving through the action area and not remaining for extended periods of time, the potential for any TS declines.

Behavioral Effects

Exposure to noise from pile driving and removal also has the potential to behaviorally disturb marine mammals. Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.*, Lusseau and Bejder, 2007; Weilgart, 2007; NRC, 2005; Southall *et al.*, 2021).

Disturbance may result in changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed;

reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where sound sources are located. Pinnipeds may increase their haul out time, possibly to avoid in-water disturbance (Thorson and Reyff, 2006). Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.*, species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.*, Richardson *et al.*, 1995; Wartzok *et al.*, 2003; Southall *et al.*, 2007; Southall *et al.*, 2021; Weilgart, 2007; Archer *et al.*, 2010). Behavioral reactions can vary not only among individuals but also within exposures of an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.*, 2012; Southall *et al.*, 2021), and can vary depending on characteristics associated with the sound source (*e.g.*, whether it is moving or stationary, number of sources, distance from the source). In general, pinnipeds seem more tolerant of, or at least habituate more quickly to, potentially disturbing underwater sound than do cetaceans, and generally seem to be less responsive to exposure to industrial sound than most cetaceans. For a review of studies involving marine mammal behavioral responses to sound, see: Southall *et al.*, 2007; Gomez *et al.*, 2016; and Southall *et al.*, 2021.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.*, bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.*, Croll *et al.*, 2001; Nowacek *et al.*, 2004; Madsen *et al.*, 2006; Yazvenko *et al.*, 2007). A determination of whether foraging disruptions incur fitness consequences is informed by information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

The area likely impacted by the project is relatively small compared to

the available habitat in the surrounding waters of the Near Island Channel.

Airborne Acoustic Effects—Pinnipeds that occur near the project site could be exposed to airborne sounds associated with pile driving and removal that have the potential to cause behavioral harassment, depending on their distance from pile driving activities. Cetaceans are not expected to be exposed to airborne sounds that would result in harassment as defined under the MMPA.

Airborne noise would primarily be an issue for pinnipeds that are swimming near the project site within the range of noise levels exceeding the acoustic thresholds. We recognize that pinnipeds in the water could be exposed to airborne sound that may result in behavioral harassment when looking with their heads above water. Most likely, airborne sound would cause behavioral responses similar to those discussed above in relation to underwater sound. For instance, anthropogenic sound could cause pinnipeds to exhibit changes in their normal behavior, such as reduction in vocalizations, or cause them to temporarily abandon the area and move further from the source. However, these animals would previously have been “taken” because of exposure to underwater sound above the behavioral harassment thresholds, which are in all cases larger than those associated with airborne sound. Thus, the behavioral harassment of these animals is already accounted for in these estimates of potential take. Therefore, we do not believe that authorization of incidental take resulting from airborne sound for pinnipeds is warranted, and airborne sound is not discussed further here.

Auditory Masking—Sound can disrupt behavior through masking, or interfering with, an animal’s ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.*, those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.*, 1995; Erbe *et al.*, 2016). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.*, snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.*, shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.*, signal-to-noise ratio, temporal variability, direction), in relation to each

other and to an animal's hearing abilities (e.g., sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions. Masking of natural sounds can result when human activities produce high levels of background sound at frequencies important to marine mammals. Conversely, if the background level of underwater sound is high (e.g., on a day with strong wind and high waves), an anthropogenic sound source would not be detectable as far away as would be possible under quieter conditions and would itself be masked.

Under certain circumstances, marine mammals experiencing significant masking could also be impaired from maximizing their performance fitness in survival and reproduction. Therefore, when the coincident (masking) sound is man-made, it may be considered harassment when disrupting or altering critical behaviors. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

The frequency range of the potentially masking sound is important in determining any potential behavioral impacts. For example, low-frequency signals may have less effect on high-frequency echolocation sounds produced by odontocetes but are more likely to affect detection of mysticete communication calls and other potentially important natural sounds such as those produced by surf and some prey species. The masking of communication signals by anthropogenic noise may be considered as a reduction in the communication space of animals (e.g., Clark *et al.*, 2009) and may result in energetic or other costs as animals change their vocalization behavior (e.g., Miller *et al.*, 2000; Foote *et al.*, 2004; Parks *et al.*, 2007; Di Iorio and Clark, 2009; Holt *et al.*, 2009). Masking can be reduced in situations where the signal and noise come from different directions (Richardson *et al.*, 1995), through amplitude modulation of the signal, or through other compensatory behaviors (Houser and Moore, 2014). Masking can be tested directly in captive species (e.g., Erbe, 2008), but in wild populations it must be either modeled or inferred from evidence of masking compensation. There are few studies addressing real-world masking sounds

likely to be experienced by marine mammals in the wild (e.g., Branstetter *et al.*, 2013).

Masking affects both senders and receivers of acoustic signals and can potentially have long-term chronic effects on marine mammals at the population level as well as at the individual level. Low-frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, with most of the increase from distant commercial shipping (Hildebrand, 2009). All anthropogenic sound sources, but especially chronic and lower-frequency signals (e.g., from vessel traffic), contribute to elevated ambient sound levels, thus intensifying masking. Background sound levels in the project area are generally already elevated due to the cruise ships, passenger ferries, charter and commercial fishing vessels, barges, and freight vessels that frequent the area. Marine Mammal Habitat Effects.

The proposed project would occur within the same footprint as existing marine infrastructure. The nearshore habitat where the proposed project would occur is an area of relatively high marine vessel traffic. Most marine mammals do not generally use the area within the immediate vicinity of the project area. Temporary, intermittent, and short-term habitat alteration may result from increased noise levels within the Level B harassment zones. Effects on marine mammals will be limited to temporary displacement from pile installation and removal noise, and effects on prey species will be similarly limited in time and space.

Water Quality—Temporary and localized reduction in water quality will occur as a result of in-water construction activities. Most of this effect will occur during the installation and removal of piles and bedrock removal when bottom sediments are disturbed. The installation and removal of piles and bedrock removal will disturb bottom sediments and may cause a temporary increase in suspended sediment in the project area. During pile extraction, sediment attached to the pile moves vertically through the water column until gravitational forces cause it to slough off under its own weight. The small resulting sediment plume is expected to settle out of the water column within a few hours. Studies of the effects of turbid water on fish (marine mammal prey) suggest that concentrations of suspended sediment can reach thousands of milligrams per liter before

an acute toxic reaction is expected (Burton, 1993).

Impacts to water quality from DTH hammers are expected to be similar to those described for pile driving. Impacts to water quality would be localized and temporary and would have negligible impacts on marine mammal habitat. Effects to turbidity and sedimentation are expected to be short-term, minor, and localized. Since the currents are strong in the area, following the completion of sediment-disturbing activities, suspended sediments in the water column should dissipate and quickly return to background levels in all construction scenarios. Turbidity within the water column has the potential to reduce the level of oxygen in the water and irritate the gills of prey fish species in the proposed project area. However, turbidity plumes associated with the project would be temporary and localized, and fish in the proposed project area would be able to move away from and avoid the areas where plumes may occur. Therefore, it is expected that the impacts on prey fish species from turbidity, and therefore on marine mammals, would be minimal and temporary. In general, the area likely impacted by the proposed construction activities is relatively small compared to the available marine mammal habitat in southeast Alaska.

Effects on Prey—Construction activities would produce continuous (*i.e.*, vibratory pile driving) and impulsive (*i.e.*, impact driving) sounds and a both continuous and impulsive sounds from DTH installation. Fish react to sounds that are especially strong and/or intermittent low-frequency sounds. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fish, although several are based on studies in support of large, multiyear bridge construction projects (e.g., Scholik and Yan, 2001; Scholik and Yan, 2002; Popper and Hastings, 2009). Sound pulses at received levels may cause noticeable changes in behavior (Pearson *et al.*, 1992; Skalski *et al.*, 1992). SPLs of sufficient strength have been known to cause injury to fish and fish mortality.

Impacts on marine mammal prey (*i.e.*, fish or invertebrates) of the immediate area due to the acoustic disturbance are possible. The duration of fish or invertebrate avoidance or other disruption of behavioral patterns in this area after pile driving stops is unknown,

but a rapid return to normal recruitment, distribution and behavior is anticipated. Further, significantly large areas of fish and marine mammal foraging habitat are available in the nearby vicinity in the Near Island Channel.

The duration of the construction activities is relatively short, with pile driving and removal activities expected last less than one-year. Each day, construction would occur for no more than 12 hours during the day and pile driving activities would be restricted to daylight hours. The most likely impact to fish from pile driving activities at the project area would be temporary behavioral avoidance of the area. In general, impacts to marine mammal prey species are expected to be minor and temporary due to the short timeframe for the project.

Construction activities, in the form of increased turbidity, have the potential to adversely affect fish in the project area. Increased turbidity is expected to occur in the immediate vicinity (on the order of 10 ft (3 m) or less) of construction activities. However, suspended sediments and particulates are expected to dissipate quickly within a single tidal cycle. Given the limited area affected and high tidal dilution rates any effects on fish are expected to be minor or negligible. In addition, best management practices would be in effect, which would limit the extent of turbidity to the immediate project area.

In summary, given the relatively short daily duration of sound associated with individual pile driving and events and the relatively small areas being affected, pile driving activities associated with the proposed action are not likely to have a permanent, adverse effect on any fish habitat, or populations of fish species. Thus, we conclude that impacts of the specified activity are not likely to have more than short-term adverse effects on any prey habitat or populations of prey species. Further, any impacts to marine mammal habitat are not expected to result in significant or long-term consequences for individual marine mammals, or to contribute to adverse impacts on their populations.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization through the IHA, which will inform both NMFS' consideration of "small numbers," and the negligible impact determinations. Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the

MMPA defines "harassment" as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to pile driving activities. Based on the nature of the activity, Level A harassment is neither anticipated nor proposed to be authorized.

As described previously, no serious injury or mortality is anticipated or proposed to be authorized for this activity. Below we describe how the proposed take numbers are estimated.

For acoustic impacts, generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential takes, additional information that can qualitatively inform take estimates is also sometimes available (e.g., previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the proposed take estimates.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (e.g., frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (e.g.,

bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (e.g., Southall *et al.*, 2007, 2021, Ellison *et al.*, 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 μ Pa)) for continuous (e.g., vibratory pile driving, drilling) and above RMS SPL 160 dB re 1 μ Pa for non-explosive impulsive (e.g., seismic airguns) or intermittent (e.g., scientific sonar) sources. Generally speaking, Level B harassment take estimates based on these behavioral harassment thresholds are expected to include any likely takes by TTS as, in most cases, the likelihood of TTS occurs at distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to detect important signals (conspecific communication, predators, prey) may result in changes in behavior patterns that would not otherwise occur.

Trident's proposed activity includes the use of continuous (vibratory pile driving) sources, and therefore the RMS SPL threshold of 120 dB re 1 μ Pa is applicable. DTH drilling has both continuous and intermittent (impulsive) components as discussed in the *Description of Sound Sources* section above. When evaluating Level B harassment, NMFS recommends treating DTH as a continuous source and applying the RMS SPL thresholds of 120 dB re 1 μ Pa.

Level A Harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). Trident's proposed activity includes the use of non-impulsive

(vibratory pile driving) sources. As described above, DTH includes both impulsive and non-impulsive characteristics. When evaluating Level A harassment, NMFS recommends treating DTH as an impulsive source.

These thresholds are provided in the table below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at:

<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance>.

TABLE 4—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset thresholds* (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	Cell 1: $L_{p,0-pk,flat}$: 219 dB; $L_{E,p,LF,24h}$: 183 dB	Cell 2: $L_{E,p,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	Cell 3: $L_{p,0-pk,flat}$: 230 dB; $L_{E,p,MF,24h}$: 185 dB	Cell 4: $L_{E,p,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	Cell 5: $L_{p,0-pk,flat}$: 202 dB; $L_{E,p,HF,24h}$: 155 dB	Cell 6: $L_{E,p,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	Cell 7: $L_{p,0-pk,flat}$: 218 dB; $L_{E,p,PW,24h}$: 185 dB	Cell 8: $L_{E,p,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	Cell 9: $L_{p,0-pk,flat}$: 232 dB; $L_{E,p,OW,24h}$: 203 dB	Cell 10: $L_{E,p,OW,24h}$: 219 dB.

*Dual metric thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds are recommended for consideration.

Note: Peak sound pressure level ($L_{p,0-pk}$) has a reference value of 1 μ Pa, and weighted cumulative sound exposure level ($L_{E,p}$) has a reference value of 1 μ Pa²s. In this table, thresholds are abbreviated to be more reflective of International Organization for Standardization standards (ISO 2017). The subscript "flat" is being included to indicate peak sound pressure are flat weighted or unweighted within the generalized hearing range of marine mammals (*i.e.*, 7 Hz to 160 kHz). The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The weighted cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.*, varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the proposed project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.*, vibratory pile driving and removal, DTH drilling). The maximum (underwater) area ensonified above the thresholds for behavioral harassment referenced above is 125 km² (48.26 mi²), that would be truncated by land masses that would obstruct underwater sound transmission and would extend into Near Island Channel and St. Paul Harbor (see figure 5 in Trident's application). Additionally, vessel traffic and other commercial and industrial activities in the project area may contribute to elevated background noise levels which may mask sounds produced by the project.

Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a

source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

$$TL = B * \log_{10} (R_1/R_2),$$

where

TL = transmission loss in dB

B = transmission loss coefficient

R_1 = the distance of the modeled SPL from the driven pile, and

R_2 = the distance from the driven pile of the initial measurement

This formula neglects loss due to scattering and absorption, which is assumed to be zero here. The degree to which underwater sound propagates away from a sound source is dependent on a variety of factors, most notably the water bathymetry and presence or absence of reflective or absorptive conditions including in-water structures and sediments. Spherical spreading occurs in a perfectly unobstructed (free-field) environment not limited by depth or water surface, resulting in a 6-dB reduction in sound level for each doubling of distance from the source ($20 * \log[\text{range}]$). Cylindrical spreading occurs in an environment in which

sound propagation is bounded by the water surface and sea bottom, resulting in a reduction of 3 dB in sound level for each doubling of distance from the source ($10 * \log[\text{range}]$). A practical spreading value of 15 is often used under conditions, such as the project site, where water increases with depth as the receiver moves away from the shoreline, resulting in an expected propagation environment that would lie between spherical and cylindrical spreading loss conditions. Practical spreading loss is assumed here.

The intensity of pile driving sounds is greatly influenced by factors such as the type of piles, hammers, and the physical environment in which the activity takes place. In order to calculate the distances to the Level A harassment and the Level B harassment sound thresholds for the methods and piles being used in this project, the applicant and NMFS used acoustic monitoring data from other locations to develop proxy source levels for the various pile types, sizes and methods. The project includes vibratory and DTH pile installation of steel pipe piles and vibratory removal of steel pipe piles, steel H-piles, and timber piles. Source levels for each pile size and driving method are presented in table 5.

TABLE 5—PROXY SOUND SOURCE LEVELS FOR PILE SIZES AND DRIVING METHODS

Pile type	Installation or removal	RMS SPL (re 1 μ Pa)	SEL (re 1 μ Pa ² -sec)	Source
Vibratory Pile Driving				
14-in timber pile	Removal	162	NA	Caltrans 2020.
14-in H-pile	Removal	150		Caltrans 2020.
16-in steel pile	Installation	161		NAVFAC 2015.
16-in steel pile	Removal			NAVFAC 2015.
24-in steel pile	Installation			NAVFAC 2015.
DTH Drilling ¹				
16-in steel pile	Installation	162	141	Heyvaert & Reyff 2021, Guan & Miner 2020.
24-in steel pile	Installation		154	Heyvaert & Reyff 2021.

¹ Sound source levels for DTH were adjusted by – 5 dB to reflect the use of the bubble curtain.

The ensonified area associated with Level A harassment is more technically challenging to predict due to the need to account for a duration component. Therefore, NMFS developed an optional User Spreadsheet tool to accompany the Technical Guidance that can be used to relatively simply predict an isopleth distance for use in conjunction with marine mammal density or occurrence to help predict potential takes. We note

that because of some of the assumptions included in the methods underlying this optional tool, we anticipate that the resulting isopleth estimates are typically going to be overestimates of some degree, which may result in an overestimate of potential take by Level A harassment. However, this optional tool offers the best way to estimate isopleth distances when more sophisticated modeling methods are not

available or practical. For stationary sources such as pile driving, the optional User Spreadsheet tool predicts the distance at which, if a marine mammal remained at that distance for the duration of the activity, it would be expected to incur PTS. Inputs used in the optional User Spreadsheet tool, and the resulting estimated isopleths, are reported below.

TABLE 6—NMFS USER SPREADSHEET INPUTS

Pile size and type	Spreadsheet tab used	Weighting factor adjustment (kHz)	Transmission loss coefficient	Number of piles per day	Activity duration (minutes)
14-in timber pile vibratory removal	A.1 Vibratory pile driving	2.5	15	25	2
14-in steel H-pile vibratory removal	A.1 Vibratory pile driving	2.5	15	20	2
16-in steel pipe pile vibratory removal ...	A.1 Vibratory pile driving	2.5	15	20	2
16-in steel pipe pile vibratory installation	A.1 Vibratory pile driving	2.5	15	5	2
24-in steel pipe pile vibratory installation (temporary).	A.1 Vibratory pile driving	2.5	15	6	2
24-in steel pipe pile vibratory removal (temporary).	A.1 Vibratory pile driving	2.5	15	8	2
24-in steel pipe pile vibratory installation	A.1 Vibratory pile driving	2.5	15	4	2
16-in steel pipe pile DTH installation	E.2 DTH pile driving	2	15	6	45
24-in steel pipe pile DTH installation (temporary).	E.2 DTH pile driving	2	15	6	30
24-in steel pipe pile DTH installation	E.2 DTH pile driving	2	15	4	60

TABLE 7—CALCULATED LEVEL A AND LEVEL B HARASSMENT ISOPLETHS

Activity	Level A harassment zone (m)					Level B harassment zone (m)
	LF-cetaceans	MF-cetaceans	HF-cetaceans	Otariids	Phocids	
14-in timber pile vibratory removal	7.1	0.6	10.4	4.3	0.3	6,310
14-in steel H-pile vibratory removal	1.0	0.1	1.4	0.6	0.0	1,000
16-in steel pipe pile vibratory removal	5.2	0.5	7.7	3.2	0.2	5,415
16-in steel pipe pile vibratory installation	2.1	0.2	3.1	1.3	0.1	
24-in steel pipe pile vibratory installation (temporary)	2.3	0.2	3.5	1.4	0.1	
24-in steel pipe pile vibratory removal (temporary)	2.8	0.3	4.2	1.7	0.1	
24-in steel pipe pile vibratory installation	1.8	0.2	2.6	1.1	0.1	
16-in steel pipe pile DTH installation	47.0	1.7	56.0	1.8	25.2	6,310
24-in steel pipe pile DTH installation (temporary)	264.1	9.4	314.5	10.3	141.3	
24-in steel pipe pile DTH installation	319.9	11.4	381.0	12.5	171.2	

Marine Mammal Occurrence and Take Estimation

In this section we provide information about the occurrence of marine mammals, including density or other relevant information which will inform the take calculations.

When available, peer-reviewed scientific publications were used to estimate marine mammal abundance in the project area. Data from monitoring reports from projects on the Kodiak Ferry Terminal were used as well as reports from other projects in Kodiak, Alaska.

Here we describe how the information provided above is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and proposed for authorization. Tables for each species are presented to show the calculation of take during the project. Both density and occurrence data was considered in incidental take estimations. Density data were used when there was no occurrence data available, or when occurrence and density data were similar. The take calculations for this project are:

Incidental take estimate = group size *
days of pile driving activity

Or

Incidental take estimate = (Activity
Level B harassment area [km²] ×
estimated density [individuals/
km²]) × days of pile driving activity

Humpback Whale

Humpback whales are present in Kodiak year-round with peaks in the spring and fall. They are considered common in the project area, meaning there are multiple sightings every month, so they could occur daily in the project's action. In the proposed project area humpback whales are expected to occur at a density of 0.093 individuals per square kilometer area (Halpin *et al.* 2009). Therefore, using the equation given above, the total number of Level B harassment takes for humpback whales would be 14. In the action area it is estimated that the majority of whales (89 percent) will be from the Hawaii DPS, 11 percent will be from the Mexico DPS, and 1 percent will be from the endangered Western North Pacific DPS (Wade 2021; Muto *et al.* 2022). Therefore 13 takes are assumed to be from the Hawaii DPS and 1 take from the Mexico DPS.

The largest Level A harassment zone for humpback whales extends 319.9 m from the noise source (table 7). All construction work would be shut down prior to a humpback whale entering the Level A harassment zone specific to the in-water activity underway at the time.

In consideration of the infrequent occurrence of humpback whales in the project area and proposed shutdown requirements, no take by Level A harassment is anticipated or proposed for humpback whales.

Killer Whale

Killer whales are present in Kodiak year-round and are considered common in the project area, meaning there are multiple sightings every month, so they could occur daily in the project's action. A single group of up to six killer whales are expected to occur in the proposed project area daily (Halpin *et al.* 2009). Therefore, using the equation given above, the total number of Level B harassment takes for killer whales would be 330. In the action area it is estimated that the majority of killer whales (80 percent) will be from the Alaska resident stock and 20 percent will be from the Gulf of Alaska/Aleutian Islands/Bering Sea transient stock (Muto *et al.* 2022). Therefore 264 takes are assumed to be from the Alaska resident stock and 66 takes from the Gulf of Alaska/Aleutian Islands/Bering Sea transient stock.

The largest Level A harassment zone for killer whales extends 11.4 m from the noise source (table 7). All construction work would be shut down prior to a killer whale entering the Level A harassment zone specific to the in-water activity underway at the time. In consideration of the small size of the Level A harassment zone and proposed shutdown requirements, no take by Level A harassment is anticipated or proposed for killer whale.

Harbor Porpoise

Harbor porpoises are present in Kodiak year-round and are occur frequently in the project area, meaning there are multiple sightings every year, so they could occur monthly in the project's action. In the proposed project area harbor porpoises are expected to occur at a density of 0.4547 individuals per square kilometer area (Marine Geospatial Ecology Lab 2021). Therefore, using the equation given above, the total number of Level B harassment takes for harbor porpoises would be 65.

The largest Level A harassment zone for harbor porpoise extends 381 m from the noise source (table 7). All construction work would be shut down prior to a harbor porpoise entering the Level A harassment zone specific to the in-water activity underway at the time. In consideration of the relatively low anticipated exposure in the project area and the anticipated effectiveness of the proposed shutdown requirements, no

take by Level A harassment is anticipated or proposed for harbor porpoise.

Dall's Porpoise

Dall's porpoises are present in Kodiak year-round and are occur frequently in the project area, meaning there are multiple sightings every year, so they could occur monthly in the project's action. In the proposed project area Dall's porpoises are expected to occur at a density of 0.218 individuals per square kilometer area (Marine Geospatial Ecology Lab 2021). Therefore, using the equation given above, the total number of Level B harassment takes for Dall's porpoise would be 31.

The largest Level A harassment zone for Dall's porpoise extends 381 m from the noise source (table 7). All construction work would be shut down prior to a Dall's porpoise entering the Level A harassment zone specific to the in-water activity underway at the time. In consideration of the relatively low anticipated exposure in the project area and the anticipated effectiveness of the proposed shutdown requirements, no take by Level A harassment is anticipated or proposed for Dall's porpoise.

Harbor Seal

Harbor seals are present in Kodiak year-round and are considered common in the project area, meaning there are multiple sightings every month, so they could occur daily in the project's action. In the proposed project area Dall's porpoises are expected to occur at a density of 0.1689 individuals per square kilometer area (Marine Geospatial Ecology Lab 2021). Therefore, using the equation given above, the total number of Level B harassment takes for harbor seals would be 24.

The largest Level A harassment zone for harbor seals extends 171.2 m from the noise source (table 7). All construction work would be shut down prior to a harbor seal entering the Level A harassment zone specific to the in-water activity underway at the time. In consideration of the relatively low anticipated exposure in the project area and the anticipated effectiveness of the proposed shutdown requirements, no take by Level A harassment is anticipated or proposed for harbor seals.

Steller Sea Lion

Steller sea lions are present in Kodiak year-round and are considered common in the project area, meaning there are multiple sightings every month, so they could occur daily in the project's action. During construction at the Kodiak Ferry

Terminal (82 FR 10894, February 26, 2017) Steller sea lions were encountered daily during construction. Up to 40 Steller sea lions are expected to occur in the proposed project area daily (Marine Geospatial Ecology Lab 2021). Therefore, using the equation given

above, the total number of Level B harassment takes for Steller sea lions would be 2,200.

The largest Level A harassment zone for harbor seals extends 12.5 m from the noise source (table 7). All construction work would be shut down prior to a Steller sea lion entering the Level A

harassment zone specific to the in-water activity underway at the time. In consideration of the small Level A harassment isopleth and proposed shutdown requirements, no take by Level A harassment is anticipated or proposed for Steller sea lions.

TABLE 8—ESTIMATED TAKE BY LEVEL A AND LEVEL B HARASSMENT, BY SPECIES AND STOCK

Common name	Stock	Stock abundance ^a	Level A harassment	Level B harassment	Total proposed take	Proposed take as percentage of stock
Humpback whale	Central North Pacific	10,103	0	12	13	0.1
	CA/OR/WA	4,973	0	2	1	0.07
Killer Whale	Alaska Resident	1,920	0	264	264	13.8
	Gulf of Alaska/Aleutian Islands/Bering Sea Transient	587	0	66	66	11.2
Harbor porpoise	Gulf of Alaska	31,946	0	65	65	0.08
Dall's porpoise	Alaska	13,110	0	31	31	0.24
Steller sea lion	Western U.S.	52,932	0	2,200	2,200	4.2
Harbor seal	South Kodiak Island	26,448	0	24	24	0.09

^a Stock size is *N*best according to NMFS 2022 Stock Assessment Reports.

Proposed Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses. NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat, as well as subsistence uses. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if

implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, and impact on operations.

In addition to the measures described later in this section, Trident would employ the following standard mitigation measures:

- At the start of each day, the Contractor(s) would hold a briefing with the Lead Protected Species Observer (PSO) to outline the activities planned for that day.

- If poor weather conditions restrict the PSO's ability to make observations within the Level A harassment zone of pile driving (e.g., if there is excessive wind or fog), pile installation and removal would be halted.

The following measures would apply to Trident's mitigation requirements:

Shutdown and Monitoring Zones

Trident must establish shutdown zones and Level B monitoring zones for all pile driving activities. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine animal (or in anticipation of an animal entering the defined area). Shutdown zones are based on the largest Level A harassment zone for each pile size/type and driving method, and behavioral monitoring zones are meant to encompass Level B harassment zones for each pile size/type and driving method, as shown in table

9. A minimum shutdown zone of 10 m would be required for all in-water construction activities to avoid physical interaction with marine mammals.

Marine mammal monitoring will be conducted during all pile driving activities to ensure that marine mammals do not enter Level A shutdown zones, that marine mammal presence in the isopleth does not exceed authorized take. Proposed shutdown zones for each activity type are shown in table 9.

Prior to pile driving, shutdown zones and monitoring zones will be established based on zones represented in table 9. Observers will survey the shutdown zones for at least 30 minutes before pile driving activities start. If marine mammals are found within the shutdown zone, pile driving will be delayed until the animal has moved out of the shutdown zone, either verified by an observer or by waiting until 15 minutes has elapsed without a sighting. If a marine mammal approaches or enters the shutdown zone during pile driving, the activity will be halted. Pile driving may resume after the animal has moved out of and is moving away from the shutdown zone or after at least 15 minutes has passed since the last observation of the animal.

All marine mammals would be monitored in the Level B harassment zones and throughout the area as far as visual monitoring can take place. If a marine mammal enters the Level B harassment zone, in-water activities would continue and PSOs would document the animal's presence within the estimated harassment zone.

If a species for which authorization has not been granted, or a species which has been granted but the authorized takes are met, is observed approaching

or within the Level B harassment zone, pile driving activities will be shutdown immediately. Activities will not resume until the animal has been confirmed to

have left the area or 15 minutes has elapsed with no sighting of the animal.

TABLE 9—SHUTDOWN AND LEVEL B HARASSMENT ZONES BY ACTIVITY

Pile size, type, and method	Minimum shutdown zone					Level B harassment zone
	Low-frequency	Mid-frequency	High-frequency	Phocid	Otariid	
Barge movements, pile positioning, ect. ...	10	10	10	10	10	10
14-in timber pile vibratory removal	10	10	15	10	10	6,310
14-in steel H-pile vibratory removal	10	10	10	10	10	1,000
16-in steel pipe pile vibratory removal	10	10	10	10	10	5,415
16-in steel pipe pile vibratory installation	10	10	10	10	10	5,415
24-in steel pipe pile vibratory installation (temporary)	10	10	10	10	10	5,415
24-in steel pipe pile vibratory removal (temporary)	10	10	10	10	10	5,415
24-in steel pipe pile vibratory installation	10	10	10	10	10	5,415
16-in steel pipe pile DTH installation	50	10	60	30	10	6,310
24-in steel pipe pile DTH installation (temporary)	265	10	315	145	15	6,310
24-in steel pipe pile DTH installation	320	15	385	175	15	6,310

Protected Species Observers

The placement of PSOs during all pile driving activities (described in the Proposed Monitoring and Reporting section) would ensure that the entire shutdown zone is visible. Should environmental conditions deteriorate such that the entire shutdown zone would not be visible (e.g., fog, heavy rain), pile driving would be delayed until the PSO is confident marine mammals within the shutdown zone could be detected.

PSOs would monitor the full shutdown zones and as much of the Level B harassment zones as possible. Monitoring zones provide utility for observing by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring enables observers to be aware of and communicate the presence of marine mammals in the project areas outside the shutdown zones and thus prepare for a potential cessation of activity should the animal enter the shutdown zone.

Pre- and Post-Activity Monitoring

Monitoring must take place from 30 minutes prior to initiation of pile driving activities (i.e., pre-clearance monitoring) through 30 minutes post-completion of pile driving. Prior to the start of daily in-water construction activity, or whenever a break in pile driving of 30 minutes or longer occurs, PSOs would observe the shutdown and monitoring zones for a period of 30 minutes. The shutdown zone would be considered cleared when a marine mammal has not been observed within

the zone for a 30-minute period. If a marine mammal is observed within the shutdown zones, pile driving activity would be delayed or halted. If work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones would commence. A determination that the shutdown zone is clear must be made during a period of good visibility (i.e., the entire shutdown zone and surrounding waters must be visible to the naked eye).

Bubble Curtain

A bubble curtain must be employed during all impact DTH activities to interrupt the acoustic pressure and reduce impact on marine mammals. The bubble curtain must distribute air bubbles around 100 percent of the piling circumference for the full depth of the water column. The lowest bubble ring must be in contact with the mudline for the full circumference of the ring. The weights attached to the bottom ring must ensure 100 percent substrate contact. No parts of the ring or other objects may prevent full substrate contact. Air flow to the bubble rings must be balanced around the circumference of the pile.

Based on our evaluation of the applicant's proposed measures, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (e.g., presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (e.g., source characterization, propagation, ambient noise); (2) affected species (e.g., life history, dive patterns); (3) co-occurrence of marine mammal species with the activity; or (4) biological or behavioral context of exposure (e.g., age, calving or feeding areas);

- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;

- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;

- Effects on marine mammal habitat (e.g., marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and,

- Mitigation and monitoring effectiveness.

Visual Monitoring

Monitoring shall be conducted by NMFS-approved observers in accordance with the monitoring plan and Section 5 of the IHA. Trained observers shall be placed from the best vantage point(s) practicable to monitor for marine mammals and implement shutdown or delay procedures when applicable through communication with the equipment operator. Observer training must be provided prior to project start, and shall include instruction on species identification (sufficient to distinguish the species in the project area), description and categorization of observed behaviors and interpretation of behaviors that may be construed as being reactions to the specified activity, proper completion of data forms, and other basic components of biological monitoring, including tracking of observed animals or groups of animals such that repeat sound exposures may be attributed to individuals (to the extent possible).

Monitoring would be conducted 30 minutes before, during, and 30 minutes after pile driving/removal activities. In addition, observers shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven or removed. Pile driving/removal activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

Between one and five PSOs will be on duty depending on the size of the monitoring zone. Locations from which PSOs would be able to monitor for marine mammals are readily available from publicly accessible shoreline areas at the Near Island Channel and surrounding waters. Monitoring locations would be selected by the

Contractor during pre-construction.

PSOs would monitor for marine mammals entering the Level B harassment zones; the position(s) may vary based on construction activity and location of piles or equipment.

PSOs would scan the waters using binoculars, and/or spotting scopes, and would use a handheld range-finder device to verify the distance to each sighting from the project site. All PSOs would be trained in marine mammal identification and behaviors and are required to have no other project-related tasks while conducting monitoring. In addition, monitoring would be conducted by qualified observers, who would be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown/delay procedures when applicable by calling for the shutdown to the hammer operator via a radio. Trident would adhere to the following observer qualifications:

- (i) Independent observers (*i.e.*, not construction personnel) are required;
- (ii) One PSO would be designated as the lead PSO or monitoring coordinator and that observer must have prior experience working as an observer;
- (iii) Other observers may substitute education (degree in biological science or related field) or training for experience; and
- (iv) Trident must submit observer Curriculum Vitae for approval by NMFS.

Additional standard observer qualifications include:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates and times when in-water construction activities were suspended to avoid potential incidental injury from construction sound of marine mammals observed within a defined shutdown zone; and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

Data Collection

PSOs would use approved data forms to record the following information:

- Dates and times (beginning and end) of all marine mammal monitoring.
- PSO locations during marine mammal monitoring.

Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed and by what method (*i.e.*, vibratory or DTH).

- Weather parameters and water conditions.
- The number of marine mammals observed, by species, relative to the pile location and if pile driving or removal was occurring at time of sighting.
- Distance and bearings of each marine mammal observed to the pile being driven or removed.
- Description of marine mammal behavior patterns, including direction of travel.
- Age and sex class, if possible, of all marine mammals observed.
- Detailed information about implementation of any mitigation triggered (such as shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal if any.

Reporting

A draft marine mammal monitoring report would be submitted to NMFS within 90 days after the completion of pile driving and removal activities. It would include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report must include:

- Dates and times (begin and end) of all marine mammal monitoring.
- Construction activities occurring during each daily observation period, including the number and type of piles driven or removed and by what method (*i.e.*, vibratory driving) and the total equipment duration for cutting for each pile.
- PSO locations during marine mammal monitoring.
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;
- Upon observation of a marine mammal, the following information: Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; Time of sighting; Identification

of the animal(s) (*e.g.*, genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; Distance and bearing of each marine mammal observed relative to the pile being driven for each sighting (if pile driving was occurring at time of sighting); Estimated number of animals (min/max/best estimate); Estimated number of animals by cohort (adults, juveniles, neonates, group composition, *etc.*); Animal's closest point of approach and estimated time spent within the harassment zone; Description of any marine mammal behavioral observations (*e.g.*, observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity (*e.g.*, no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);

- Number of marine mammals detected within the harassment zones, by species.

- Detailed information about any implementation of any mitigation triggered (*e.g.*, shutdowns and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any.

If no comments are received from NMFS within 30 days, the draft final report would constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

Reporting Injured or Dead Marine Mammals

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by the IHA (if issued), such as an injury, serious injury or mortality, Trident would immediately cease the specified activities and report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Alaska Regional Stranding Coordinator. The report would include the following information:

- Description of the incident;
- Environmental conditions (*e.g.*, Beaufort sea state, visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities would not resume until NMFS is able to review the

circumstances of the prohibited take. NMFS would work with Trident to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. Trident would not be able to resume their activities until notified by NMFS via letter, email, or telephone.

In the event that Trident discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.*, in less than a moderate state of decomposition as described in the next paragraph), Trident would immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinator. The report would include the same information identified in the paragraph above. Activities would be able to continue while NMFS reviews the circumstances of the incident. NMFS would work with Trident to determine whether modifications in the activities are appropriate.

In the event that Trident discovers an injured or dead marine mammal and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), Trident would report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinator, within 24 hours of the discovery. Trident would provide photographs, video footage (if available), or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of

marine mammals that might be "taken" through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.*, intensity, duration), the context of any impacts or responses (*e.g.*, critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.*, as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, the discussion of our analysis applies to all the species listed in table 2, given that the anticipated effects of this activity on these different marine mammal stocks are expected to be similar. There is little information about the nature or severity of the impacts, or the size, status, or structure of any of these species or stocks that would lead to a different analysis for this activity.

Pile driving and removal activities associated with the project as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment from underwater sounds generated from pile driving and removal. Level A harassment is extremely unlikely given the small size of the Level A harassment isopleths and the required mitigation measures designed to minimize the possibility of injury to marine mammals (see Proposed Mitigation section). No mortality is anticipated given the nature of the activity. Pile installation and removal activities are likely to result in the Level B harassment of marine mammals that move into the ensonified zone, primarily in the form of disturbance or displacement of marine mammals. Take would occur within a limited, confined area of each stock's range. Level B harassment would be reduced to the level of least practicable adverse impact through use of mitigation measures described herein. Further, the amount of take authorized is small when compared to stock abundance.

Based on reports in the literature as well as monitoring from other similar

activities, behavioral disturbance (*i.e.*, level B harassment) would likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (*e.g.*, Thorson and Reyff, 2006; HDR, Inc. 2012; Lerma, 2014; ABR, 2016). Most likely for pile driving, individuals would simply move away from the sound source and be temporarily displaced from the areas of pile driving, although even this reaction has been observed primarily only in association with impact pile driving. The pile driving activities analyzed here are similar to, or less impactful than, numerous other construction activities conducted in Alaska, which have taken place with no observed severe responses of any individuals or known long-term adverse consequences. Level B harassment would be reduced to the level of least practicable adverse impact through use of mitigation measures described herein and, if sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the area while the activity is occurring. While vibratory driving associated with the proposed project may produce sound at distances of many kilometers from the project site, thus overlapping with some likely less-disturbed habitat, the project site itself is located in a busy harbor and the majority of sound fields produced by the specified activities are close to the harbor. Animals disturbed by project sound would be expected to avoid the area and use nearby higher-quality habitats.

The project also is not expected to have significant adverse effects on affected marine mammals' habitat. The project activities would not modify existing marine mammal habitat for a significant amount of time. The activities may cause some fish or invertebrates to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range; but, because of the short duration of the activities, the relatively small area of the habitat that may be affected, and the availability of nearby habitat of similar or higher value, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

The waters around Kodiak Island are part of the Alaska humpback whale feeding BIA (Ferguson *et al.*, 2015). Humpback whales are present around Kodiak, although the majority of sightings have occurred outside of Near Island Channel. The area of the BIA that may be affected by the proposed project is small relative to the overall area of the

BIA. The humpback whale feeding BIA is active between May and November while the proposed project is scheduled to occur between March and June, resulting in only 2 months of overlap. Additionally, pile driving associated with the project is expected to take only 55 days, further reducing the temporal overlap with the BIA. Therefore, the proposed project is not expected to have significant adverse effects on the foraging of Alaska humpback whale. No areas of specific biological importance (*e.g.*, ESA critical habitat, other BIAs, or other areas) for any other species are known to co-occur with the project area.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect any of the species or stocks through effects on annual rates of recruitment or survival:

- No serious injury, mortality, or Level A harassment is anticipated or authorized;
- The anticipated incidents of Level B harassment would consist of, at worst, temporary modifications in behavior that would not result in fitness impacts to individuals;
- The ensnifed areas from the project are very small relative to the overall habitat ranges of all species and stocks;
- The lack of anticipated significant or long-term negative effects to marine mammal habitat or any other areas of known biological importance; and
- The proposed mitigation measures are expected to reduce the effects of the specified activity to the level of least practicable adverse impact.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted previously, only take of small numbers of marine mammals may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an

authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

Table 8 demonstrates the number of animals that could be exposed to received noise levels that could cause Level B harassment for the proposed work in Kodiak, Alaska. Our analysis shows that less than 14 percent of each affected stock could be taken by harassment. The numbers of animals proposed to be taken for these stocks would be considered small relative to the relevant stock's abundances, even if each estimated taking occurred to a new individual—an extremely unlikely scenario.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

In order to issue an IHA, NMFS must find that the specified activity will not have an "unmitigable adverse impact" on the subsistence uses of the affected marine mammal species or stocks by Alaskan Natives. NMFS has defined "unmitigable adverse impact" in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

In the Kodiak area sea lions and harbor seals are available for subsistence harvest under the MMPA. Limited subsistence harvests of marine mammals outside of Near Island Channel has occurred in the past, with the most recent recorded/documented harvests of marine mammals in Kodiak in 2011. The proposed activity will take place in Near Island Channel, and no activities overlap with current subsistence hunting areas; therefore,

there are no relevant subsistence uses of marine mammals adversely impacted by this action. The proposed project is not likely to adversely impact the availability of any marine mammal species or stocks that are commonly used for subsistence purposes or to impact subsistence harvest of marine mammals in the region.

Based on the description of the specified activity, the measures described to minimize adverse effects on the availability of marine mammals for subsistence purposes, and the proposed mitigation and monitoring measures, NMFS has preliminarily determined that there will not be an unmitigable adverse impact on subsistence uses from Trident's proposed activities.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species, in this case with the Alaska Regional Office.

NMFS is proposing to authorize take of western DPS of Steller sea lions, which are listed under the ESA. The Permits and Conservation Division has requested initiation of section 7 consultation with the Alaska Regional Office for the issuance of this IHA. NMFS will conclude the ESA consultation prior to reaching a determination regarding the proposed issuance of the authorization.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to Trident for conducting Bunkhouse Dock replacement project in Kodiak, Alaska between March 1, 2024 and February 29, 2025, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>.

Request for Public Comments

We request comment on our analyses, the proposed authorization, and any

other aspect of this notice of proposed IHA for the proposed construction project. We also request comment on the potential renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform decisions on the request for this IHA or a subsequent renewal IHA.

On a case-by-case basis, NMFS may issue a one-time, 1-year renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical activities as described in the Description of Proposed Activity section of this notice is planned or (2) the activities as described in the Description of Proposed Activity section of this notice would not be completed by the time the IHA expires and a renewal would allow for completion of the activities beyond that described in the *Dates and Duration* section of this notice, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed renewal IHA effective date (recognizing that the renewal IHA expiration date cannot extend beyond 1 year from expiration of the initial IHA).

- The request for renewal must include the following:

- (1) An explanation that the activities to be conducted under the requested renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).

- (2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: December 19, 2023.

Kimberly Damon-Randall,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD546]

Takes of Marine Mammals Incidental To Specified Activities; Taking Marine Mammals Incidental to New England Wind, Phase 1 Park City Wind Marine Site Characterization Surveys

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of incidental harassment authorization.

SUMMARY: NMFS has received a request from Park City Wind, LLC (Park City Wind), for the re-issuance of a previously issued incidental harassment authorization (IHA) with the only change being effective dates. The initial IHA authorized take of marine mammals incidental to marine site characterization surveys in coastal waters off of Massachusetts, Rhode Island, Connecticut, and New York. The project has been delayed and none of the work covered in the initial IHA has been conducted. The scope of the activities and anticipated effects remain the same, authorized take numbers are not changed, and the required mitigation, monitoring, and reporting remains the same as included in the initial IHA. NMFS is, therefore, issuing a second identical IHA to cover the incidental take analyzed and authorized in the initial IHA.

DATES: This authorization is effective from March 1, 2024, through February 28, 2025.

ADDRESSES: An electronic copy of the final 2022 IHA previously issued to Park City Wind, Park City Wind's application, and the **Federal Register** notices proposing and issuing the initial IHA may be obtained by visiting <https://www.fisheries.noaa.gov/action/incidental-take-authorization-park-city-wind-llc-new-england-wind-project-phase-1-marine>. In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Alyssa Clevens, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the Marine Mammal Protection Act (MMPA; 16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to

NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth.

NMFS has defined “negligible impact” in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The MMPA states that the term “take” means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal.

Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Summary of Request

On September 1, 2022, NMFS published final notice of our issuance of an IHA authorizing take of 16 species of marine mammals incidental to marine site characterization surveys in coastal waters off of Massachusetts, Rhode Island, Connecticut, and New York in the area of the Bureau of Ocean Energy Management (BOEM) Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS)-A 0543 and along potential offshore export cable corridors (OECC) to landfall locations (87 FR 44087). The effective dates of that IHA were September 1, 2022, through August 31, 2023. On October 30, 2023, Park City Wind informed NMFS that the project was delayed.

None of the work identified in the initial IHA (*i.e.*, geophysical, geotechnical, and geohazard data collection) has occurred. Park City Wind submitted a request to re-issue the IHA, with effective dates from March 1, 2024, through February 28, 2025, in order to conduct the marine site characterization survey work that was analyzed and authorized through the previously issued IHA. The initial IHA was effective from September 1, 2022, through August 31, 2023. Park City Wind has requested issuance with new effective dates of March 1, 2024, through February 28, 2025.

Summary of Specified Activity and Anticipated Impacts

The planned activities (including mitigation, monitoring, and reporting), authorized incidental take, and anticipated impacts on the affected stocks are the same as those analyzed and authorized through the previously issued IHA.

As part of their overall marine site characterization survey operations, Park City Wind plans to conduct high-resolution geophysical (HRG) and geotechnical surveys in Lease Area OCS-A 0543, and the associated OECC. The purpose of the marine site characterization surveys is to collect data concerning seabed (geophysical, geotechnical, and geohazard), ecological, and archeological conditions within the footprint of offshore wind facility development. Surveys are also conducted to map potential unexploded ordnance (UXO) and benthic habitat studies.

The location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described for the initial IHA. The mitigation and monitoring are also as prescribed in the initial IHA.

Species that have the potential to be taken by the planned activities can be found in the initial 2022 **Federal Register** notices (87 FR 32123, 87 FR 44087). A description of the methods and inputs used to estimate take anticipated to occur and, ultimately, the take that was authorized is found in the previous documents referenced above. NMFS has reviewed recent Stock Assessment Reports, information on relevant Unusual Mortality Events, and recent scientific literature, and determined that no new information affects our original analysis of impacts under the initial IHA.

We refer to the documents related to the previously issued IHA, which include the **Federal Register** notice of the issuance of the initial 2022 IHA for Park City Wind’s survey work (87 FR

44087), Park City Wind’s application, the **Federal Register** notice of the proposed IHA (87 FR 32123), and all associated references and documents.

On August 1, 2022, NMFS announced proposed changes to the existing NARW vessel speed regulations to further reduce the likelihood of mortalities and serious injuries to endangered NARWs from vessel collisions, which are a leading cause of the species’ decline and a primary factor in an ongoing Unusual Mortality Event (87 FR 46921, August 1, 2022). Should a final vessel speed rule be issued and become effective during the effective period of this IHA (or any other MMPA incidental take authorization), the authorization holder would be required to comply with any and all applicable requirements contained within the final rule. Specifically, where measures in any final vessel speed rule are more protective or restrictive than those in this or any other MMPA authorization, authorization holders would be required to comply with the requirements of the rule. Alternatively, where measures in this or any other MMPA authorization are more restrictive or protective than those in any final vessel speed rule, the measures in the MMPA authorization would remain in place. These changes would become effective immediately upon the effective date of any final vessel speed rule and would not require any further action on NMFS’s part.

Determinations

Park City Wind will conduct activities as analyzed in the initial 2022 IHA. As described above, the number of authorized takes of the same species and stocks of marine mammals are identical to the numbers that were found to meet the negligible impact and small numbers standards and authorized under the initial IHA and no new information has emerged that would change those findings. The issued 2024 IHA includes identical required mitigation, monitoring, and reporting measures as the initial 2022 IHA, and there is no new information suggesting that our analysis or findings should change.

Based on the information contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; and (4) Park City Wind’s

activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action with respect to environmental consequences on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental take authorizations with no anticipated serious injury or mortality) of the Companion Manual for NAO 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS determined that the issuance of the initial IHA qualified to be categorically excluded from further NEPA review. NMFS has determined that the application of this categorical exclusion remains appropriate for this IHA.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

NMFS Office of Protected Resources previously determined that issuance of the initial 2022 IHA falls within the scope of activities analyzed in NMFS Greater Atlantic Regional Fisheries Office's programmatic consultation regarding geophysical surveys along the U.S. Atlantic coast in the 3 Atlantic Renewable Energy Regions (completed June 29, 2021; revised September 2021).

Authorization

NMFS has issued an IHA to Park City Wind for marine site characterization survey activities associated with the specified activity from March 1, 2024, through February 28, 2025. All previously described mitigation,

monitoring, and reporting requirements from the initial 2022 IHA are incorporated.

Dated: December 20, 2023.

Kimberly Damon-Randall,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

[FR Doc. 2023–28404 Filed 12–22–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD600]

New England Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public hybrid meeting of its Risk Policy Working Group to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). This meeting will be held in-person with a webinar option. Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Wednesday, January 10, 2024, at 9 a.m. Webinar registration URL information: https://zoom.us/webinar/register/WN_6ehbb-P8RgeAUDQjhvC_Zg.

ADDRESSES: This meeting will be held at the Fairfield Inn & Suites, 185 MacArthur Drive, New Bedford, MA 02740; telephone: (774) 634–2000.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Risk Policy Working Group (RPWG) will address the terms of reference (TORs) approved by the New England Fishery Management Council (Council), including progress made in reviewing the Council's current Risk Policy, and Risk Policy Road Map (TOR 1). They will continue to consider possible changes to the risk policy (TOR 2), focusing on how to structure a revised risk policy, including discussions on a decision tree approach

and a tiered approach. The RPWG will receive presentations on how other regional fishery management Councils approach risk in decision making. Other business will be discussed, if necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Cate O'Keefe, Ph.D., Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 20, 2023.

Alyssa Lynn Weigers,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–28409 Filed 12–22–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0216]

Agency Information Collection Activities; Comment Request; Process for FSA ID Account Creation for Individuals Without a Social Security Number in Connection With Person Authentication Service (PAS)

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED requested the Office of Management and Budget (OMB) to conduct an emergency review of a new information collection.

DATES: The Department requested emergency processing from OMB for this information collection request on December 20, 2023. As a result, the Department is providing the public with the opportunity to comment under the full comment period. Interested persons

are invited to submit comments on or before February 26, 2024.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use <http://www.regulations.gov> by searching the Docket ID number ED–2023–SCC–0216. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at <http://www.regulations.gov> by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the regulations.gov site is not available to the public for any reason, the Department will temporarily accept comments at ICDocketMgr@ed.gov. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave, SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use

of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Process for FSA ID Account Creation for Individuals without a Social Security Number in Connection with Person Authentication Service (PAS).

OMB Control Number: 1845–0179.

Type of Review: A new information collection request.

Respondents/Affected Public: Individuals and Households.

Total Estimated Number of Annual Responses: 3,500.

Total Estimated Number of Annual Burden Hours: 1,155.

Abstract: The Department of Education (Department) requested emergency processing for this information collection, 1845–0179, Process for FSA ID Account Creation for Individuals without a Social Security Number in Connection with Person Authentication Service (PAS); and therefore, is requesting the 60-day public comment period for the full ICR. Applicants, parents, and borrowers establish an FSA ID, which includes a username and password. The FSA ID is used for the purposes of verifying the identity of the user; allowing users to establish an account with FSA; safeguarding their personally identifiable and financial information; signing applications and loan related documents; providing users access to their information and applications; allowing users to customize or update their accounts with FSA; renewing or revoking a user's account with FSA; and supporting the Federal Student Aid Information Center (FSAIC) help desk functions.

The specific questions that applicants are asked to answer in the FSA ID creation process are described separately in the Creating FSA–ID document, which explains the use of the questions in the application. As part of the standard process, users' information is matched with information from the Social Security Administration (SSA) to confirm their SSA status.

In the event of individuals who do not have a SSN to match, they are instructed to the contact the Department and provide one of the following documents (U.S. State/Territory Driver's License; U.S. State or City Identification Card; Foreign Passport; Municipal identification card; Community ID; or a Consular identification card) and a signed attestation of their identity under the penalty of perjury, as instructed by the Privacy Act.

This collection provides the process and application that individuals

without an SSN may use to acquire an FSA ID to access the statutory and regulatory benefits of the Title IV, HEA student financial assistance programs. The Department received emergency clearance on December 20, 2023, since normal clearance processing would not enable to implement this critical change by the launch of the 2024–25 FAFSA form, which would result in no access to the FAFSA application for individuals who need to get an FSA ID without a Social Security Number. Any delay in getting access to the FAFSA form would increase the potential for public harm through delayed access to student financial aid and the possibility of decreasing the likelihood of postsecondary enrollment. As a result, in order to meet the late-December 2023 form launch, the Department requested that OMB approve the collection associated with non-Social Security Number FSA ID account creation process using the emergency clearance procedures.

Dated: December 20, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–28427 Filed 12–22–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Savannah River Site

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Savannah River Site. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Monday, January 29, 2024; 1 p.m.–4:15 p.m. EST.

Tuesday, January 30, 2024; 9 a.m.–3:30 p.m. EST.

ADDRESSES: Doubletree by Hilton Hotel Augusta, 2651 Perimeter Parkway, Augusta, GA 30909.

The meeting will also be streamed on YouTube, no registration is necessary; links for the livestream can be found on the following website: <https://cab.srs.gov/srs-cab.html>.

FOR FURTHER INFORMATION CONTACT:

Amy Boyette, Office of External Affairs, U.S. Department of Energy (DOE), Savannah River Operations Office, P.O. Box A, Aiken, SC 29802; Phone: (803) 952-6120; or Email: amy.boyette@srs.gov.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to provide advice and recommendations concerning the following EM site-specific issues: clean-up activities and environmental restoration; waste and nuclear materials management and disposition; excess facilities; future land use and long-term stewardship. The Board may also be asked to provide advice and recommendations on any EM program components.

Tentative Agenda:

Monday, January 29, 2024:
Chair Update
Agency Updates
Subcommittee Updates
Program Presentations
Board Business
Public Comments

Tuesday, January 30, 2024:
Program Presentations
Public Comments
Board Business, Voting

Public Participation: The meeting is open to the public. To register for in-person attendance, please send an email to srscitizensadvisoryboard@srs.gov no later than 4:00 p.m. EST on Thursday, January 25, 2024. The EM SSAB, Savannah River Site, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Amy Boyette at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board via email either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should submit their request to srscitizensadvisoryboard@srs.gov. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. Comments will be accepted after the meeting, by no later than 4:00 p.m. EST on Tuesday, February 6, 2024. Please submit comments to srscitizensadvisoryboard@srs.gov. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make oral public

comments will be provided a maximum of five minutes to present their comments. Individuals wishing to submit written public comments should email them as directed above.

Minutes: Minutes will be available by emailing or calling Amy Boyette at the email address or telephone number listed above. Minutes will also be available at the following website: <https://cab.srs.gov/srs-cab.html>.

Signed in Washington, DC, on December 20, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023-28422 Filed 12-22-23; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY**Environmental Management Site-Specific Advisory Board, Hanford**

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an in-person/virtual hybrid meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Hanford. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES:

Tuesday, February 6, 2024; 9 a.m.–3:15 p.m. PST.

Wednesday, February 7, 2024; 9 a.m.–3:30 p.m. PST.

ADDRESSES: This hybrid meeting will be in-person at the Columbia Basin College Gjerde Center (address below) and virtually. To receive the virtual access information and call-in number, please contact the Deputy Designated Federal Officer, Lindsay Somers, at the telephone number or email listed below at least five days prior to the meeting. Columbia Basin College, Gjerde Center, 2600 N 20th Avenue, Pasco, WA 99301.

FOR FURTHER INFORMATION CONTACT:

Lindsay Somers, Deputy Designated Federal Officer, U.S. Department of Energy, Hanford Office of Communications, Richland Operations Office, P.O. Box 550, Richland, WA 99354; Phone: (509) 376-0923; or Email: lindsay.somers@rl.doe.gov.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to provide advice and recommendations concerning the following EM site-specific issues: clean-up activities and environmental restoration; waste and nuclear materials management and disposition; excess

facilities; future land use and long-term stewardship. The Board may also be asked to provide advice and recommendations on any EM program components.

Tentative Agenda:

- Tri-Party Agreement Agencies' Updates
- Presentation
- Consideration of Draft Advice
- Board Subcommittee Reports
- Discussion of Board Business

Public Participation: The meeting is open to the public. The EM SSAB, Hanford, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Lindsay Somers at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or within five business days after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Lindsay Somers. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available at the following website: <http://www.hanford.gov/page.cfm/hab/FullBoardMeetingInformation>.

Signed in Washington, DC, on December 20, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023-28372 Filed 12-22-23; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY**Preventing Outages and Enhancing the Resilience of the Electric Grid Formula Grants to States and Indian Tribes**

AGENCY: Grid Deployment Office, Department of Energy.

ACTION: Notice of intent.

SUMMARY: The U.S. Department of Energy's (DOE's) National Energy Technology Laboratory (NETL) intends to issue, on behalf of the DOE Grid Deployment Office (GDO), an amendment to the Administrative and Legal Requirements Document (ALRD)

DE-FOA-0002736 (BIL—Preventing Outages and Enhancing the Resilience of the Electric Grid Formula Grants to States and Indian Tribes), titled Amendment 000008. This grant program is authorized under of the Bipartisan Infrastructure Law (BIL), and Amendment 000008 provides access to fiscal year (FY) 2024 formula grant allocations.

ADDRESSES: Requests for more information should be addressed by electronic mail to david.parsons@hq.doe.gov.

FOR FURTHER INFORMATION CONTACT: David Parsons, (240) 449-7764, david.parsons@hq.doe.gov.

SUPPLEMENTARY INFORMATION: The BIL is a once-in-a-generation investment in infrastructure, which will grow a more sustainable, resilient, and equitable economy through enhancing U.S. competitiveness, driving the creation of good-paying union jobs, and ensuring stronger access to economic, environmental, and other benefits for disadvantaged communities. The BIL appropriates more than \$62 billion to DOE to invest in American manufacturing and workers; expand access to energy efficiency; deliver reliable, clean, and affordable power to more Americans; and deploy the technologies of tomorrow through clean energy demonstrations.

The forthcoming ALRD Amendment 000008, expected to take effect in January 2024 (available at: <https://www.fedconnect.net/fedconnect/?doc=DE-FOA-0003221&agency=DOE>), will support the Administration and Congressional goals to (1) demonstrate measurable improvements in energy resilience in the United States and mitigate climate related risk, (2) invest in modernized grid infrastructure that can enable consumer access to lower-cost energy and accommodate increased electrification, increased penetrations of variable renewable electricity and distributed energy resources, and other evolving system needs over the coming decades, (3) invest in clean energy and decarbonization solutions to achieve a carbon-free power sector by 2035 and net-zero greenhouse gas emissions economy-wide by 2050, and (4) create good-paying jobs with the free and fair choice to join a union.

The purpose of ALRD Amendment 000008 is to allow for submission of applications for the FY 2024 formula grant allocations. The FY 2024 formula grant allocation amounts are available at: <https://netl.doe.gov/bilhub/grid-resilience/formula-grants>. The process for requesting a FY 2024 allocation depends on whether the applicant is an

existing grant recipient, a current grant applicant, or a new grant applicant:

- *Existing Grant Recipients* that have already received grants for FY 2022 and FY 2023 of the Program will have 90 days from the issuance of ALRD Amendment 000008 to request their FY 2024 allocation, in accordance with the Terms and Conditions of their current Grant award.
- *Current Grant Applicants* that previously submitted a grant application for FY 2022 and FY 2023 of the program *but have not yet received their grant at the time the ALRD Amendment 000008 (for FY 2024) is issued*, will have 90 days from the issuance of ALRD Amendment 000008 to amend their submitted grant application to include the FY 2024 allocations.

- *New Grant Applicants* are eligible applicants (as defined in ALRD Amendment 000008) that did not submit a grant application for FY 2022 and FY 2023 of the Program. New Grant Applicants will have 90 days from the issuance of ALRD Amendment 000008 to submit a grant application for a FY 2024 allocation. Several one-time actions, explained below, must be completed before an application can be submitted, including registration with the System for Award Management (SAM), obtaining a Unique Entity Identifier (UEI), and registering with FedConnect.net. These actions can be completed prior to the issuance of ALRD Amendment 000008. Prospective New Grant Applicants are encouraged to address these items as soon as possible, as some may take several weeks to complete. Additional instructions for New Grant Applicants will be provided in the ALRD Amendment 000008.

Note: Neither applications nor allocation requests are being accepted at this time.

The current ALRD (Amendment 000007) is available at: <https://www.fedconnect.net/fedconnect/?doc=DE-FOA-0002736&agency=DOE>.

New Grant Applicants must complete the following steps in order to submit their application via FedConnect:

Pre-application actions:

SAM—Applicants must register with the SAM at <https://www.sam.gov/> prior to submitting an application in response to this ALRD. Designating an Electronic Business Point of Contact (EBiz POC) and obtaining a special password called an MPIN are important steps in SAM registration. The applicant must maintain an active SAM registration with current information at all times during which it has an active Federal award or an application under consideration. More information about SAM registration for applicants is

available at: https://www.fsd.gov/gsafsd_sp?id=gsafsd_kb_articles&sys_id=650d493e1bab7c105465eaccac4bcbcb.

Note: If clicking the SAM links do not work, please copy and paste the link into your browser.

UEI—Applicants must obtain an UEI from the SAM to uniquely identify the entity. The UEI is available in the SAM entity registration record.

Note: Subawardees/subrecipients at all tiers must also obtain an UEI from the SAM and provide the UEI to the award recipient before the subaward can be issued.

Note: Due to the high demand of UEI requests and SAM registrations, entity legal business name and address validations are taking longer than expected to process. Entities should start the UEI and SAM registration process as soon as possible. If entities have technical difficulties with the UEI validation or SAM registration process they should utilize the HELP feature on [SAM.gov](https://www.sam.gov). [SAM.gov](https://www.sam.gov) will address entity service tickets in the order in which they are received and asks that entities not create multiple service tickets for the same request or technical issue.

FedConnect.net—Applicants must register with FedConnect to submit applications in response to the ALRD, to submit questions, and to receive the award. FedConnect website: <https://www.fedconnect.net/>. For more information regarding registration with FedConnect, review the FedConnect Ready, Set, Go! Guide at: https://www.fedconnect.net/FedConnect/Marketing/Documents/FedConnect_Ready_Set_Go.pdf.

Electronic Signatures—Acknowledgement of award documents by the Grant Recipient authorized representative through electronic systems used by the Department of Energy, including FedConnect, constitutes the Grantee's acceptance of the terms and conditions of the award. Acknowledgement via FedConnect by the Grantee's authorized representative constitutes the Grantee's electronic signature.

Signing Authority

This document of the Department of Energy was signed on December 14, 2023, by Maria D. Robinson, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for

publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 20, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2023–28401 Filed 12–22–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2576–210]

FirstLight CT Housatonic LLC; Notice of Effectiveness of Withdrawal of Application for Amendment of License

On October 5, 2023, FirstLight CT Housatonic LLC (licensee) filed an application for non-capacity amendment of the license for the 114.9-megawatt Housatonic River Hydroelectric Project No. 2576. On November 30, 2023, the licensee filed a notice of withdrawal of the amendment application. The project is located on the Housatonic River in the Fairfield, Litchfield, and New Haven counties, Connecticut.

No motion in opposition to the notice of withdrawal has been filed, and the Commission has taken no action to disallow the withdrawal. Pursuant to Rule 216(b) of the Commission's Rules of Practice and Procedure,¹ the withdrawal of the application became effective on December 15, 2023, and this proceeding is hereby terminated.

Dated: December 19, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28437 Filed 12–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–672–000]

Moonshot Solar, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Moonshot Solar, LLC's application for

market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 8, 2024.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at FERCOnlineSupport@ferc.gov or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

Dated: December 19, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28440 Filed 12–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP24–252–000.

Applicants: Dogwood Energy LLC, Every Missouri West, Inc., Every Kansas Central, Inc.

Description: Joint Petition for Limited Waiver of Capacity Release Regulations, et al. of Dogwood Energy LLC, et al.

Filed Date: 12/18/23.

Accession Number: 20231218–5301.

Comment Date: 5 p.m. ET 1/2/24.

Docket Numbers: RP24–253–000.

Applicants: Venture Global Gator Express, LLC.

Description: § 4(d) Rate Filing: Part 2 Section 1 Service rates 2024—

–Corrected to be effective 1/18/2024.

Filed Date: 12/19/23.

Accession Number: 20231219–5000.

Comment Date: 5 p.m. ET 1/2/24.

Docket Numbers: RP24–254–000.

Applicants: Transcontinental Gas Pipe Line Company, LLC.

Description: Compliance filing: Rate Schedule S–2 OFO Refund Report December 2023 to be effective N/A.

Filed Date: 12/19/23.

Accession Number: 20231219–5076.

Comment Date: 5 p.m. ET 1/2/24.

Docket Numbers: RP24–256–000.

Applicants: Gulf Run Transmission, LLC.

Description: § 4(d) Rate Filing: Amended NRA—TGC to be effective 12/19/2023.

¹ 18 CFR 385.216(b) (2022).

Filed Date: 12/19/23.

Accession Number: 20231219–5096.

Comment Date: 5 p.m. ET 1/2/24.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP23–1095–001.

Applicants: Eastern Gas Transmission and Storage, Inc.

Description: Compliance filing: EGTS—Report of GSS–TE Surcharge Distribution to be effective N/A.

Filed Date: 12/19/23.

Accession Number: 20231219–5058.

Comment Date: 5 p.m. ET 1/2/24.

Docket Numbers: RP24–222–000.

Applicants: Cameron Interstate Pipeline, LLC.

Description: Report Filing: Cameron Interstate Pipeline Adjustment of Fuel Retainage Per to be effective N/A.

Filed Date: 12/18/23.

Accession Number: 20231218–5264.

Comment Date: 5 p.m. ET 1/2/24.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <https://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

Dated: December 19, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28441 Filed 12–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5944–024]

Moretown Hydroelectric, LLC; Notice of Availability of Final Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380, the Office of Energy Projects has reviewed the application for a new license to continue to operate and maintain the Moretown No. 8 Hydroelectric Project. The project is located on the Mad River in Washington County, Vermont. Commission staff has prepared a Final Environmental Assessment (EA) for the project.

The FEA contains staff's analysis of the potential environmental impacts of the project and concludes that licensing the project, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

The Commission provides all interested persons with an opportunity to view and/or print the EA via the internet through the Commission's Home Page (<http://www.ferc.gov/>), using the "eLibrary" link. Enter the docket number, excluding the last three digits in the docket number field, to access the document. For assistance, contact FERC Online Support at FERCOnlineSupport@ferc.gov, or toll-free at (866) 208–3676, or for TTY, (202) 502–8659.

You may also register online at <https://ferconline.ferc.gov/FERCOnline.aspx> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

For further information, contact Maryam Zavareh at (202) 502–8474 or by email at Maryam.Zavareh@ferc.gov.

Dated: December 19, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28436 Filed 12–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–697–000]

Westlands Solar Blue (OZ) Owner, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Westlands Solar Blue (OZ) Owner, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 8, 2024.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>). From the Commission's

Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. Email the Public Reference Room at public.reference.room@ferc.gov.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502-6595 or OPP@ferc.gov.

Dated: December 19, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023-28438 Filed 12-22-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24-698-000]

Castanea Project, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Castanea Project, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice

and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 8, 2024.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>). From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. Email the Public Reference Room at public.reference.room@ferc.gov.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available

information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502-6595 or OPP@ferc.gov.

Dated: December 19, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023-28435 Filed 12-22-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD24-6-000]

Federal Power Act Section 203 Blanket Authorizations for Investment Companies

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of inquiry.

SUMMARY: The Federal Energy Regulatory Commission (Commission) seeks comment on whether, and if so, how, the Commission should revise its policy on providing blanket authorizations for investment companies under section 203(a)(2) of the Federal Power Act. The Commission also seeks comment on what constitutes control of a public utility in evaluating holding companies', including investment companies', requests for blanket authorization and what factors it should consider when evaluating control over public utilities as part of a request for blanket authorization.

DATES: Initial comments are due March 25, 2024 and reply comments are due April 24, 2024.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways. Electronic filing through <http://www.ferc.gov>, is preferred.

- **Electronic Filing:** Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.

- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery.

- **Mail via U.S. Postal Service Only:**

Addressed to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

- **Hand (including courier) Delivery:** Deliver to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

The Comment Procedures Section of this document contains more detailed filing procedures.

FOR FURTHER INFORMATION CONTACT:

Noah Monick (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, Noah.Monick@ferc.gov.

Michelle Wei (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, Michelle.Wei@ferc.gov.

SUPPLEMENTARY INFORMATION:

1. In this Notice of Inquiry (NOI), the Commission seeks comment on whether, and if so, how, the Commission should revise its policy on providing blanket authorizations for investment companies¹ under section 203(a)(2) of the Federal Power Act (FPA).² The Commission also seeks comment on what constitutes control of a public utility in evaluating holding companies', including investment companies', requests for blanket authorization and what factors it should consider when evaluating control over public utilities or holdings companies thereof as part of a request for blanket authorization.

I. Background

2. Section 203(a)(2) of the FPA provides that:

No holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire, or take any security with a value in excess of \$10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of \$10,000,000 without first having secured an order of the Commission authorizing it to do so.³

3. The Commission has both established in its regulations and granted by Commission order blanket authorizations under section 203(a)(2) for transactions that meet certain criteria. In Order No. 669,⁴ the

Commission promulgated regulations to implement the amendments to section 203 in the Energy Policy Act of 2005 (EPAct 2005),⁵ including granting blanket authorizations for certain types of transactions, such as foreign utility acquisitions by holding companies, intra-holding company system financing and cash management arrangements, certain internal corporate reorganizations, and certain investments in transmitting utilities and electric utility companies.⁶ The Commission stated that its goal in promulgating the new regulations was "to ensure that all jurisdictional transactions subject to section 203 are consistent with the public interest and at the same time ensure that our rules do not impede day-to-day business transactions or stifle timely investment in transmission and generation infrastructure."⁷ For example, one of the blanket authorizations granted by the Commission provides authorization for holding companies regulated by the Board of Governors of the Federal Reserve Bank or by the Office of the Comptroller of the Currency, under the Bank Holding Company Act of 1956 as amended by the Gramm-Leach-Bliley Act of 1999, to acquire and hold an unlimited amount of the securities of holding companies that include a transmitting utility or an electric utility company.⁸ The blanket authorization requires that the securities be held either as a fiduciary, as principal for derivatives hedging purposes incidental to the business of banking (so long as it commits not to vote such securities to the extent they exceed 10 percent of the outstanding shares), as collateral for a loan, or solely for purposes of liquidation and in connection with a loan previously contracted for and owned beneficially for a period of not more than two years (subject to conditions and a reporting requirement).⁹

4. Prior to Order No. 669, the Commission's order in *UBS AG* granted a blanket authorization on an individual basis for UBS AG and Bank of America

to acquire public utility securities during their banking businesses.¹⁰ The Commission stated that it was satisfied that the applicants in that proceeding would be precluded from using their fiduciary holdings to serve their own interests, rather than the interests of their fiduciary clients. The Commission stated that "backstop protection is provided by the procedures, controls and monitoring programs banking institutions are required to have in place in order to conduct fiduciary activities and the comprehensive nature of supervision and regulation by Bank Regulators of banks' fiduciary."¹¹

5. The Commission has also issued blanket authorizations, on a case-specific basis to investment companies, that allowed the acquisitions of securities in public utilities over the \$10 million threshold established by EPAct 2005 and up to 20% of the outstanding voting securities of a given public utility. For instance, in 2006, the Commission granted a blanket authorization for Capital Research and Management Company to acquire utility securities on behalf of its funds, subject to certain conditions.¹² As a result of these conditions, including limitations on the amount of both collective ownership and ownership of securities for each individual fund, governing policies, and status as beneficial owners eligible to file Schedule 13G under the Securities' and Exchange Act of 1934,¹³ the Commission found that Capital Research and Management Company could not exercise control over public utilities, and that there would be no harm to the public interest that could otherwise result from their holding significant equity positions in public utilities.¹⁴ The Commission noted that the repeal of the Public Utility Holding Company Act of 1935 (PUHCA 1935) and modifications to section 203 of the FPA had changed the law governing investment in utility securities.¹⁵ The Commission found that a blanket authorization was appropriate to "encourage greater investment in utilities by mutual funds," provided that the Commission can perform continuing oversight in accordance with section 203 of the FPA.¹⁶

¹ For the purposes of this NOI, the term "investment companies" refers to those companies meeting the definition of "investment companies" in the Investment Company Act of 1940, which includes any issuer that "holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities." 15 U.S.C. 80a-3. If commenters believe the Commission should apply a different definition or use a different term, they are encouraged to explain in their comments.

² 16 U.S.C. 824b(a)(2).

³ *Id.*

⁴ *Transactions Subject to FPA Section 203*, Order No. 669, 113 FERC ¶ 61,315 (2005), *order on reh'g*,

Order No. 669-A, 115 FERC ¶ 61,097, *order on reh'g*, Order No. 669-B, 116 FERC ¶ 61,076 (2006); see *Blanket Authorization Under FPA Section 203*, Order No. 708, 122 FERC ¶ 61,156, *order on reh'g*, Order No. 708-A, 124 FERC ¶ 61,048 (2008), *order on reh'g*, Order No. 708-B, 127 FERC ¶ 61,157 (2009) (amending the Commission's regulations pursuant to FPA section 203 to provide for additional blanket authorizations under FPA section 203(a)(1)).

⁵ Energy Policy Act of 2005, Public Law 109-58, 119 Stat. 594 (2005).

⁶ See 18 CFR 33.1(c).

⁷ Order No. 669, 113 FERC ¶ 61,315 at P. 4.

⁸ 18 CFR 33.1(c)(9).

⁹ See *id.* § (c)(9)(i)-(iv).

¹⁰ *UBS AG*, 101 FERC ¶ 61,312 (2002), *order on reh'g*, 103 FERC ¶ 61,284, *order on reh'g*, 105 FERC ¶ 61,078 (2003).

¹¹ *UBS AG*, 105 FERC ¶ 61,078 at P. 16.

¹² *Cap. Research & Mgmt. Co.*, 116 FERC ¶ 61,267 (2006).

¹³ 15 U.S.C. 78a *et seq.*

¹⁴ *Cap. Research & Mgmt. Co.*, 116 FERC ¶ 61,267 at P. 32.

¹⁵ *Id.* PP 26-27 (citing 15 U.S.C. 79a *et seq.*).

¹⁶ *Id.* P. 28.

6. The Commission issued other individual blanket authorizations after its order in *Capital Research & Management Co.* applying similar conditions.¹⁷ The blanket authorizations were time-limited, for a period of three years, based on the Commission's reasoning that it should periodically reevaluate whether the blanket authorizations remained consistent with the public interest.¹⁸ The Commission has in several instances granted subsequent requests for extensions of those blanket authorizations upon the same terms and conditions of the original orders.¹⁹

7. In 2010, the Commission undertook a generic proceeding to address the acquisition of voting securities of a public utility by holding companies in response to a petition by the Electric Power Supply Association (EPSA) requesting that the Commission provide clarification on the Commission's jurisdiction over investors holding between 10% and 20% of a public utility's outstanding voting securities who are eligible to file a statement of beneficial ownership with the Securities and Exchange Commission.²⁰ In that proceeding, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing to create a FERC form wherein holding companies would affirm that an investor did not control a public utility when the investor refrained from engaging in certain actions.²¹ Entities signing the form

would have been eligible for a blanket authorization for the acquisition of up to 20% of the outstanding voting securities of a public utility or holding company thereof. Comments on the NOPR generally fell into two groups. The first group believed that the Commission's proposal was too restrictive and that an investor would be unwilling to commit to the restrictions on the proposed FERC form, such that the Commission's proposal did not provide the original relief requested by EPSA; the second group believed the Commission could be opening up wholesale energy markets to anticompetitive behavior through partial acquisitions of the securities of multiple public utilities without adequate oversight. The Commission ultimately decided that, having considered these comments, it was persuaded to not seek to adopt the proposed reforms, and withdrew the NOPR and terminated the rulemaking proceeding.²²

8. Since the Commission revised its regulations to expand blanket authorizations under section 203(a)(2) and began granting case-specific blanket authorizations for holding companies, including investment companies, there have been changes in the public utility, finance, and banking industries that warrant consideration of whether the Commission's blanket authorization policy continues to work as intended. These changes include consolidation in the public utility industry as well as the growth of large index funds and asset managers. Factors such as the repeal of PUHCA 1935 and increased interest in U.S. utility assets by foreign companies/investors and private equity investors have led to the greater consolidation of utility holding companies, as shown by utility merger activity of approximately \$200 billion from 2012 to 2018.²³ At the beginning of 2010, there was approximately \$2.3 trillion invested in index funds, which grew to \$11.4 trillion by the end of 2019.²⁴ Index

or accept representation on the public utility's board of directors or otherwise serve in any management capacity; not request or receive non-public information, either directly or indirectly, concerning the business or affairs of the public utility; and not solicit, or participate in any solicitation of, proxies involving the public utility).

²² *Control & Affiliation for Purposes of Mkt.-Based Rate Requirements Under Section 205 of the Fed. Power Act & the Requirements of Section 203 of the Fed. Power Act*, 157 FERC ¶ 61,064 (2016).

²³ See Lillian Federico, *State Regulatory Reviews Are Creating Headwinds For Utility Merger Activity*, S&P GLOBAL (Apr. 5, 2019), <https://www.spglobal.com/marketintelligence/en/news-insights/research/state-regulatory-reviews-are-creating-headwinds-for-utility-merger-activity>.

²⁴ Financial Times, *Index Funds Break Through \$10m-in-Assets Mark*, <https://www.ft.com/content/a7e20d96-318c-11ea-9703-eea0cae3f0de> (Jan. 7, 2020).

funds are estimated to have grown from 20% of the fund market in 2011 to 43% by the end of 2021.²⁵ Both commenters and FERC Commissioners have noted that this change in the manner in which assets are owned and controlled warrants the Commission's careful consideration to make sure that its blanket authorization policy is consistent with the public interest.²⁶

II. Discussion

9. We are issuing this NOI to further explore whether, and if so, how, the Commission should revise its policy on blanket authorizations for holding companies, including investment companies, under section 203(a)(2) of the FPA. We invite all interested persons to submit comments and reply comments on any or all of the questions listed below. Commenters need not answer all the questions.

A. Blanket Authorization Policy

10. As noted above, the Commission has granted company-specific blanket authorizations under section 203(a)(2) for holding companies, including investment companies' managed funds, to acquire the voting securities of public utilities and holding companies thereof, in addition to the blanket authorizations granted by the Commission in its regulations. We seek comment on current Commission policy as well as whether, and if so, how, the Commission should revise its policy.

(Q1) Please describe whether the Commission's current blanket authorization policy, as set forth in the Commission's regulations or on a case-specific basis, is sufficient to ensure that holding companies, including investment companies, lack the ability to control the public utilities and holding companies whose securities they acquire and that the transactions underlying the blanket authorization are consistent with the public interest.

(Q2) If the Commission's current policy is insufficient, how should the

²⁵ Investment Company Institute, *2022 Investment Company Factbook*, at 29 (2022), https://www.icifactbook.org/pdf/2022_factbook.pdf.

²⁶ Commissioners Danly, Clements, and Christie have raised concerns related to the influence of large investment companies over public utilities and whether there is adequate scrutiny in the grant of some blanket authorizations. See *BlackRock, Inc.*, 179 FERC ¶ 61,049 (Clements, Comm'r, concurring at P 3); *BlackRock, Inc.*, 179 FERC ¶ 61,049 (Christie, Comm'r, concurring at PP 4–6); Joint Statement of Commissioner Danly & Commissioner Christie Regarding The Vanguard Group, Inc. *et al.*, Docket No. EC19–57–001, at PP 7–9 (Aug. 11, 2022) (eLibrary Accession No. 20220811–4002); Joint Statement of Commissioner Danly & Commissioner Christie Regarding The Vanguard Group, Inc., *et al.*, Docket No. EC19–57–002, at P 7 (May 9, 2023) (eLibrary Accession No. 20230509–4000).

¹⁷ See *Ecofin Holdings Ltd.*, 120 FERC ¶ 61,189 (2007); *The Goldman Sachs Grp.*, 121 FERC ¶ 61,059 (2007); *Morgan Stanley*, 121 FERC ¶ 61,060 (2007); *Legg Mason, Inc.*, 121 FERC ¶ 61,061 (2007); *Horizon Asset Mgmt., Inc.*, 125 FERC ¶ 61,209 (2008); *Franklin Res., Inc.*, 126 FERC ¶ 61,250 (2009); *BlackRock, Inc.*, 131 FERC ¶ 61,063 (2010). Additional blanket authorizations were granted via delegated authority where applicants met the criteria established in previously-issued Commission orders. See *T. Rowe Price Grp., Inc.*, 119 FERC ¶ 62,048 (2007) (delegated order); *Lord, Abbott & Co. LLC*, 129 FERC ¶ 62,239 (2009) (delegated order); *Mario J. Gabelli GGCP, Inc.*, 137 FERC ¶ 62,127 (2011) (delegated order); *The Vanguard Grp., Inc.*, 168 FERC ¶ 62,081 (2019) (delegated order).

¹⁸ See *Cap. Research & Mgmt. Co.*, 116 FERC ¶ 61,267 at P 46 (“[G]iven the importance of balancing the need for regulatory oversight with the provision of some business certainty, the Commission grants the requested authorizations, as conditioned, on a temporary basis. The authorization expires three years from the date of this order, without prejudice to requests to extend the authorization.”).

¹⁹ See, e.g., *The Goldman Sachs Grp.*, 134 FERC ¶ 61,227 (2011); *BlackRock, Inc.*, 179 FERC ¶ 61,049 (2022).

²⁰ *Control & Affiliation for Purposes of Mkt.-Based Rate Requirements Under Section 205 of the Fed. Power Act & the Requirements of Section 203 of the Fed. Power Act*, 130 FERC ¶ 61,046, at P 4 (2010) (citing Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (2000)).

²¹ *Id.* PP 36–37 (requiring an affirmation from the investor that, among other things, it will: not seek

Commission revise its case-specific blanket authorizations for holding companies, including investment companies, to acquire voting securities? How should the Commission revise its regulations providing certain blanket authorizations under section 203(a)(2)?

(Q3) Are the existing conditions and restrictions associated with case-specific blanket authorizations, such as the submission of Securities and Exchange Commission (SEC) Schedule 13D and 13G filings, effective in ensuring that holding companies, including investment companies, lack control over public utilities, and holding companies thereof, such that the Commission can be assured that the transactions underlying the blanket authorization are consistent with the public interest?

(Q4) Does the current scope or availability of blanket authorizations for the acquisition of voting securities by holding companies, including investment companies, create concerns regarding an adverse effect on competition or jurisdictional rates?

(Q5) If there are concerns with the current policy regarding grants of blanket authorizations to holding companies, including investment companies, are there specific commitments or other conditions from holding companies, including investment companies, that could give the Commission assurance that such blanket authorizations are consistent with the public interest?

(Q6) The blanket authorization in 18 CFR 33.1(c)(9)(iv) requires that a holding company file—when securities are held “[s]olely for purposes of liquidation and in connection with a loan previously contracted for and owned beneficially for a period of not more than two years,”—on a public basis and within 45 days of the close of each calendar quarter, both its total holdings and its holdings as principal, each by class, unless the holdings within a class are less than one percent of outstanding shares, irrespective of the capacity in which they were held. Specifically, there have been cases where it was unclear, based on the record, whether an entity has satisfied the requirements for blanket authorization under 18 CFR 33.1(c)(9).²⁷

²⁷ See, e.g., *Black Hills Colo. Elec., LLC*, 184 FERC ¶ 61,172, at P 19 (2023) (“Black Hills MBR Sellers state that State Street represented to them that State Street qualifies under section 33.1(c)(9) of the Commission’s regulations for blanket authorization under section 203(a)(2) of the FPA to acquire and hold an unlimited amount of securities of holding companies that include a transmitting utility or an electric utility company.”) (citation omitted); see also *id.* (Danly, Comm’r, concurring at P 3) (“It is not clear to me whether State Street satisfies the requirements above and nothing in Black Hills MBR

Should the Commission require a holding company, or a subsidiary of that company, that qualifies for FPA section 203 blanket authorization under 18 CFR 33.1(c)(9) to report on what basis it qualifies (*i.e.*, “(i) [a]s a fiduciary; (ii) [a]s principal for derivatives hedging purposes incidental to the business of banking and it commits not to vote such securities to the extent they exceed 10 percent of the outstanding shares; (iii) [a]s collateral for a loan; or (iv) [s]olely for purposes of liquidation and in connection with a loan previously contracted for and owned beneficially for a period of not more than two years”)? Are there any other measures that the Commission should take to oversee compliance with the terms of these blanket authorizations?

(Q7) The case-specific blanket authorizations granted by the Commission to investment companies generally require informational filings of holdings, similar to that required of the blanket authorization in 18 CFR 33.1(c)(9)(iv). Are these informational filings sufficient for the Commission to maintain an appropriate level of oversight for compliance with the terms of blanket authorizations? Are there any other measures that the Commission should take to oversee compliance with the terms of these blanket authorizations?

B. Large Investment Companies

11. The three largest index fund investment companies currently vote over 20% of the stock in the largest U.S. public companies, a number that may soon rise to 40%.²⁸ Some have argued that the size of these investment companies creates issues related to competition and gives the investment companies unique leverage over the utilities whose voting securities they control.²⁹ Additionally, some have

Sellers’ filing demonstrates which, if any, of the elements of our regulation State Street satisfies.”).

²⁸ See Nathan Atkinson, *If Not the Index Funds, Then Who?*, 17 BERKELEY BUS. L.J. 44, 45 (2020) (“In recent years, large asset managers have reached incredible sizes, managing trillions of dollars of assets on behalf of tens of millions of clients. The largest three, BlackRock, Vanguard, and State Street, taken together (the ‘Big Three’), vote about 20% of shares in most large companies, with the majority of these shares held in passive index funds.”) (citation omitted); Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 724 (2019).

²⁹ See Public Citizen, Inc., Protest, Docket No. EC16–77–002, at 1 (filed Mar. 11, 2022) (“Not only is it impossible for a fund manager of BlackRock’s size and scope to remain a passive investor, scholarly research demonstrates that BlackRock’s accumulation of voting securities constitutes control over utilities, and its horizontal power over competing utilities harms competition.”); see also Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1267 (2016) (“A small group

argued that the largest index funds have used their ownership stakes to pressure utilities to meet particular public policy goals, despite committing to not exercise control over the utilities.³⁰ We seek comment on whether, and if so, how, the Commission should consider the size of an investment company in evaluating a request for blanket authorization under section 203(a)(2).

(Q8) How can the Commission effectively evaluate the influence and control exerted by holding companies, including investment companies, regardless of their size, over public utilities when considering blanket authorizations under section 203(a)(2)? What factors should be prioritized to ensure a fair and comprehensive assessment while maintaining a straightforward and equitable process for all holding companies, including investment companies?

(Q9) Please describe whether and how the Commission should consider holding companies’, including investment companies’, pre-existing ownership and control of public utilities and holding companies thereof in determining whether to grant blanket authorizations under section 203(a)(2).

(Q10) How should the Commission distinguish between various types of investment vehicles for purposes of section 203(a)(2) blanket authorizations?

(Q11) What are the impacts on the public interest, both positive and negative, of holding companies, including investment companies, holding voting securities in multiple public utilities and Commission-regulated entities?

(Q12) What other ways may up to 20% ownership or control of multiple public utilities and holding companies thereof by holding companies, including investment companies, affect the public interest that the Commission should consider?

C. Evaluation of Control Under Section 203 of the FPA

12. Often, when seeking a blanket authorization under section 203(a)(2), an investment company will argue that its investments in public utilities do not

of institutions has acquired large shareholdings in horizontal competitors throughout our economy, causing them to compete less vigorously with each other.”).

³⁰ See Consumers’ Research, Inc., Motion to Intervene and Protest, Docket No. EC19–57–002, at 4–5 (filed Nov. 28, 2022) (arguing that the three largest index funds have “have embarked on a full-scale engagement and proxy-voting strategy to force utility companies to comply with various decarbonization goals”); see also Eric C. Chaffee, *Index Funds & ESG Hypocrisy*, 71 CASE W. RES. L. REV. 1295, 1298–1299 (2021) (noting statements by index fund managers related to climate and sustainability goals).

allow for it to control the public utility, including control over the day-to-day management and operations of the utility, or holding company thereof.³¹ However, it has been argued that by holding voting securities in a large number of public utilities, investment companies are able to influence utility behavior in ways that are not captured by the Commission's current analysis of control.³² We seek comment on what factors the Commission should consider when evaluating control over public utilities as part of a request for blanket authorization.

(Q13) In what way may a holding company, including an investment company, exert control over public utilities that is not currently captured by the Commission's current policies and regulations?

(Q14) What strategies or actions taken by holding companies, including investment companies, or the actions of a public utility that is the subject of a blanket authorization could demonstrate control or a degree of influence that would require prior Commission review under section 203(a)(2)? In other words, what are the indicia of control that the Commission could look to when assessing whether a holding company can exercise control?

(Q15) Does holding the voting securities, notwithstanding commitments not to exercise control, of multiple public utilities provide a form of control or influence that is not addressed by the Commission's current policies and regulations? If so, how? And how should the Commission resolve this form of control or influence?

(Q16) Should the Commission consider the impact of investment companies holding public utility voting securities on long-term planning by public utilities or other issues beyond day-to-day control over utility operations? If so, how?

(Q17) What corporate governance factors should the Commission consider when evaluating whether investment companies can exercise control over public utilities? For instance, should the Commission consider the ability of an investment company to influence board membership of a public utility and, if so, how?

³¹ See, e.g., *BlackRock, Inc.*, 131 FERC ¶ 61,063 at P 17.

³² See Senator Michael S. Lee et al., Letter to Commission, Docket No. EC16-77-002 at 5 (filed June 28, 2023) ("Many of [BlackRock's] significant attempts to influence control, however, have likely been behind closed doors, in the form of 'investor engagement' with the backdrop of [Climate Action 100+] and [the Net Zero Asset Managers Initiative]'s coordinated activities and massive collective voting power.").

III. Comment Procedures

13. The Commission invites interested persons to submit comments on the matters and issues identified in this notice. Initial comments are due March 25, 2024 and reply comments are due April 24, 2024. Comments must refer to Docket No. AD24-6-000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

14. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at <http://www.ferc.gov>. The Commission accepts most standard word processing formats. Documents created electronically using word processing software must be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

15. Commenters that are not able to file comments electronically may file an original of their comment by USPS mail or by courier or other delivery services. For submission sent via USPS only, filings should be mailed to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE, Washington, DC 20426. Submission of filings other than by USPS should be delivered to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

IV. Document Availability

16. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>).

17. From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

18. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at 202-

502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov.

By direction of the Commission.
Commissioner Christie is concurring with a separate statement attached.

Issued: December 19, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

United States of America

Federal Energy Regulatory Commission

Federal Power Act Section 203 Blanket Authorizations for Investment Companies

Docket No. AD24-6-000 (Issued December 19, 2023)

CHRISTIE, Commissioner, *concurring*:

1. Public utilities, sometimes called "public service corporations" or "public service companies" under various state laws,¹ are not garden-variety, for-profit, shareholder-owned companies. In particular, public utilities that provide electrical power to retail customers are usually holders of a state-granted monopoly franchise that comes with various public service obligations, such as providing reliable power service at rates that are just and reasonable. So whether a public utility is owned by investors directly or through a holding company structure, it is absolutely essential for regulators to make sure that the interests of investors do not conflict with the public service obligations that a utility has. And yes, there is a potential conflict. That potential conflict requires heightened regulatory scrutiny when huge investment companies and asset managers, as well as large private equity funds, which individually and collectively direct literally trillions of dollars in capital, appear to be acting not as passive investors simply seeking the best risk-based returns for their own clients, but instead appear to be *actively* using their investment power to affect how the utility meets its own public service obligations. That is why this proceeding is so essential, to explore those issues and determine whether the Commission's own regulations and regulatory practices are still sufficient to protect the interests of the customers of public utility companies which, again, are likely to be monopoly providers of a vital public service such as electrical power.

2. As I mentioned in my concurrence to an earlier order extending BlackRock, Inc.'s (BlackRock) blanket authorization under section 203 of the Federal Power Act (FPA),² it simply is no longer a

¹ See, e.g., Va. Code Ann. § 56.1 *et seq.*

² *BlackRock, Inc.*, 179 FERC ¶ 61,049 (2022) (Christie, Comm'r, concurring at P 3) (BlackRock

credible assertion that investment managers, like BlackRock, State Street Corporation, and The Vanguard Group, Inc., are always or should be assumed to be merely passive investors. These investment managers are often the three biggest investors in publicly traded companies across the U.S. economy, including the utility industry, and wield significant financial power by virtue of their investments.³ These investment managers may occasionally use that financial power to push various types of policy agendas, agendas that may ultimately conflict with the utility's public service obligations to its customers.⁴ Or, totally different from any policy goal, the threat may come from a private equity investor's attempt to turn a quick profit on a short-term trade by undercutting utility practices that are designed to serve its retail customers over the long term, not the short-term interests of the private equity investor.

3. One focus recently, and rightfully so, has been on "ESG" (environmental, social, and governance-related) corporate initiatives, with huge asset managers pushing policy decisions that should be left to elected legislators. For example, I have pointed out the reliability problems that will result from premature dispatchable generation retirements that may come from these initiatives.⁵ Decisions on the appropriate generation resources mix for a public utility with a state-granted franchise are policy decisions for state policymakers, not huge Wall Street asset managers.

4. But let us be clear—"ESG" investor activity is simply a symptom of a larger, more pernicious threat that has always existed in the utility industry: improper investor influence and control over public utilities. Large investors can and do force utilities to make decisions that are contrary to their public service obligations to their retail customers. This, among other related concerns, is

exactly why Congress enacted a suite of consumer protection statutes, including the FPA almost 100 years ago.

Congress's subsequent revisions to the FPA over the years, such as by the Energy Policy Act of 2005, signal the ongoing importance of consumer protection in the Commission's regulatory responsibilities, including under section 203. Congress may have directed the Commission to streamline its regulations to facilitate greater investments in the utility industry, such as through section 203 blanket authorizations,⁶ but that streamlining does not, and should *never*, come at expense of protecting consumers. Indeed, it is the Commission's task to balance these two competing responsibilities and to continue to revisit and evaluate that balance. So I fully agree that this NOI is timely and compelling and I look forward to moving forward on it.

For these reasons, I respectfully concur.

Mark C. Christie
Commissioner

[FR Doc. 2023-28443 Filed 12-22-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98-1-000]

Records Governing Off-the-Record Communications

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the

Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e) (1) (v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. This filing may be viewed on the Commission's website at <http://www.ferc.gov> using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll free at (866) 208-3676, or for TTY, contact (202) 502-8659.

Docket Nos.	File date	Presenter or requester
Prohibited		
1. CP22-2-000	12-12-2023	FERC Staff ¹
2. CP22-2-000	12-12-2023	FERC Staff ²
3. CP22-2-000	12-13-2023	FERC Staff ³
4. CP22-2-000	12-15-2023	FERC Staff ⁴

Concurrence), available at <https://www.ferc.gov/news-events/news/commissioner-christies-concurrence-blackrocks-authorization-buy-voting-securities>.

³ You can see the extent of these investment managers' holdings through the quarterly reports the Commission receives as part of the requirements associated with section 203(a)(2) blanket authorizations. See, e.g., BlackRock, Quarterly Report, Docket No. EC16-77-002 (filed Nov. 15,

2023) (detailing holdings in several publicly traded holding companies with public utility subsidiaries).

⁴ See BlackRock Concurrence at PP 4-5.

⁵ See, e.g., Testimony of Commissioner Mark C. Christie, *Oversight of FERC: Adhering to a Mission of Affordable and Reliable Energy for America*, United States House of Representatives (June 12, 2023), available at <https://www.ferc.gov/media/testimony-commissioner-mark-c-christie-oversight-ferc-adhering-mission-affordable-and>; Written Testimony of Commissioner Mark Christie Before

the Committee on Energy and Natural Resources, United States Senate (Sept. 27, 2021), available at <https://cms.ferc.gov/media/written-testimony-commissioner-mark-christie-committee-energy-and-natural-resources-united>.

⁶ See, e.g., *Transactions Subject to FPA Section 203*, Order No. 669, 113 FERC ¶ 61,315 (2005), order on reh'g, Order No. 669-A, 115 FERC ¶ 61,097, order on reh'g, Order No. 669-B, 116 FERC ¶ 61,076 (2006).

Docket Nos.	File date	Presenter or requester
Exempt None.		

¹ Emailed comments from Nathalie Bouville and 15 other individuals.

² Emailed comments from Paul Snodgrass and 13 other individuals.

³ Emailed comments from Alan Unell and 22 other individuals.

⁴ Emailed comments from Harry Moody.

Dated: December 19, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023-28434 Filed 12-22-23; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC24-27-000.

Applicants: Evergy Missouri West, Inc., Dogwood Energy LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Evergy Missouri West, Inc.

Filed Date: 12/18/23.

Accession Number: 20231218-5274.

Comment Date: 5 p.m. ET 1/8/24.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG24-59-000.

Applicants: Yellow Pine Solar II, LLC.

Description: Yellow Pine Solar II, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 12/19/23.

Accession Number: 20231219-5146.

Comment Date: 5 p.m. ET 1/9/24.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER19-1217-005.

Applicants: Montana-Dakota Utilities Co.

Description: Triennial Market Power Analysis for Central Region of Montana-Dakota Utilities Co.

Filed Date: 12/15/23.

Accession Number: 20231215-5329.

Comment Date: 5 p.m. ET 2/13/24.

Docket Numbers: ER22-2185-003.

Applicants: Black Hills Colorado Electric, LLC.

Description: Compliance filing: Compliance Filing of Tariff Sheets to Implement Formula Rate Settlement to be effective 9/1/2022.

Filed Date: 12/18/23.

Accession Number: 20231218-5254.

Comment Date: 5 p.m. ET 1/8/24.

Docket Numbers: ER24-226-001.

Applicants: Evergy Missouri West, Inc., Evergy Metro, Inc., Southwest Power Pool, Inc.

Description: Tariff Amendment: Southwest Power Pool, Inc. submits tariff filing per 35.17(b): Amended Filing—Revisions to the Formula Rate of Evergy Companies to be effective 12/27/2023.

Filed Date: 12/18/23.

Accession Number: 20231218-5249.

Comment Date: 5 p.m. ET 1/8/24.

Docket Numbers: ER24-678-001.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Amendment of Cancellation of WMPA, SA No. 6228; AF2-057 in Docket ER24-678-000 to be effective 2/14/2024.

Filed Date: 12/18/23.

Accession Number: 20231218-5261.

Comment Date: 5 p.m. ET 1/8/24.

Docket Numbers: ER24-697-000.

Applicants: Westlands Solar Blue (OZ) Owner, LLC.

Description: Baseline eTariff Filing: Solar Blue Application for Market-Based Rate Authorization to be effective 12/19/2023.

Filed Date: 12/18/23.

Accession Number: 20231218-5272.

Comment Date: 5 p.m. ET 1/8/24.

Docket Numbers: ER24-698-000.

Applicants: Castanea Project, LLC.

Description: Baseline eTariff Filing: Castanea Application for Market-Based Rate Authorization to be effective 12/19/2023.

Filed Date: 12/19/23.

Accession Number: 20231219-5002.

Comment Date: 5 p.m. ET 1/9/24.

Docket Numbers: ER24-699-000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 4200 NextEra Energy Resources Surplus Interconnection GIA to be effective 2/17/2024.

Filed Date: 12/19/23.

Accession Number: 20231219-5004.

Comment Date: 5 p.m. ET 1/9/24.

Docket Numbers: ER24-700-000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 4201 Wildcat Ranch Energy Storage Surplus

Interconnection GIA to be effective 2/17/2024.

Filed Date: 12/19/23.

Accession Number: 20231219-5009.

Comment Date: 5 p.m. ET 1/9/24.

Docket Numbers: ER24-701-000.

Applicants: New York Independent System Operator, Inc.

Description: § 205(d) Rate Filing: NYISO 205: Proposed ICAP Demand Curve Enhancements re: Seasonal Reference Points to be effective 2/20/2024.

Filed Date: 12/19/23.

Accession Number: 20231219-5063.

Comment Date: 5 p.m. ET 1/9/24.

Docket Numbers: ER24-702-000.

Applicants: Duke Energy Indiana, LLC.

Description: § 205(d) Rate Filing: DEI-Blocke RS No. 283 Facilities Agmt to be effective 2/18/2024.

Filed Date: 12/19/23.

Accession Number: 20231219-5102.

Comment Date: 5 p.m. ET 1/9/24.

Docket Numbers: ER24-703-000.

Applicants: Virginia Electric and Power Company, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Virginia Electric and Power Company submits tariff filing per 35.13(a)(2)(iii): VEPCO submits One WDSA, SA No. 7142 to be effective 9/27/2023.

Filed Date: 12/19/23.

Accession Number: 20231219-5109.

Comment Date: 5 p.m. ET 1/9/24.

Docket Numbers: ER24-704-000.

Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.

Description: Tariff Amendment: Alabama Power Company submits tariff filing per 35.15: Putney Solar (Solar & Battery) LGIA Termination Filing to be effective 12/19/2023.

Filed Date: 12/19/23.

Accession Number: 20231219-5125.

Comment Date: 5 p.m. ET 1/9/24.

Docket Numbers: ER24-705-000.

Applicants: Bazinga, LLC.

Description: Baseline eTariff Filing: Baseline new to be effective 12/20/2023.

Filed Date: 12/19/23.

Accession Number: 20231219-5193.

Comment Date: 5 p.m. ET 1/9/24.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RD24–2–000.

Applicants: North American Electric Reliability Corporation, Western Electricity Coordinating Council.

Description: Joint Petition of the North American Electric Reliability Corporation et. al. for Approval of Proposed Regional Reliability Standard VAR–501–WECC–4.

Filed Date: 12/15/23.

Accession Number: 20231215–5332.

Comment Date: 5 p.m. ET 1/18/24.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number. Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding. eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659. The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

Dated: December 19, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28442 Filed 12–22–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER24–673–000]

PGR 2022 Lessee 5, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of PGR 2022 Lessee 5, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 8, 2024.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the

last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at FERCOnlineSupport@ferc.gov or call toll-free, (866) 208–3676 or TTY, (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or OPP@ferc.gov.

Dated: December 19, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–28439 Filed 12–22–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2023–0474; FRL–11384–03–OCSPP]

Endocrine Disruptor Screening Program (EDSP); Near-Term Strategies for Implementation; Notice of Availability and Request for Comment; Extension of Comment Period; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; correction.

SUMMARY: In the **Federal Register** of December 14, 2023, EPA announced the extension of the comment period established in a document that published in the **Federal Register** of October 27, 2023 that announced the availability of and solicited comment on near-term strategies to help the Agency meet its obligations and commitments under the Federal Food, Drug, and Cosmetic Act (FFDCA), which requires, that EPA screen for and protect against endocrine disrupting effects in humans. This document corrects the extended comment period date that published in the **Federal Register** of December 14,

2023, which inadvertently included the incorrect year.

DATES: December 26, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA-HQ-OPP-2023-0474, through the Federal eRulemaking Portal at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

Catherine Aubee, Endocrine Disruptor Screening Program (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; main telephone number: (202) 566-1030; email address: pesticidequestions@epa.gov.

SUPPLEMENTARY INFORMATION: To give stakeholders additional time to review materials and prepare comments, EPA extended the comment period established in the **Federal Register** document of October 27, 2023, at 88 FR 73841 (FRL-11384-01-OCSPP) for 60 days, from December 26, 2023. However, the extended comment period date established in the **Federal Register** document of December 14, 2023, at 88 FR 86644 (FRL-11384-02-OCSPP), was incorrectly stated as February 26, 2023. This notice corrects the comment period date to February 26, 2024. More information on the action can be found in the **Federal Register** of October 27, 2023.

Correction

In the **Federal Register** of December 14, 2023, in FR Doc. 2023-27405, on page 86644, in the first column, correct the **DATES** caption to read:

DATES: The comment period for the document published in the **Federal Register** of October 27, 2023, at 88 FR 73841 (FRL-11384-01-OCSPP) is extended. Comments must be received on or before February 26, 2024.

Authority: 7 U.S.C. 136 *et seq.* and 21 U.S.C. 346a.

Dated: December 20, 2023.

Angela Hofmann,

Director, Regulatory Support Branch, Mission Support Division, Office of Program Support, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2023-28510 Filed 12-22-23; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR-2023-0292; FRL-11010-01-OAR]

California State Motor Vehicle Pollution Control Standards; Advanced Clean Cars II Regulations; Request for Waiver of Preemption; Opportunity for Public Hearing and Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of opportunity for public hearing and comment.

SUMMARY: The California Air Resources Board (CARB) has notified the Environmental Protection Agency (EPA) that it has adopted regulations applicable to new 2026 and subsequent model year (MY) California on-road light- and medium-duty vehicles, hereinafter the Advanced Clean Cars II (ACC II) regulations. The ACC II regulations include two sets of requirements, one for conventional vehicles powered by internal combustion engines and one for zero-emission vehicles (with plug-in hybrid electric vehicles subject to both sets). By letter dated May 22, 2023, CARB submitted a request that EPA grant a waiver of preemption under section 209(b) of the Clean Air Act (CAA) for the ACC II regulations. This notice announces that EPA has scheduled a public hearing concerning California's request and that EPA is accepting written comment on the request.

DATES:

Comments. Comments must be received on or before the date of February 27, 2024.

Public Hearing: EPA will hold a virtual public hearing on January 10, 2024. If necessary, an additional session may be held virtually on January 11, 2024, to accommodate the number of testifiers that sign-up to testify. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information regarding the public hearing and registration. Additional information regarding the virtual public hearing and this action can be found at: <https://www.epa.gov/regulations-emissions-vehicles-and-engines/virtual-public-hearing-californias-advanced-clean-car>.

ADDRESSES:

Comments. You may submit your comments, identified by Docket ID No. EPA-HQ-OAR-2023-0292, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov> (our preferred method). Follow the online instructions for submitting comments.

- *Email:* a-and-r-Docket@epa.gov. Include Docket ID No. EPA-HQ-OAR-2023-0292 in the subject line of the message.

- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Air Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.

- *Hand Delivery or Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this action. Comments received may be posted without change to <https://www.regulations.gov>, including any personal information provided. For the full EPA public comment policy, information about confidential business information (CBI) or multimedia submissions, and general guidance on making effective comments, please visit <http://www.epa.gov/dockets/commenting-epa-dockets>.

Public hearing. The virtual public hearing will be held on January 10, 2024. If necessary, an additional session may be held on January 11, 2024, to accommodate the number of testifiers that sign-up to testify. The hearing will begin each day at 10:00 a.m. Eastern Time (ET) and end when all parties who wish to speak have had an opportunity to do so. All hearing attendees (including even those who do not intend to provide testimony) should register for the public hearing by January 4, 2024. Information on how to register can be found at <https://www.epa.gov/regulations-emissions-vehicles-and-engines/virtual-public-hearing-californias-advanced-clean-car>. Additional information regarding the hearing appears below under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT:

David Dickinson, Office of Transportation and Air Quality, (6405)), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460, Email: Dickinson.David@epa.gov. Telephone: (202) 343-9256.

SUPPLEMENTARY INFORMATION:

I. CARB's Waiver Request

CARB's May 22, 2023, letter to the EPA Administrator notified EPA that CARB had finalized its ACC II regulations. The ACC II regulations, adopted by the Board on August 25, 2022 (approved by California's Office of Administrative Law (OAL) and

becoming effective November 30, 2022) contain a series of requirements under California's low-emission vehicle (LEV) IV regulation and a series of requirements regarding its zero-emission vehicle (ZEV) program.¹ The LEV IV requirements include, for example, applying exhaust and evaporative emission fleet-average standards solely to vehicles powered by internal combustion engines and excluding ZEVs from the fleet calculation. The LEV IV requirements reduce the maximum allowed exhaust and evaporative emission rates from vehicles under the existing fleet-average standard and aim to reduce cold-start emissions by applying the emissions standards to a broader range of in-use driving conditions.² The ZEV requirements of ACC II include, for example, a requirement for vehicle manufacturers to sell increasing percentages of ZEVs beginning with the 2026 MY.³ Manufacturers are able to meet up to 20 percent of their sales requirements through the use of plug-in hybrid vehicles (PHEVs) that meet specified requirements.

CARB requests that EPA grant a new waiver for the ACC II regulatory program. CARB's request and waiver analysis includes "a description of California's rulemaking actions, a review of the criteria governing EPA's evaluation of California's request for waiver action, [CARB's] analysis and rationale supporting [its] request, and supporting documents."⁴ CARB's waiver analysis, set forth in its ACC II Waiver Support Document, addresses how the ACC II regulations and CARB's waiver request meet each of the three waiver criteria in section 209(b)(1) of the CAA.⁵ For example, CARB explains how the ACC II regulations will not cause California motor vehicle emission standards, in the aggregate, to be less protective of public health and welfare

than applicable federal standards and that no basis exists for the EPA Administrator to find that CARB's determination is arbitrary and capricious under section 209(b)(1)(A) of the CAA.⁶ CARB also explains how it continues to demonstrate California's need for a separate motor vehicle emission program, including the ACC II regulations contained in its waiver request, under section 209(b)(1)(B) of the CAA.⁷ Finally, CARB explains how the ACC II regulations in its waiver request meet the requirement in section 209(b)(1)(C), which requires California's regulations to be consistent with section 202(a) of the CAA.⁸

II. Scope of Preemption and Criteria for a Waiver Under the Clean Air Act

Section 209(a) of the CAA provides:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No state shall require certification, inspection or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

Section 209(b) of the Act requires the Administrator, after notice and opportunity for public hearing, to waive application of the prohibitions of section 209(a) for any state that has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the state determines that the state standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. California is the only state that is qualified to seek and receive a waiver under section 209(b).⁹ Section 209(b)(1) requires the Administrator to grant a waiver unless he finds that (A) the determination of the state is arbitrary and capricious, (B) the state does not need the state standards to meet compelling and extraordinary conditions, or (C) the state standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act. Previous

decisions granting waivers of Federal preemption for motor vehicles have stated that State standards are inconsistent with section 202(a) if there is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time period or if the Federal and State test procedures impose inconsistent certification procedures.¹⁰

III. Request for Comment

When EPA receives new waiver requests from CARB, EPA traditionally publishes a notice of opportunity for public hearing and comment and then, after the comment period has closed, publishes a notice of its decision in the **Federal Register**. In this action, EPA invites comment on the following three criteria: whether (a) California's determination that its motor vehicle emission standards are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards is arbitrary and capricious, (b) California needs such standards to meet compelling and extraordinary conditions, and (c) California's standards and accompanying enforcement procedures are consistent with section 202(a) of the CAA.

With regard to section 209(b)(1)(B), EPA must grant a waiver request unless the Agency finds that California "does not need such State standards to meet compelling and extraordinary conditions." EPA has interpreted the phrase "need[s] such State standards to meet compelling and extraordinary conditions" to mean that California needs a separate motor vehicle program as a whole in order to address environmental problems caused by conditions specific to California and/or effects unique to California (the "traditional" interpretation).¹¹ EPA intends to use this traditional interpretation in evaluating California's

¹ The ACC II regulatory text can be found in Attachment 7 to CARB's May 22, 2023, ACC II waiver request (the ACC II Waiver Support Document) found at EPA-HQ-OAR-2023-0292. The specific regulatory provisions under EPA's waiver consideration can be found at footnote 36 to the ACC II Waiver Support Document.

² Cold starts occur when the vehicle engine is started after the vehicle has been shut-off for a period of time.

³ The ZEV sales percentages for each vehicle manufacturer are based on their respective fleet sales in a given model year.

⁴ Letter from Steven S. Cliff, CARB, dated May 22, 2023, EPA-HQ-OAR-2023-0292. The ACC II Waiver Support Document, attached to the letter from Mr. Cliff, are both available at EPA-HQ-OAR-2023-0292.

⁵ The ACC II Waiver Support Document provides a summary of the adopted regulations, a brief history of similar regulations, and an analysis of the adopted regulation under the waiver criteria in section 209(b)(1) of the CAA.

⁶ ACC II Waiver Support Document at 28–35.

⁷ *Id.* at 35–44.

⁸ *Id.* at 44–57.

⁹ "The language of the statute and its legislative history indicate that California's regulations, and California's determination that they comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them." *Motor and Equipment Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1121 (D.C. Cir. 1979).

¹⁰ To be consistent, the California certification procedures need not be identical to the Federal certification procedures. California procedures would be inconsistent, however, if manufacturers would be unable to meet the State and the Federal requirements with the same test vehicle in the course of the same test. *See, e.g.*, 43 FR 32182 (July 25, 1978).

¹¹ *See, e.g.*, 81 FR 78149, 78153 (November 7, 2016); 81 FR 95982 95985–86 (December 29, 2016). EPA recently found and confirmed, in the Agency's reconsideration of a previous withdrawal of a waiver of preemption for CARB's Advanced Clean Car program, that the traditional interpretation of section 209(b)(1)(B) was appropriate and continues to be a better interpretation. 87 FR 14332, 14367 (March 14, 2022). CARB's May 22, 2023, waiver request addresses both the traditional and an alternative interpretation wherein the need for the specific standards in the waiver request would be evaluated.

need for the ACC II regulations under section 209(b)(1)(B).

With regard to section 209(b)(1)(C), EPA must grant a waiver request unless the Agency finds that California's standards are not consistent with section 202(a). EPA has previously stated that consistency with section 202(a) requires that California's standards must be technologically feasible within the lead time provided, giving due consideration to costs, and that California and applicable Federal test procedures be consistent.¹²

EPA also maintains a web page that contains general information on its review of California waiver and authorization requests. Included on that page are links to prior waiver and authorization **Federal Register** notices. The page can be accessed at <https://www.epa.gov/state-and-local-transportation/vehicle-emissions-california-waivers-and-authorizations>.

IV. Procedures for Public Participation

The virtual public hearing will be held on January 10, 2024. If necessary, an additional session may be held on January 11, 2024, to accommodate the number of testifiers that sign-up to testify. The hearing will begin at 10:00 a.m. Eastern Time (ET). All hearing attendees (including those who do not intend to provide testimony and merely listen) should register for the public hearing at: <https://www.epa.gov/regulations-emissions-vehicles-and-engines/virtual-public-hearing-californias-advanced-clean-car>. Those seeking to register should do so by January 4, 2024.

If you require the services of a translator or special accommodations such as American Sign Language, please pre-register for the hearing and describe your needs by January 4, 2024. EPA may not be able to arrange accommodations without advance notice.

Please note that any updates made to any aspect of the hearing will be posted online at: <https://www.epa.gov/regulations-emissions-vehicles-and-engines/virtual-public-hearing-californias-advanced-clean-car>.

¹² See, e.g., 81 FR 78149, 78153–54 (“EPA has previously stated that the determination is limited to whether those opposed to the waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with the federal test procedure. Infeasibility would be shown here by demonstrating that there is inadequate lead time to permit the development of technology necessary to meet the 2013 HD OBD New or Stricter Requirements that are subject to the waiver request, giving appropriate consideration to the cost of compliance within that time.”) (citing 38 FR 30136 (November 1, 1973) and 40 FR 30311 (July 18, 1975)); 81 FR 95982, 95986 (December 29, 2016); 70 FR 50322 (August 26, 2005).

californias-advanced-clean-car. While EPA expects the hearing to go forward as set forth above, please monitor the website or contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to determine if there are any updates. EPA does not intend to publish a document in the **Federal Register** announcing updates.

Each commenter will have 3 minutes to provide oral testimony. EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. EPA recommends submitting the text of your oral comments as written comments to the docket for this action. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing.

The Agency will make a verbatim record of the proceedings at the hearing that will be placed in the docket. EPA will keep the record open until February 27, 2024. After expiration of the comment period, the Administrator will render a decision on CARB's request based on the record of the public hearing, relevant written submissions, and other information that he deems pertinent.

Sarah Dunham,

Director, Office of Transportation and Air Quality, Office of Air and Radiation.

[FR Doc. 2023–28301 Filed 12–22–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2023–0613; FRL–11608–01–OCSPP]

Formaldehyde; Draft Risk Evaluation Peer Review by the Science Advisory Committee on Chemicals (SACC); Request for Nominations of ad hoc Expert Reviewers

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is seeking public nominations of scientific and technical experts that EPA can consider for service as *ad hoc* reviewers assisting the Science Advisory Committee on Chemicals (SACC) with the peer review of the Agency's evaluation of the risks from formaldehyde being conducted to inform risk management decisions under the Toxic Substances Control Act (TSCA) and the Federal Insecticide,

Fungicide, and Rodenticide Act (FIFRA) programs. EPA expects to ask the SACC to consider and review the Office of Pollution, Prevention, and Toxics (OPPT) and the Office of Pesticide Programs (OPP) joint hazard assessments for human and ecological health; and the OPPT exposure and risk characterizations. This SACC peer review is in addition to prior external peer reviews by the National Academies of Science, Engineering, and Medicine (NASEM), the EPA's Human Studies Review Board (HSRB) and the SACC. The Agency is leveraging these peer reviews to support further development of the risk evaluation of formaldehyde. To facilitate nominations, this document provides information about the SACC, the intended topic for the planned peer review, the expertise sought for this peer review, instructions for submitting nominations to EPA, and the Agency's plan for selecting the *ad hoc* reviewers for this peer review.

DATES: Submit your nominations on or before January 25, 2024.

ADDRESSES: Submit your nominations to the Designated Federal Official (DFO) listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: The DFO is Tamue Gibson, MS, Mission Support Division (7602M), Office of Program Support, Office of Chemical Safety and Pollution Prevention, Environmental Protection Agency; telephone number: (202) 564–7642 or call the SACC main office at (202) 564–8450; email address: gibson.tamue@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. What action is the Agency taking?

The Agency is seeking public nominations of scientific and technical experts that EPA can consider for service as *ad hoc* reviewers assisting the SACC with the peer review of the Agency's evaluation of the risks from formaldehyde being conducted to inform risk management decisions under TSCA and FIFRA programs. EPA expects to ask the SACC to consider and review the OPPT and OPP joint hazard assessments for human and ecological health; and the OPPT exposure and risk characterizations. This SACC peer review is in addition to prior external peer reviews by the National Academies of Science, Engineering, and Medicine (NASEM), the EPA's Human Studies Review Board (HSRB) and the SACC. The Agency is leveraging these peer reviews to support further development of the risk evaluation of formaldehyde.

To facilitate nominations, this document provides information about the SACC, the intended topic for the planned peer review, the expertise sought for this peer review, instructions for submitting nominations to EPA, and the Agency's plan for selecting the *ad hoc* reviewers for this peer review.

In addition, this document provides advance notice that EPA's plans to publish in the **Federal Register** in early 2024 separate documents to: (1) Announce the availability of and solicit public comment on the candidate list of *ad hoc* expert reviewers for this peer review; (2) Announce a 4-day public meeting of the SACC anticipated to be scheduled for May 2024; and (3) Announce the availability of and solicit public comment on the draft documents and related materials submitted to the SACC for peer review. In these future notices, EPA will also provide instructions for submitting written comments and for registering to provide oral comments at the SACC meeting.

B. What is the Agency's authority for taking this action?

EPA established the SACC in 2016 in accordance with TSCA section 26(o), 15 U.S.C. 2625(o), to provide independent advice and expert consultation with respect to the scientific and technical aspects of issues relating to the implementation of TSCA. The SACC operates in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. 10, and supports activities under TSCA, 15 U.S.C. 2601 *et seq.*, the Pollution Prevention Act (PPA), 42 U.S.C. 13101 *et seq.*, and other applicable statutes.

C. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of interest to those involved in the manufacture, processing, distribution, and disposal of chemical substances and mixtures, and/or those interested in the assessment of risks involving chemical substances and mixtures regulated under TSCA. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

D. What should I consider as I submit my nominations to EPA?

Do not submit CBI or other sensitive information to EPA through <https://www.regulations.gov> or email. If your nomination contains any information that you consider to be CBI or otherwise protected, please contact the DFO listed under **FOR FURTHER INFORMATION**

CONTACT to obtain special instructions before submitting that information.

II. Background

A. What is the purpose of the SACC?

The SACC provides independent scientific advice and recommendations to the EPA on the scientific and technical aspects of risk assessments, methodologies, and pollution prevention measures and approaches for chemicals regulated under TSCA. The SACC is comprised of experts in toxicology; environmental risk assessment; exposure assessment; and related sciences (*e.g.*, synthetic biology, pharmacology, biotechnology, nanotechnology, biochemistry, biostatistics, physiologically based pharmacokinetic (PBPK) modeling, computational toxicology, epidemiology, environmental fate, environmental engineering and sustainability). The SACC currently consists of 18 members. When needed, the committee will be assisted by *ad hoc* reviewers with specific expertise in the topics under consideration.

B. Why is EPA conducting the risk evaluation?

TSCA requires EPA to conduct risk evaluations on prioritized chemical substances and identifies the minimum components the Agency must include in all chemical substance risk evaluations. The purpose of conducting risk evaluations is to determine whether a chemical substance presents an unreasonable risk to human health or the environment under the chemical's conditions of use (COUs). These evaluations include assessing risks to relevant potentially exposed or susceptible subpopulations. As part of this process, EPA integrates hazard and exposure assessments using the best available science and reasonably available information to assure decisions are based on the weight of the scientific evidence (WoSE). For more information about the three stages of EPA's process for ensuring the safety of existing chemicals (*i.e.*, prioritization, risk evaluation, and risk management), go to <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/how-epa-evaluates-safety-existing-chemicals>.

C. What is the focus of this SACC peer review?

EPA is planning this SACC peer review of the Agency's evaluation of the risks from formaldehyde being conducted to inform risk management decisions under TSCA and FIFRA programs. EPA expects to ask the SACC

to consider and review the OPPT and OPP joint hazard assessments for human and ecological health; and the OPPT exposure and risk characterizations. This SACC peer review is in addition to prior external peer reviews by the NASEM, the EPA's HSRB and the SACC. The Agency is leveraging these peer reviews to support further development of the risk evaluation of formaldehyde. The TSCA risk evaluation of formaldehyde is expected to comprise several modules (*i.e.*, human health hazard, ecological hazard, release and exposure assessments) and two risk assessment documents—the ecological risk assessment and the human health risk assessment. As part of the TSCA risk evaluation for formaldehyde, OPPT is assessing formaldehyde COUs (*e.g.*, composite wood products, plastics, rubber, toys, and various adhesives and sealants).

Recommendations from the formaldehyde SACC review will be considered in the development of the TSCA and FIFRA risk evaluations and may inform other EPA efforts related to the assessment and regulation of formaldehyde. The Agency will be seeking SACC review of its data analyses and methodologies relevant to human health hazard and exposure analyses that have not been previously peer reviewed.

With respect to the formaldehyde human health hazard identification and dose-response analysis for acute inhalation and dermal routes, EPA is relying on peer review from three HSRB meetings: October 2022, May 2023, and October 2023. The HSRB reviewed the WoSE for EPA's acute inhalation point of departure (POD). Because the Agency's updated hazard characterization takes into consideration the HSRB's recommendations, EPA will not be soliciting review of the acute inhalation POD or WoSE. The HSRB reviewed relevant dermal studies, but not the WoSE for establishing the dermal POD. As such, EPA will seek review of the dermal POD and WoSE.

For chronic inhalation exposure and the cancer inhalation unit risk (IUR), the Agency intends to defer to the draft 2022 Integrated Risk Information System Toxicological Review of Formaldehyde and associated 2023 review by the NASEM. In part due to overlapping discussion of specific studies under review by NASEM and the HSRB, the latter recommended in its July 2023 report that EPA conduct a more coordinated peer review approach with other entities (*e.g.*, NASEM, HSRB, SACC) regarding advice in establishing PODs for formaldehyde. In response to this recommendation, EPA intends to

solicit comment on the chronic inhalation reference concentration (RfC).

The Agency intends to seek review of the oral POD and WoSE including the Agency's assessment of the strengths and uncertainties in the underlying data and the utility of the data for risk assessment purposes. The Agency anticipates several areas of peer review related to human and environmental exposure to formaldehyde. EPA intends to request SACC review of how the environmental fate and monitoring data are used to support the qualitative assessment of formaldehyde exposure via water and land pathways to human and ecological populations. The Agency intends to seek SACC review related to EPA's assessment of formaldehyde air exposure via inhalation to terrestrial species based on fate, exposure modeling, monitoring, and toxicity data.

EPA intends to request SACC review on the Agency's interpretation of the available occupational monitoring data utilized in the formaldehyde occupational exposure assessment. The request for SACC review will focus on unique attributes considered and relied upon in the exposure assessment, including use of short-term exposure estimates, application of data relevancy, and evidence integration strategies.

EPA intends to seek review on its qualitative assessment of consumer exposure via the oral route. The Agency based this assessment on available data for TSCA COUs, indicating that formaldehyde is not expected to be released from consumer products or, if released, will not be available for uptake via an oral exposure route (e.g., mouthing).

EPA intends to seek SACC review of the approach used to assess indoor air exposures, which considers both modeled and monitored formaldehyde concentrations.

EPA intends to seek review on the interpretation and assessment of ambient air monitoring data and its use in the risk evaluation. However, the Agency is not intending to request review on the modeling methods used to estimate formaldehyde exposure in ambient (outdoor) air as the methods used have been previously peer reviewed. SACC already reviewed both the Draft TSCA Screening Level Approach for Assessing Ambient Air and Water Exposures to Fenceline Communities, Version 1.0 and the 2023 Draft Supplement to the 1,4-Dioxane Risk Evaluation. Furthermore, feedback from these reviews have been incorporated into the draft formaldehyde risk assessment.

EPA intends to request review of the assessment of aggregate exposure to formaldehyde.

III. Nominations of ad hoc Reviewers

A. Why is EPA seeking nominations for ad hoc reviewers?

As part of a broader process for developing a pool of candidates for SACC peer reviews, EPA is asking the public and stakeholder communities for nominations of scientific and technical experts that EPA can consider as prospective candidates for service as *ad hoc* reviewers assisting the SACC with the peer reviews. Any interested person or organization may nominate qualified individuals for consideration as prospective candidates for this review by following the instructions provided in this document. Individuals may also self-nominate.

Those who are selected from the pool of prospective candidates will be invited to attend the public meeting and to participate in the discussion of key issues and assumptions at the meeting. In addition, they will be asked to review and to help finalize the meeting minutes.

B. What expertise is sought for this peer review?

Individuals nominated for this SACC peer review, should have expertise in one or more of the following areas: Indoor air quality; ambient air quality; exposure science with experience in air modeling and monitoring (for review of air exposure analysis); risk assessment (experience in chemicals and environmental fate of chemicals with background in risk assessment, aggregate exposure and risk assessment, industrial hygiene, ecological/terrestrial exposure); inhalation toxicology; dermal sensitization; statistics (experience in air quality data for review of interpretation of available monitoring data, experience in interpretation of environmental release data (e.g., Toxic Release Inventory (TRI) and National Emissions Inventory (NEI))); epidemiology; and toxicology with expertise in interpreting gastrointestinal toxicity data associated with oral chemical exposure. Nominees should be scientists who have sufficient professional qualifications, including training and experience, to be capable of providing expert comments on the scientific issues for this review.

C. How do I make a nomination?

By the deadline indicated under **DATES**, submit your nomination to the DFO listed under **FOR FURTHER INFORMATION CONTACT**. Each nomination

should include the following information: Contact information for the person making the nomination; name, affiliation, and contact information for the nominee; and the disciplinary and specific areas of expertise of the nominee.

D. Will ad hoc reviewers be subjected to an ethics review?

SACC members and *ad hoc* reviewers are subject to the provisions of the Standards of Ethical Conduct for Employees of the Executive Branch at 5 CFR part 2635, conflict of interest statutes in Title 18 of the United States Code and related regulations. In anticipation of this requirement, prospective candidates for service on the SACC will be asked to submit confidential financial information which shall fully disclose, among other financial interests, the candidate's employment, stocks and bonds, and where applicable, sources of research support. EPA will evaluate the candidates' financial disclosure forms to assess whether there are financial conflicts of interest, appearance of a loss of impartiality, or any prior involvement with the development of the documents under consideration (including previous scientific peer review) before the candidate is considered further for service on the SACC.

E. How will EPA select the ad hoc reviewers?

The selection of scientists to serve as *ad hoc* reviewers for the SACC is based on the function of the Committee and the expertise needed to address the Agency's charge to the Committee. No interested scientists shall be ineligible to serve by reason of their membership on any other advisory committee to a federal department or agency or their employment by a federal department or agency, except EPA. Other factors considered during the selection process include availability of the prospective candidate to fully participate in the Committee's reviews, absence of any conflicts of interest or appearance of loss of impartiality, independence with respect to the matters under review, and lack of bias. Although financial conflicts of interest, the appearance of loss of impartiality, lack of independence, and bias may result in non-selection, the absence of such concerns does not assure that a candidate will be selected to serve on the SACC.

Numerous qualified candidates are often identified for SACC reviews. Therefore, selection decisions involve carefully weighing a number of factors including the candidates' areas of expertise and professional

qualifications, and achieving an overall balance of different scientific perspectives across reviewers. The Agency will consider all nominations of prospective candidates for service as *ad hoc* reviewers for the SACC that are received on or before the date listed in the **DATES** section of this document.

IV. Advance Notice of Other Planned Activities

As indicated previously, EPA's plans to publish separate documents in the **Federal Register** in early 2024 to announce the planned activities related to this peer review that are briefly discussed in this unit.

A. Planned Public Review of a Candidate List of *ad hoc* Reviewers Being Considered

Although the final selection of *ad hoc* reviewers is a discretionary function of the Agency, EPA plans to make available for public comment a candidate list of *ad hoc* expert reviewers for this peer review in early 2024. The "List of Candidates" provides the names and biographical sketches of all interested and available nominees identified from respondents to this solicitation, other nominations received, and any additional candidates identified by EPA staff.

B. Planned Public Meeting

EPA plans to announce a 4-day public meeting of the SACC that is anticipated to be scheduled for May 2024. At that time, EPA will provide logistical information and instructions for registering to attend and/or provide oral comments at the SACC meeting.

C. Planned Public Review of Materials Submitted for Peer Review

EPA plans to announce the availability of and solicit public comment on the draft documents and related materials submitted to the SACC for peer review. At that time, EPA will provide instructions for accessing the materials provided to the SACC and will provide instructions for submitting written comments and instructions for registering to provide oral comments at the SACC meeting. These materials will also be available in Docket ID No. EPA-HQ-OPPT-2022-0613 at <https://www.regulations.gov> and through the SACC website at <https://www.epa.gov/tsca-peer-review>. As additional background materials become available and are provided to the SACC, EPA will include those additional background documents (e.g., SACC members and consultants participating in this meeting and the meeting agenda) in the docket and through the SACC website.

D. How can I stay informed about SACC activities?

You may subscribe to the following listserv for alerts regarding this and other SACC-related activities: https://public.govdelivery.com/accounts/USAEPAPPT/subscriber/new?topic_id=USAEPAPPT_101.

(Authority: 15 U.S.C. 2625(o); 5 U.S.C 10)

Dated: December 20, 2023.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2023-28430 Filed 12-22-23; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OLEM-2023-0451; FRL-11466-01-OLEM]

Waste Reduction Model (WARM) Version 16: Request for Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: The Environmental Protection Agency (EPA) has released the Waste Reduction Model (WARM) version 16 and its supporting documentation, along with the WARM v16 methodology external peer review report and the WARM v16 data quality assessment report. WARM is a tool that estimates the potential greenhouse gas emissions, energy savings and economic impacts of baseline and alternative waste management practices of materials. This Notice is inviting public comment on WARM v16 and its supporting documentation from a broad range of individuals and organizations. The EPA will consider the public comments received to inform future improvements to WARM.

DATES: Comments must be submitted on or before February 9, 2024.

ADDRESSES:

Written Comments: Submit your written comments, identified by Docket ID No. EPA-HQ-OLEM-2023-0451, through the Federal eRulemaking Portal at <https://www.regulations.gov/>. Follow the online instructions for submitting comments.

Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at: <https://www.epa.gov/dockets>.

Instructions: All submissions received must include the Docket ID No. EPA-HQ-OLEM-2023-0451 for this notice. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT:

Priscilla Halloran, Resource Conservation and Sustainability Division, Office of Resource Conservation and Recovery, Office of Land and Emergency Management, Mail Code 5306T, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: 202-566-0311, or Kimberly Cochran (same address); telephone number: 202-566-0308; email address: orcrWARMquestions@epa.gov. For more information on WARM, please visit <https://epa.gov/warm>.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Response to this request for public comment is voluntary. Submit your comments, identified by Docket ID No. EPA-HQ-OLEM-2023-0451, at <https://www.regulations.gov/> (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The Environmental Protection Agency may publish any comment received to its public docket. Responses to this request for public comment may be submitted by a single party or a team. Responses will only be accepted using Microsoft Word (.docx) or Adobe PDF (.pdf) file formats. The response document should contain the following:

- Two clearly delineated sections: (1) Cover page with company name and contact information; and (2) responses by topic and/or that address specific EPA questions.

- 1-inch margins (top, bottom, and sides).

- Times New Roman and 12-point font.

Comments containing references, studies, research, and other empirical data that are not widely published should include copies or electronic

links to the referenced materials. Do not submit to EPA's docket at <https://www.regulations.gov> any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). Please visit: <https://www.epa.gov/dockets> for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments. No confidential and/or business proprietary information, copyrighted information, or personally identifiable information should be submitted in response to this notice.

Privacy Note: All comments received from members of the public will be available for public viewing on [Regulations.gov](https://www.regulations.gov). In accordance with FAR 15.202(3), responses to this notice are not offers and cannot be accepted by the Federal Government to form a binding contract. Additionally, those submitting responses are solely responsible for all expenses associated with response preparation.

II. General Information

A. What is the purpose of this request for public comment?

The EPA will use the feedback and information received through this public comment process, along with findings of the external peer review and data quality assessment, to inform future improvements to WARM.

The Environmental Protection Agency launched the Waste Reduction Model (WARM) in 1998. WARM has been updated and expanded fifteen times since its launch in 1998. In 2022 and 2023, WARM underwent an external peer review and a data quality assessment as part of the EPA's on-going efforts to ensure WARM's scientific integrity. (Reports are available in the docket EPA-HQ-OLEM-2023-0451 and on the web at <https://epa.gov/warm>.)

The EPA created WARM to provide high-level comparisons of potential greenhouse gas (GHG) emissions reductions, energy savings, and economic impacts (labor hours, wages and taxes when considering different

materials management practices. Materials management practices include—source reduction, recycling, anaerobic digestion, combustion, composting and landfilling.

WARM models 61 materials commonly found in municipal solid waste (MSW) and construction and demolition debris (C&D), including aluminum cans, glass, paper, plastics, organics (including food waste) and building materials.

WARM is a comparative tool rather than a comprehensive measurement tool. WARM was not developed for and, as such, should not be used for final site-specific materials management decisions, when other human health and environmental impacts of the different management methods may need to be considered (such as air pollution, water pollution, noise, etc.). It also should not be used for developing GhG inventories, which need to establish a baseline and measure reductions over time on an annual basis for an entity.

III. Request for Information

The Environmental Protection Agency requests public comment on WARM v16 and its supporting documentation from a broad range of individuals and organizations with an understanding of and interest in tools and models related to life cycle materials management, such as: federal, state, tribal, territorial, and local governments; industry; researchers; academia; non-profit organizations; community groups; individuals and international organizations. EPA is interested in receiving input on the following:

- How can the scientific rigor and adherence to modeling best practices and assumptions in WARM regarding biogenic carbon emissions, carbon storage in forests, soils, and landfills, and utility offsets from combustion be improved?
- How can WARM better align with best practices in climate change modeling and assumptions?
- How can the alignment of data, assumptions, and model components in WARM with real market practices be improved?
- In assessing WARM, how well do the modeled management practices represent the diversity of practices typically used in the United States?
- When evaluating WARM, how accurately does it depict the common secondary use of recycled materials in the United States?
- What recommendations can be made for enhancing the clarity, transparency, relevance, and usability of

WARM and its accompanying documentation?

- Are there any studies or data sources that are relevant to WARM but are currently not integrated, and how could their inclusion be beneficial for future development?

- What are the potential advantages and disadvantages of conducting future WARM model development in a more publicly accessible development environment, such as GitHub, to encourage increased transparency and public involvement?

- What are the potential advantages and disadvantages of the EPA considering the use of readily available data from public sources (such as the Federal LCA Commons) in WARM, especially the use of non-waste management data, to enhance data consistency, accessibility and reliability across federal government life cycle work?

The Environmental Protection Agency will use feedback and information received through this public comment, the external peer review and the data quality assessment to inform future improvements to WARM. Please identify the question(s) you are responding to when submitting your comments.

IV. Disclaimer and Important Note

This request for public comment is issued solely for information, research and planning purposes and does not constitute a Request for Proposals (RFP) or a Request for Applications (RFA). Responding to this notice will not give any advantage to or preclude any organization or individual in any subsequently issued solicitation, RFP, or RFA. Any future development activities related to this activity will be announced separately. This notice does not represent any award commitment on the part of the U.S. Government, nor does it obligate the Government to pay for costs incurred in the preparation and submission of any responses.

Dated: December 13, 2023.

Carolyn Hoskinson,

Director, Office of Resource Conservation and Recovery.

[FR Doc. 2023-28342 Filed 12-22-23; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPPT-2017-0127; FRL-11623-01-OCSPF]

2023 Report; Inventory of Mercury Supply, Use, and Trade in the United States; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is announcing the availability of the 2023 mercury inventory report, which summarizes information on mercury supply, use, and trade in the United States that is required to be reported to EPA by rule directly from mercury manufacturers, importers, and processors. The Toxic Substances Control Act (TSCA) directs the EPA to carry out and publish in the **Federal Register** every three years an inventory of mercury supply, use, and trade in the United States. TSCA defines “mercury” as “elemental mercury” or “a mercury compound.”

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA-HQ-OPPT-2017-0127, is available online at <http://www.regulations.gov>. Additional instructions for visiting the docket, along with more information about dockets generally, is available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Thomas Groeneveld, Existing Chemicals Risk Management Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 566-1188; email address: groeneveld.thomas@epa.gov.

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email address: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:**I. Does this action apply to me?**

This action applies to the public in general and may be of interest to a wide range of stakeholders including members of the public interested in elemental mercury or mercury compounds generally. Other topics of interest include the supply, use, or trade of elemental mercury or mercury compounds, including mercury-added products and manufacturing processes. As such, the Agency has not attempted

to describe all the specific entities that may be interested in this action.

II. What is the Agency's authority for taking this action?

TSCA section 8(b)(10), 15 U.S.C. 2507(b)(10), directs EPA to carry out and publish in the **Federal Register** not later than April 1, 2017, and every three years thereafter, an inventory of mercury supply, use, and trade in the United States. TSCA section 8(b)(10)(A) defines “mercury” as “elemental mercury” or “a mercury compound” (15 U.S.C. 2507(b)(10)(A)). In carrying out the mercury inventory, EPA is to “identify any manufacturing processes or products that intentionally add mercury” (15 U.S.C. 2607(b)(10)(C)(i)) and “recommend actions, including proposed revisions of Federal law or regulations, to achieve further reductions in mercury use” (15 U.S.C. 2607(b)(10)(C)(ii)).

III. What action is the Agency taking?

EPA is publishing the 2023 report of the inventory of mercury supply, use, and trade in the United States (15 U.S.C. 2507(b)(10)(B)). This is the second report in which the supply, use, and trade of mercury is presented based on data collected by EPA under the mercury reporting requirements under TSCA that are codified in 40 CFR part 713. Persons subject to the reporting requirements in 40 CFR part 713 submitted information directly to EPA via the Mercury Electronic Reporting (MER) application, which is accessed through the Agency's Central Data Exchange (CDX). For reporting activities that occurred in the calendar year 2021, the deadline for reporting mercury information to EPA was July 1, 2022, and the inventory collection, reporting, and publication cycle will continue every three years thereafter.

IV. How can I access this report?

The 2023 inventory report, and the previously published report in 2020, may be found in the docket for this action and on the EPA mercury website at <https://www.epa.gov/mercury>.

Authority: 15 U.S.C. 2607(b)(10)(B).

Dated: December 20, 2023.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2023-28376 Filed 12-22-23; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPPT-2023-0312; FRL 11015-01-OCSPF]

4,4'-Methylene bis(2-chloroaniline); Request Under the Toxic Substances Control Act (TSCA) for Records and Reports of Significant Adverse Reactions to Health or the Environment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Through this notice, the Environmental Protection Agency (EPA) is requiring manufacturers (including importers) and processors of the chemical substance 4,4'-methylene bis(2-chloroaniline) to submit the records and reports of allegations that this chemical substance causes significant adverse reactions to health or the environment that they are required to maintain and submit to EPA when requested under the Toxic Substances Control Act (TSCA). Information submitted to the Agency in response to this notice will help inform future EPA activities regarding this chemical, including aiding EPA activities related to this chemical substance having been identified as a candidate for designation as a High-Priority Substance for TSCA risk evaluation.

DATES: Records must be received by EPA on or before February 26, 2024.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA HQ-OPPT-2023-0312, is available online at <https://www.regulations.gov> or in person at the Office of Pollution Prevention and Toxics Docket (OPPT Docket) in the Environmental Protection Agency Docket Center (EPA/DC). Additional instructions on visiting the docket, along with more information about dockets generally, are available at <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

Brian Barone, Data Gathering and Analysis Division (7406M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 566-0233; email address: barone.brian@epa.gov.

SUPPLEMENTARY INFORMATION:**I. Executive Summary****A. What action is the Agency taking?**

EPA is requiring submission of TSCA section 8(c) records of allegations of significant adverse reactions to health or

the environment for the listed chemical. Regulations specifying TSCA section 8(c) recordkeeping and reporting requirements are codified at 40 CFR part 717. Pursuant to TSCA section 8(c) and 40 CFR 717.17(b), each person who is required to maintain records under TSCA section 8(c) and implementing regulations at 40 CFR part 717 shall submit copies of such records to EPA upon request. EPA is issuing this TSCA section 8(c) action so that the health and environmental risks from exposure to this chemical substance can be evaluated. The submitted information is expected to be used to corroborate suspected adverse health or environmental effects of the chemical under review and to help identify trends of adverse effects across the industry that may not be apparent to any one chemical company.

EPA has initiated the prioritization process for this chemical substance as a candidate for designation as a High-Priority Substance for risk evaluation. EPA plans to use data received through this request to support the prioritization process to better understand suspected adverse health or environmental effects of the chemical. Further, should EPA finalize the designation of this chemical as a high-priority substance for risk evaluation, then gathering this type of data before EPA initiates such a risk evaluation could help make the risk evaluation process more efficient and focused. EPA anticipates issuing additional TSCA section 8(c) submission requirements for other chemical substances identified as candidates for prioritization. EPA is using this TSCA section 8(c) submission requirement as a first pilot step in making use of the TSCA section 8(c) data gathering authority as part of the general candidate selection process to be used by EPA for TSCA section 6 prioritization activities.

B. What is the Agency's authority for taking this action?

Under TSCA section 8(c), chemical manufacturers (including importers) and processors must maintain records of significant adverse reactions to health or the environment alleged to have been caused by chemical substances or mixtures and, upon request, submit or make the records available to the Agency. Significant adverse reactions are reactions that may indicate a substantial impairment of normal activities or long-lasting or irreversible damage to health or the environment. Regulations implementing TSCA section 8(c) appear in 40 CFR part 717.

C. Does this action apply to me?

This action may potentially affect you if you manufacture (defined under TSCA to include import) or process the chemical substance described by this document. The following list of North American Industry Classification System (NAICS) codes is neither intended to be exhaustive nor indicate expected reporting from a given industry sector but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Manufacturing (NAICS codes 31–33), and/or
- Other Chemical and Allied Products Merchant Wholesalers (NAICS code 424690).

Other types of entities not included could also be affected. To determine whether your entity is affected by this action, you should carefully examine the applicability criteria found in 40 CFR part 717. If you have questions regarding the applicability of this action to a particular entity or information regarding additional entities that may not be listed in this Notice, please consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

D. What is 4,4'-methylene bis(2-chloroaniline) (MBOCA)?

MBOCA is used as a curing agent for liquid polyurethane elastomers. These elastomers have been used to produce shoe soles; rolls for postage stamp machines; cutting bars in plywood manufacturing; rolls and belt drives in cameras, computers, and reproducing equipment; and pulleys for escalators and elevators. Animal studies have reported effects on the lung, liver, and kidney from chronic oral exposure to MBOCA. Animal studies have reported that MBOCA produces tumors of the liver, lung, urinary bladder, and mammary glands from oral exposure. EPA has classified MBOCA as a Group B2, probable human carcinogen.

II. Request for TSCA Section 8(c) Records

A. Who must submit records?

This requirement to submit TSCA section 8(c) allegation records applies to persons who manufacture (defined under TSCA to include import) or process MBOCA, and who are subject to TSCA section 8(c) recordkeeping requirements pursuant to 40 CFR 717.5.

The regulations provide limited exemptions from recordkeeping and reporting requirements for certain manufacturers and sites of manufacture, as described at 40 CFR 717.5(a)(1) and

717.7(a). Persons or site activities are exempt pursuant to 40 CFR 717.7(a)(1) if the means by which they manufacture a chemical substance solely involves mining or other solely extractive functions, e.g., those companies or sites within a company whose sole function is to mine mineral ores, extract petroleum or natural gas, quarry non-metallic minerals (including extraction of salts from seawater or brines), mine or otherwise extract coal, or separate gases from the atmosphere. In addition, the regulations exempt persons whose only manufacturing act is to produce a substance coincidentally under specific circumstances, as described in 40 CFR 717.7(a)(2).

Two types of processors (who are not also manufacturers) are subject to TSCA section 8(c) recordkeeping under the regulations at 40 CFR 717.5(b)(1) and to reporting under this notice: those who produce and market chemical mixtures (including solutions) and those who repackaging chemical substances or mixtures.

A person solely engaged in the distribution of chemical substances is exempt from TSCA section 8(c) recordkeeping and reporting pursuant to 40 CFR 717.7(c) unless such person is also a manufacturer or processor subject to the regulations. For example, a “distributor” who repackages chemical substances or mixtures is considered to be a processor and, thus, is not a sole distributor.

Similarly, pursuant to 40 CFR 717.7(d), a person who is a retailer is exempt from TSCA section 8(c) recordkeeping and reporting unless such person is also a manufacturer or a processor subject to this request.

B. What types of records must be submitted?

TSCA section 8(c) requires any manufacturer, processor, or distributor of a chemical substance or mixture to keep records of “significant adverse reactions” to health or the environment, as determined by rule, alleged to have been caused by the chemical substance or mixture. Implementing regulations at 40 CFR part 717 describe the types of records that must be kept and are briefly summarized here.

A “significant adverse reactions” is defined in 40 CFR 717.3(i) as reactions that may indicate a substantial impairment of normal activities, or long-lasting or irreversible damage to health or the environment. Allegations subject to the recordkeeping requirement are described at 40 CFR 717.10. “Allegation” is defined at 40 CFR 717.3(a) to mean a statement, made without formal proof or regard for

evidence, that a chemical substance or mixture has caused a significant adverse reaction to health or the environment.

Significant adverse reactions to human health that must be recorded could include, but are not limited to, birth defects, impairment of bodily functions, or impairment of normal activities, as described at 40 CFR 717.12(a). TSCA section 8(c) allegations may focus on serious health effects, but they can also report lesser effects experienced by a group of individuals or repeatedly by an individual. Allegations that do not meet the definition of a “significant adverse reaction” should not be reported to EPA in the TSCA section 8(c) call-in. Additionally, the regulation at 40 CFR 717.12(b) exempts “known human effects” from this recordkeeping requirement. The definition of “known human effects” at 40 CFR 717.3(c) covers commonly recognized human health effects resulting from exposure to a substance as described in publicly available sources such as Safety Data Sheets (SDS), product labeling, or scientific literature, including, but not limited to, information found at the Agency for Toxic Substances Disease Registry website available at <https://www.atsdr.cdc.gov/index.html> and EPA’s Integrated Risk Management System available at <https://www.epa.gov/iris>. However, pursuant to 40 CFR 717.3(c)(2), the exemption does not apply if the reaction was a significantly more severe toxic effect than previously described, or if the reaction resulted from a lower exposure level, a significantly shorter exposure period, or a different exposure route than previously described.

Significant adverse reactions to the environment must also be recorded even if restricted to the environment surrounding a plant or disposal site. Pursuant to 40 CFR 717.12(c), such reactions could include but are not limited to: gradual or sudden changes to composition of animal or plant life, deaths of organisms such as fish kills, reduction of reproductive success of species, changes in behavior or distribution of species, loss of agricultural productivity, and irreversible contamination of the environment.

Pursuant to 40 CFR 717.12(d), a significant adverse reaction to the environment is not required to be recorded if the alleged cause is directly attributable to an incident of environmental contamination that has already been reported to the Federal government under any applicable authority.

EPA is requiring submission of all TSCA section 8(c) records that fall within the record retention period described in TSCA section 8(c) and 40 CFR 717.15(d). Accordingly, this request for records includes:

- Records of significant adverse reactions to the health of employees first reported to or known by the person maintaining such records within the past 30 years, including employee health-related allegations arising from any employment-related exposure, whether or not such allegation was submitted by or on the behalf of that recordkeeper’s own employee.
- Any other record of significant adverse reactions first reported to or known by the person maintaining the record within the past five years.

C. What information must be included with a submission?

Manufacturers of the chemical substance listed in this notice must submit any records kept pursuant to 40 CFR part 717 of significant adverse reactions alleged to have been caused by the chemical substance. Under the regulations, a manufacturer is responsible for collecting allegations regarding substances it manufactures, as well as allegations regarding certain chemical processing and distribution activities it may carry out. Accordingly, as provided in 40 CFR 717.5(a)(2), manufacturers of the listed chemical substance must submit records of any collected allegations that:

- Identify the listed chemical substance or identify operations used in the manufacture of the chemical substance;
- Identify any of the manufacturer’s own processing or distribution in commerce activities with respect to the chemical substance;
- Identify emissions, effluents, or other discharges from activities described in this paragraph; and
- Identify a substance produced coincidentally during processing, use, storage or disposal of a chemical substance it manufactures, where either the coincidentally produced chemical substance or the originally manufactured chemical substance is listed in this notice.

Processors of the chemical substance listed in this notice who are subject to TSCA section 8(c) recordkeeping requirements (*i.e.*, persons who process chemical substances to produce mixtures, or repackage chemical substances or mixtures) must also submit any records kept pursuant to 40 CFR part 717 of significant adverse reactions alleged to have been caused by the chemical substance. As provided by

40 CFR 717.5(b)(2), this includes allegations that:

- Identify any mixture the processor produces and distributes in commerce containing the listed chemical substance, or identify the listed chemical substance or mixture containing the listed chemical substance that the processor repackages and distributes in commerce;
- Identify any of the processor’s own further processing or distribution in commerce activities of such products;
- Identify emissions, effluents, or other discharges from activities described in this paragraph;
- Identify a substance produced coincidentally during the processing, use, storage, or disposal of any mixture the processor produces and distributes in commerce or any chemical substance or mixture it repackages and distributes in commerce, where either the coincidentally produced chemical substance or the processed chemical substance is listed in this notice.

As provided by 40 CFR 717.15(b), in addition to the original allegation as received, TSCA section 8(c) reported allegation records must contain the name and address of the site that received the allegation; the date the allegation was received; the implicated chemical substance, mixture, article, company process or operation, or site discharge; a description of the alleged health effect(s) and/or environmental effect(s).

Additionally, the submission must include the results of any self-initiated investigation with respect to an allegation and copies of any further required records or reports relating to the allegation, as described at 40 CFR 717.15(b)(3) and (4)).

EPA encourages respondents to conduct a thorough review of their TSCA 8(c) records, including a search for all known synonyms and trade names associated with the listed chemical. Alternative identifiers can be found through many sources, including PubChem, an open chemistry database operated by the National Institutes of Health (NIH) at <https://pubchem.ncbi.nlm.nih.gov>, EPA’s CompTox Chemical Dashboard website at <https://comptox.epa.gov/dashboard> and EPA’s Substance Registry Service (SRS) at <https://cdxapps.epa.gov/oms-substance-registry-services/search>.

D. How does this request for allegation records differ from TSCA section 8(e) reporting?

TSCA section 8(e) requires manufacturers, processors, and distributors of a chemical substance or mixture to notify EPA immediately of

information that reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment, unless that person knows that EPA has already been informed. EPA published a TSCA section 8(e) Policy Statement and Guidance on June 3, 2003 (68 FR 33129 (FRL-7287-4)), which defines “substantial-risk information” as information which reasonably supports the conclusion that a chemical substance or mixture presents a substantial risk of injury to health or the environment, and “substantial risk of injury to health or the environment” as a risk of considerable concern because of the seriousness of the effect, and the fact or probability of its occurrence—without consideration for economic or social benefits of use or costs of restricting use. Information related to serious toxic effects should be reported regardless of exposure. Unlike records maintained under TSCA section 8(c), which need only be submitted to EPA upon request, TSCA requires that information required by TSCA section 8(e) be reported “immediately” (*i.e.*, within 30 days of obtaining the information).

The source of the information handled under TSCA sections 8(c) and 8(e) is also different. While allegations recorded pursuant to TSCA section 8(c) are likely to be received directly from workers, consumers, and plant neighbors, TSCA section 8(e) submissions usually result from designed, controlled studies and reports strongly implicating a chemical. TSCA section 8(e) health effects submissions focus on new serious health effects. TSCA section 8(e) reporting requirements are also triggered by information about significant changes in exposure circumstances with a recognized hazardous substance, which may be identified through monitoring studies or other means. TSCA section 8(c) allegations may focus on serious health effects, but they can also report lesser effects experienced by a group of individuals, or repeatedly by an individual.

E. How to report?

All submitters must report TSCA section 8(c) data electronically, using the CSPP: Submissions for Chemical Safety and Pesticide Programs software (CSPP Software) accessible via EPA’s Central Data Exchange (CDX) system available at <https://cdx.epa.gov/>. The CSPP Software provides a TSCA Communications application that a registered CDX user will access to submit TSCA section 8(c) records. Guidance on how to submit TSCA

section 8(c) data is available in the docket (EPA-HQ-OPPT-2023-0312) and via EPA’s TSCA section 8(c) web page for this action at <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/tsca-8c-reporting-44-methylene-bis2-chloroaniline-mboca>. You may also obtain help by contacting EPA’s TSCA Hotline at tsca-hotline@epa.gov or 202-554-1404. For help with accessing your CDX account, please contact the CDX help desk at <https://cdx.epa.gov/contact> or (888) 890-1995 (for international callers: (970) 494-5500).

F. How to submit confidential business information?

Any person submitting copies of records may assert a business confidentiality claim covering all or part of the submitted information in accordance with the procedures described in 40 CFR part 703 (88 FR 37155, June 7, 2023 (FRL-8223-02-OCSPP)).

Requirements for asserting and maintaining confidentiality claims are described in 40 CFR 703.5. Such claim must be made concurrent with submission of the information. If no such claim accompanies the submission, EPA will not recognize a confidentiality claim, and the information in that submission may be made available to the public without further notice. Confidentiality claims must be substantiated at the time of submission to EPA pursuant to the requirements of 40 CFR 703.5(b). To assert a claim of confidentiality for information contained in a submitted record, the respondent must submit two copies of the document. One copy must be complete. In that copy, the respondent must indicate what information, if any, is claimed as confidential by marking the specific information on each page with a label such as “confidential”, “proprietary”, or “CBI.” The other copy must be a public version of the submission and attachments, with all information that is claimed as confidential removed. See 40 CFR 703.5(c). Both the copy containing information claimed as CBI and the “sanitized” copy must be submitted electronically, as discussed in Unit II.F. The TSCA Communications Tool incorporates many of the requirements for asserting CBI claims, including substantiation questions, a required certification statement, and prompts to provide a sanitized copy. Further details regarding the requirements for confidentiality claims can be found in 40 CFR part 703.

G. When is reporting not required?

As provided by 40 CFR part 717, reporting is not required by certain persons for certain types of activities involving the chemical, including:

- Entities considered manufacturers solely due to mining or other resource extraction activities are not required to report (40 CFR 717.7(a)(1));
- Persons whose sole manufacturing is due to the incidental or coincidental production of chemical substances in certain circumstances are not required to report (40 CFR 717.7(a)(2)(i)–(v));
- Processors are required to report only if they process chemical substances to produce mixtures or repackage chemical substances or mixtures (40 CFR 717.5(b)(1));
- A person solely engaged in the distribution of chemical substances is exempt from 8(c) reporting, unless such person is also a manufacturer or processor subject to 8(c) requirements (40 CFR 717.7(c)); and
- A person who is a retailer is exempt from 8(c) reporting unless such person is also a manufacturer or a processor subject to 8(c) requirements (40 CFR 717.7(d)).

Known human effects (*i.e.*, commonly recognized human health effects in literature or product labels/SDS) need not be reported unless the effect is significantly more severe, occurred after a significantly shorter exposure period or lower exposure level, or occurred due to a different exposure route than previously described (see 40 CFR 717.12(b) and 717.3(c) for details).

Additionally, firms are not required to record a significant adverse reaction to the environment if the alleged cause of that significant adverse reaction can be directly attributable to an accidental spill or other accidental discharge, emission exceeding permitted limits, or other incident of environmental contamination that has been reported to the Federal Government under any applicable authority (40 CFR 717.12(d)).

III. Paperwork Reduction Act (PRA)

According to PRA, 44 U.S.C. 3501 *et seq.*, an agency may not conduct or sponsor, and a person is not required to respond to a collection of information that requires Office of Management and Budget (OMB) approval under the PRA, unless it has been approved by OMB and displays a currently valid OMB control number. The OMB control numbers for EPA’s regulations in title 40 of the CFR, after appearing in the **Federal Register**, are listed in 40 CFR part 9, and included on the related collection instrument or form, if applicable.

The information collection requirements associated with records of allegations of significant adverse reactions to human health or the environment under TSCA section 8(c) are contained in 40 CFR part 717 (OMB Control No. 2070–0224; EPA ICR No. 2703.01) approved by OMB on November 23, 2022. This action does not impose any burden requiring additional OMB approval. The annual paperwork burden per respondent is estimated to be 12.25 hours. This burden estimate includes the time needed to maintain records of allegations of significant adverse reactions, submit copies of these allegation records when required by EPA, and review of the **Federal Register** notice. For additional details, please see the Information Collection Request document that is available in the docket.

Authority: 15 U.S.C. 2607(c).

Dated: December 19, 2023.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2023–28299 Filed 12–22–23; 8:45 am]

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FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meetings

TIME AND DATE: 3:12 p.m. on Wednesday, December 20, 2023.

PLACE: The meeting was held in the Board Room located on the sixth floor of the FDIC Building located at 550 17th Street NW, Washington, DC.

STATUS: Closed.

MATTERS TO BE CONSIDERED: The Board of Directors of the Federal Deposit Insurance Corporation met to consider matters related to the Corporation's supervision, corporate, and resolution activities. In calling the meeting, the Board determined, on motion of Director Rohit Chopra (Director, Consumer Financial Protection Bureau), seconded by Director Michael J. Hsu (Acting Comptroller of the Currency), and concurred in by Vice Chairman Travis J. Hill, Director Jonathan P. McKernan, and Chairman Martin J. Gruenberg, that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of the "Government in the Sunshine Act" (5 U.S.C. 552b (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B) and (c)(10)).

CONTACT PERSON FOR MORE INFORMATION: Requests for further information concerning the meeting may be directed to Debra A. Decker, Executive Secretary of the Corporation, at 202–898–8748.

Dated this 20th day of December, 2023.

Federal Deposit Insurance Corporation.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2023–28472 Filed 12–21–23; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS23–21]

Appraisal Subcommittee; Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of special closed meeting.

Description: In accordance with section 1104(b) of title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) met for a special closed meeting on this date.

Location: Virtual meeting via Webex.

Date: December 14, 2023.

Time: 10:30 a.m. ET.

Action and Discussion Item

Personnel Matter

The ASC convened a Special Closed Meeting to discuss a personnel matter. No action was taken by the ASC.

James R. Park,

Executive Director.

[FR Doc. 2023–28365 Filed 12–22–23; 8:45 am]

BILLING CODE 6700–01–P

FEDERAL RESERVE SYSTEM

Agency Information Collection

Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, without revision, the Reporting and Recordkeeping Requirements Associated with Regulation Y (Capital Plans) (FR Y–13; OMB No. 7100–0342).

FOR FURTHER INFORMATION CONTACT:

Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of

the Chief Data Officer, Board of Governors of the Federal Reserve System, nuha.elmaghrabi@frb.gov, (202) 452–3884.

Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. The OMB inventory, as well as copies of the PRA Submission, supporting statements (which contain more detailed information about the information collections and burden estimates than this notice), and approved collection of information instrument(s) are available at <https://www.reginfo.gov/public/do/PRAMain>. These documents are also available on the Federal Reserve Board's public website at <https://www.federalreserve.gov/apps/reportingforms/home/review> or may be requested from the agency clearance officer, whose name appears above.

Final Approval Under OMB Delegated Authority of the Extension for Three Years, Without Revision, of the Following Information Collection

Collection title: Reporting and Recordkeeping Requirements Associated with Regulation Y (Capital Plans).

Collection identifier: FR Y–13.

OMB control number: 7100–0342.

General description of collection: In addition to other reporting and recordkeeping requirements, Section 225.8 of Regulation Y—Bank Holding Companies and Change in Bank Control (12 CFR 225.8) requires respondents to submit a capital plan to the Board on an annual basis and to request prior approval from the Board under certain circumstances before making a capital distribution.

Frequency: Annually and on occasion.

Respondents: Top-tier bank holding companies (BHCs) domiciled in the United States with \$100 billion or more in total consolidated assets; U.S. intermediate holding companies with total consolidated assets of \$100 billion or more; any other BHC domiciled in the United States that is made subject to

section 225.8, in whole or in part, by order of the Board; and any nonbank financial company supervised by the Board that is made subject to section 225.8 pursuant to a rule or order of the Board.¹

Total estimated number of respondents: 34.

Total estimated annual burden hours: 177,562.

Current actions: On September 11, 2023, the Board published a notice in the **Federal Register** (88 FR 62370) requesting public comment for 60 days on the extension, without revision, of the FR Y–13. The comment period for this notice expired on November 13, 2023. The Board did not receive any comments.

Board of Governors of the Federal Reserve System, December 19, 2023.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–28346 Filed 12–22–23; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, without revision, the Reporting, Recordkeeping, and Disclosure Requirements Associated with Regulation VV (FR VV; OMB No. 7100–0360).

FOR FURTHER INFORMATION CONTACT:

Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, nuha.elmaghrabi@frb.gov, (202) 452–3884.

Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the Paperwork

Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. The OMB inventory, as well as copies of the PRA Submission, supporting statements (which contain more detailed information about the information collections and burden estimates than this notice), and approved collection of information instrument(s) are available at <https://www.reginfo.gov/public/do/PRAMain>. These documents are also available on the Federal Reserve Board's public website at <https://www.federalreserve.gov/apps/reportingforms/home/review> or may be requested from the agency clearance officer, whose name appears above.

Final Approval Under OMB Delegated Authority of the Extension for Three Years, Without Revision, of the Following Information Collection

Collection title: Reporting, Recordkeeping, and Disclosure Requirements Associated with Regulation VV.

Collection identifier: FR VV.

OMB control number: 7100–0360.

General description of collection: Section 13 of the Bank Holding Company Act of 1956 (BHC Act)¹ and the Board's implementing regulation, Regulation VV—Proprietary Trading and Certain Interests in and Relationships with Covered Funds (12 CFR part 248),² restrict the ability of banking entities to engage in proprietary trading³ or to have certain interests in, or relationships with, a hedge fund or private equity fund. Respondents must submit certain information to facilitate the monitoring and enforcement of these restrictions.

Frequency: Quarterly, annual, and event-generated.

Respondents: State member banks, bank holding companies, savings and loan holding companies, foreign banking organizations, U.S. branches or agencies of foreign banks, and other holding companies that control an insured depository institution.

¹ 12 U.S.C. 1851.

² The Board issued Regulation VV in conjunction with the Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Commodity Futures Trading Commission, and Securities and Exchange Commission (collectively, the agencies), with each of the agencies promulgating regulations implementing section 13 of the BHC Act.

³ The term “proprietary trading” means engaging as principal for the trading account of the banking entity in any purchase or sale of one or more financial instruments. See 12 CFR 248.3(a).

Respondents may also include any subsidiary of the foregoing.

Total estimated number of respondents: 231.

Total estimated annual burden hours: 30,676.⁴

Current actions: On September 28, 2023, the Board published a notice in the **Federal Register** (88 FR 66846) requesting public comment for 60 days on the extension, without revision, of the FR VV. The comment period for this notice expired on November 27, 2023. The Board did not receive any comments.

Board of Governors of the Federal Reserve System, December 19, 2023.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–28347 Filed 12–22–23; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, without revision, the Recordkeeping and Disclosure Requirements and Provisions Associated with Real Estate Appraisal Standards (FR Y–30; OMB No. 7100–0250).

DATES: Comments must be submitted on or before February 26, 2024.

ADDRESSES: You may submit comments, identified by FR Y–30, by any of the following methods:

- **Agency Website:** <https://www.federalreserve.gov/>. Follow the instructions for submitting comments at <https://www.federalreserve.gov/apps/foia/proposedregs.aspx>.

- **Email:** regs.comments@federalreserve.gov. Include the OMB number or FR number in the subject line of the message.

- **Fax:** (202) 452–3819 or (202) 452–3102.

- **Mail:** Federal Reserve Board of Governors, Attn: Ann E. Misback, Secretary of the Board, Mailstop M–

⁴ More detailed information regarding this collection, including more detailed burden estimates, can be found in the OMB Supporting Statement posted at <https://www.federalreserve.gov/apps/reportingforms/home/review>. On the page displayed at the link, you can find the OMB Supporting Statement by referencing the collection identifier, FR VV.

¹ Large savings and loan holding companies are also subject to capital planning requirements, pursuant to Subpart S of the Board's Regulation LL (12 CFR part 238, subpart S). The collections of information included in that Subpart are accounted for in the Board's FR LL Paperwork Reduction Act (PRA) clearance (OMB No. 7100–0380).

4775, 2001 C St. NW, Washington, DC 20551.

All public comments are available from the Board's website at <https://www.federalreserve.gov/apps/foia/proposedregs.aspx> as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any confidential business information, identifying information, or contact information. Public comments may also be viewed electronically or in paper in Room M-4365A, 2001 C St. NW, Washington, DC 20551, between 9:00 a.m. and 5:00 p.m. on weekdays, except for Federal holidays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452-3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395-6974.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghribi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, nuha.elmaghribi@frb.gov, (202) 452-3884.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

During the comment period for this proposal, a copy of the proposed PRA OMB submission, including the draft reporting form and instructions, supporting statement (which contains more detail about the information collection and burden estimates than this notice), and other documentation, will be made available on the Board's public website at <https://www.federal>

[reserve.gov/apps/reportingforms/home/review](https://www.federalreserve.gov/apps/reportingforms/home/review) or may be requested from the agency clearance officer, whose name appears above. Final versions of these documents will be made available at <https://www.reginfo.gov/public/do/PRAMain>, if approved.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal Under OMB Delegated Authority To Extend for Three Years, Without Revision, the Following Information Collection

Collection title: Recordkeeping and Disclosure Requirements and Provisions Associated with Real Estate Appraisal Standards.

Collection identifier: FR Y-30.

OMB control number: 7100-0250.

General description of collection: Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) (12 U.S.C. 3331 *et seq.*) requires that, for federally related transactions,¹ regulated institutions

¹ A "federally related transaction" means any real estate-related financial transaction which (A) a federal financial institutions regulatory agency or the Resolution Trust Corporation engages in, contracts for, or regulates, and (B) requires the services of an appraiser. 12 U.S.C. 3350(4). The term "real estate-related financial transaction" means any transaction involving (A) the sale, lease, purchase, investment in or exchange of real property, including interests in property, or the

obtain real estate appraisals performed by certified or licensed appraisers in conformance with uniform appraisal standards. The Board's regulations implementing Title XI of FIRREA, contained in the Board's Regulation Y—Bank Holding Companies and Change in Bank Control (12 CFR part 225), include certain recordkeeping requirements that apply to respondents. The Board and other supervisory agencies also have issued Interagency Appraisal and Evaluation Guidelines (the Guidelines) that convey supervisory expectations relating to real estate appraisals and evaluations used to support real estate-related financial transactions.² These Guidelines recommend that institutions adopt certain policies and procedures to ensure compliance with Title XI of FIRREA and Regulation Y.

Frequency: Event-generated.

Respondents: State member banks, bank holding companies, and nonbank subsidiaries of bank holding companies.

Total estimated number of respondents: 1,866.

Total estimated annual burden hours: 28,340.³

Board of Governors of the Federal Reserve System, December 19, 2023.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023-28348 Filed 12-22-23; 8:45 am]

BILLING CODE 6210-01-P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, without revision, the Reporting Requirements Associated with section 208.22 of Regulation H (Notifications Related to Community Development and Public Welfare Investments by State Member Banks) (FR H-6; OMB No. 7100-0278).

financing thereof, (B) the refinancing of real property or interests in real property, and (C) the use of real property or interests in property as security for a loan or investment, including mortgage-backed securities. 12 U.S.C. 3350(5).

² SR 10-16, available at <https://www.federalreserve.gov/boarddocs/srletters/2010/sr1016.htm>.

³ More detailed information regarding this collection, including more detailed burden estimates, can be found in the OMB Supporting Statement posted at <https://www.federalreserve.gov/apps/reportingforms/home/review>. On the page displayed at the link, you can find the OMB Supporting Statement by referencing the collection identifier, FR Y-30.

FOR FURTHER INFORMATION CONTACT:

Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, nuha.elmaghrabi@frb.gov, (202) 452-3884.

Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395-6974.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. The OMB inventory, as well as copies of the PRA Submission, supporting statements (which contain more detailed information about the information collections and burden estimates than this notice), and approved collection of information instrument(s) are available at <https://www.reginfo.gov/public/do/PRAMain>. These documents are also available on the Federal Reserve Board's public website at <https://www.federalreserve.gov/apps/reportingforms/home/> or may be requested from the agency clearance officer, whose name appears above.

Final Approval Under OMB Delegated Authority of the Extension for Three Years, Without Revision, of the Following Information Collection

Collection title: Reporting Requirements Associated with Section 208.22 of Regulation H (Notifications Related to Community Development and Public Welfare Investments by State Member Banks).

Collection identifier: FR H-6.

OMB control number: 7100-0278.

General description of collection: Section 208.22 of Regulation H—Membership of State Banking Institutions in the Federal Reserve System (12 CFR 208.22) requires state member banks, in connection with their community development or public welfare investment activity, to submit a request for approval to the appropriate Federal Reserve Bank unless the investment does not require prior Board approval, in which case the state member bank must submit a written notice to the Reserve Bank.

Frequency: Event-generated.

Respondents: State member banks.

Total estimated number of respondents: 251.

Total estimated annual burden hours: 919.¹

Current actions: On August 18, 2023, the Board published a notice in the **Federal Register** (88 FR 56628) requesting public comment for 60 days on the extension, without revision, of the FR H-6. The comment period for this notice expired on October 17, 2023. The Board did not receive any comments.

Board of Governors of the Federal Reserve System, December 19, 2023.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023-28345 Filed 12-22-23; 8:45 am]

BILLING CODE 6210-01-P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at <https://www.federalreserve.gov/foia/request.htm>. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551-0001, not later than January 10, 2024.

¹ More detailed information regarding this collection, including more detailed burden estimates, can be found in the OMB Supporting Statement posted at <https://www.federalreserve.gov/apps/reportingforms/home/review>. On the page displayed at the link, you can find the OMB Supporting Statement by referencing the collection identifier, FR H-6.

A. Federal Reserve Bank of Atlanta (Erien O. Terry, Assistant Vice President) 1000 Peachtree Street NE, Atlanta, Georgia 30309. Comments can also be sent electronically to Applications.Comments@atl.frb.org:

1. *John Adam Robertson, individually and as trustee of the Edwin G. Robertson Children's Irrevocable Trust, and Aaron Andrew Robertson, individually and as trustee of the Craig E. Robertson Children's Irrevocable Trust, all of Speedwell, Tennessee;* as a group acting in concert, to retain voting shares of Robertson Holding Company, L.P., Harrogate, Tennessee. Robertson Holding Company, L.P., controls Commercial Bancgroup, Inc., which controls Commercial Bank, both of Harrogate, Tennessee. Commercial Bancgroup, Inc., also controls AB&T Financial Corporation, which controls Alliance Bank & Trust Company, both of Gastonia, North Carolina.

In addition, *Aaron Andrew Robertson; Cynthia Diane Robertson; James Oscar Robertson; John Adam Robertson, all of Speedwell, Tennessee; Sherri Jo Robertson and Noah Bradley Robertson, both of Harrogate, Tennessee; Dakota John Robertson, Bristol, Tennessee; Judith Yvonne Robertson, Cumberland Gap, Tennessee; Matthew Craig Robertson and Matthew Craig Robertson II, both of Tazewell, Tennessee; Olivia Grace Robertson, Hanahan, South Carolina; Emily Alayne King, Halle McLayne King, John McKinley King, and Riley Parker King, all of Powell, Tennessee;* as a group acting in concert with Robertson Holding Company, L.P., to retain voting shares of Commercial Bancgroup, Inc.

B. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) One Memorial Drive, Kansas City, Missouri 64198-0001. Comments can also be sent electronically to KCApplicationComments@kc.frb.org:

1. *Rebecca Yarbrough, St. Joseph, Missouri, and Dallas Forrest, Columbia, Missouri;* to form the Maudlin Family control group, a group acting in concert, to retain voting shares of First American Bancshares, Inc., and thereby indirectly retain voting shares of First Security Bank, both of Union Star, Missouri.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023-28383 Filed 12-22-23; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM**Agency Information Collection
Activities: Announcement of Board
Approval Under Delegated Authority
and Submission to OMB**

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend, with revision, the Application for Exemption from Prohibited Service at Savings and Loan Holding Companies (FR LL–12; OMB No. 7100–0338).

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, nuha.elmaghrabi@frb.gov, (202) 452–3884.

Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. The OMB inventory, as well as copies of the PRA Submission, supporting statements (which contain more detailed information about the information collections and burden estimates than this notice), and approved collection of information instrument(s) are available at <https://www.reginfo.gov/public/do/PRAMain>. These documents are also available on the Federal Reserve Board's public website at <https://www.federalreserve.gov/apps/reportingforms/home/review> or may be requested from the agency clearance officer, whose name appears above.

Final Approval Under OMB Delegated Authority of the Extension for Three Years, With Revision, of the Following Information Collection

Collection title: Application for Exemption from Prohibited Service at Savings and Loan Holding Companies.

Collection identifier: FR LL–12.

OMB control number: 7100–0338.

Effective date: December 31, 2023.

General description of collection: The Federal Deposit Insurance Act and the Board's Regulation LL—Savings and Loan Holding Companies (12 CFR part 238) prohibit individuals who have been convicted of certain criminal offenses or who have agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such criminal offenses from participating in the affairs of a savings and loan holding company (SLHC) or any of its subsidiaries without the written consent of the Board. Such an individual, or the SLHC with which the individual seeks to participate, may apply for an exemption from this prohibition.

Frequency: Event-generated.

Respondents: SLHCs; Individuals.

Total estimated number of respondents: 32.

Total estimated change in burden: 530.

Total estimated annual burden hours: 674.¹

Current actions: On September 28, 2023, the Board published a notice in the **Federal Register** (88 FR 66844) requesting public comment for 60 days on the extension, with revision, of the FR LL–12. The Board proposed to revise the FR LL–12 by clearing two previously uncleared recordkeeping and disclosure requirements: (1) In order to utilize the exception at 12 CFR 238.86 related to employees in non-policymaking roles, an SLHC must maintain a list of all policymaking positions and review this list annually; and (2) A person who is not subject to the requirement to seek an exemption from the Board because their criminal offenses are de minimis must disclose the conviction or pretrial diversion or similar program to all insured depository institutions and other banking organizations the affairs of which he or she participates. The comment period for this notice expired on November 27, 2023. The Board did not receive any comments. The revisions will be implemented as proposed.

Board of Governors of the Federal Reserve System, December 19, 2023.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–28349 Filed 12–22–23; 8:45 am]

BILLING CODE 6210–01–P

¹ More detailed information regarding this collection, including more detailed burden estimates, can be found in the OMB Supporting Statement posted at <https://www.federalreserve.gov/apps/reportingforms/home/review>. On the page displayed at the link, you can find the OMB Supporting Statement by referencing the collection identifier, FR LL–12.

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

[OMB Control No. 9000–0205; Docket No. 2023–0053; Sequence No. 11]

**Information Collection; Implementation
of Federal Acquisition Supply Chain
Security Act (FASCSA) Orders**

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, and the Office of Management and Budget (OMB) regulations, DoD, GSA, and NASA invite the public to comment on an extension concerning Implementation of Federal Acquisition Supply Chain Security Act (FASCSA) Orders. DoD, GSA, and NASA invite comments on: whether the proposed collection of information is necessary for the proper performance of the functions of Federal Government acquisitions, including whether the information will have practical utility; the accuracy of the estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. OMB has approved this information collection for use through April 30, 2024. DoD, GSA, and NASA propose that OMB extend its approval for use for three additional years beyond the current expiration date.

DATES: DoD, GSA, and NASA will consider all comments received by February 26, 2024.

ADDRESSES: DoD, GSA, and NASA invite interested persons to submit comments on this collection through <https://www.regulations.gov> and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov. Instructions: All items submitted must cite OMB Control No. 9000–0205, Implementation of Federal Acquisition

Supply Chain Security Act (FASCSA) Orders. Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT:

Marissa Ryba, Procurement Analyst, at telephone 314–586–1280, or Marissa.Ryba@gsa.gov.

SUPPLEMENTARY INFORMATION:

A. OMB Control Number, Title, and any Associated Form(s)

9000–0205, Implementation of Federal Acquisition Supply Chain Security Act (FASCSA) Orders

B. Need and Uses

This clearance covers the information that offerors and contractors must submit to comply with the following FAR requirements:

a. FAR 52.204–29, Federal Acquisition Supply Chain Security Act Orders-Representation and Disclosures. This provision prohibits contractors from providing or using as part of the performance of the contract any covered article, or any products or services produced or provided by a source, if the covered article or the source is subject to an applicable FASCSA order identified in the clause at FAR 52.204–30(b)(1).

By submitting an offer, offerors are representing compliance with the prohibition. If an offeror cannot represent compliance with the prohibition, then the offeror must disclose the following information in accordance with 52.204–29(e):

- (1) Name of the product or service provided to the Government;
- (2) Name of the covered article or source subject to an FASCSA order;
- (3) If applicable, name of the vendor, including the Commercial and Government Entity code and unique entity identifier (if known), that supplied the covered article or the product or service to the Offeror;
- (4) Brand;
- (5) Model number (original equipment manufacturer number, manufacturer part number, or wholesaler number);
- (6) Item description;
- (7) Reason why the applicable covered article or the product or service is being provided;

b. FAR 52.204–30, Federal Acquisition Supply Chain Security Act Orders-Prohibition. This clause requires contractors to provide a report to the

Government within 3 business days if the contractor identifies that the contractor or any-tier subcontractor, delivered or used a covered article or product or service subject to a FASCSA order. The report requires the following information:

- (1) Contract number;
- (2) Order number(s), if applicable;
- (3) Name of the product or service provided to the Government;
- (4) Name of the covered article or source subject to a FASCSA order;
- (5) If applicable, name of the vendor, including the Commercial and Government Entity code and unique entity identifier (if known), that supplied the covered article or the product or service to the Contractor;
- (6) Brand;
- (7) Model number (original equipment manufacturer number, manufacturer part number, or wholesaler number);
- (8) Item description; and
- (9) Any readily available information about mitigation actions undertaken or recommended.

The contractor must also submit additional information within 10 days of submitting the first report identifying any further available information about mitigation actions undertaken or recommended. Additionally, the contractor shall describe the efforts it undertook to prevent submission and any additional efforts to prevent future submission of the covered article or the product or service produced or provided by a source subject to an applicable FASCSA order.

FAR provision 52.204–29. Information collected under will be by the government to determine whether to seek a waiver from a FASCSA order issued under the authority of the Federal Acquisition Supply Chain Security Act of 2018.

FAR clause 52.204–30 will Information collected will be used by the contracting officer working with the requirement activity to determine whether it is necessary to take further action and modify the contract.

C. Annual Burden

Respondents/Recordkeepers: 6,113.

Total Annual Responses: 1.

Total Burden Hours: 12,226.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division by calling 202–501–4755 or emailing GSARegSec@gsa.gov. Please cite OMB Control No. 9000–0205, Implementation

of Federal Acquisition Supply Chain Security Act (FASCSA) Orders.

Janet Fry,

Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2023–28419 Filed 12–22–23; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2015–D–2818]

Rare Diseases: Considerations for the Development of Drugs and Biological Products; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance for industry entitled “Rare Diseases: Considerations for the Development of Drugs and Biological Products.” This guidance is intended to assist sponsors of drugs and biological products for treatment of rare diseases in conducting efficient and successful drug development programs through a discussion of selected issues commonly encountered in rare disease drug development. This guidance finalizes the draft guidance entitled “Rare Diseases: Common Issues in Drug Development” issued on February 1, 2019.

DATES: The announcement of the guidance is published in the **Federal Register** on December 26, 2023.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or

anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA-2015-D-2818 for "Rare Diseases: Considerations for the Development of Drugs and Biological Products." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240-402-7500.

- *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you

must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240-402-7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993-0002; or the Office of Communication, Outreach, and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT:

Andrea Bell-Vlasov, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 6484, Silver Spring, MD 20993-0002, 240-402-4977; or Anne Taylor, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993-0002, 240-402-7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a final guidance for industry entitled "Rare Diseases: Considerations for the Development of Drugs and Biological Products." This guidance is intended to assist sponsors of drugs and biological products for treatment of rare diseases in conducting efficient and successful product development programs through a discussion of selected issues

commonly encountered in rare disease drug development. This final guidance addresses important aspects of drug and biological product development to support the proposed clinical investigation(s), including nonclinical pharmacology/toxicology; trial design and endpoint considerations to ensure quality and interpretability of data; standard of evidence to establish safety and effectiveness; and drug manufacturing considerations during drug development.

This guidance finalizes the draft guidance entitled "Rare Diseases: Common Issues in Drug Development" issued February 1, 2019 (84 FR 1156). Changes made from the draft to the final guidance took into consideration comments received. Major changes include the removal of the natural history section (because this is addressed in a separate guidance), additional considerations regarding nonclinical studies, information on the use of external controls and early randomization, a section discussing safety considerations, information on changes to drug substance or manufacturing process, and sections discussing participation of patients/patient groups in drug development programs and pediatric considerations in rare disease drug development.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on "Rare Diseases: Considerations for the Development of Drugs and Biological Products." It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. The previously approved collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501-3521).

The following collections of information in the final guidance have been approved under OMB control number 0910-0001:

- Submitting under 21 CFR 314.50(c)(1)(iv) and (d)(3) (§ 314.50(c)(1)(iv) and (d)(3)) a summary of the nonclinical pharmacology and toxicology section and the human pharmacokinetics and bioavailability section of new drug application (NDAs);

- Submitting under § 314.50(d)(1)(i) chemistry, manufacturing, and controls information, including the drug substance, for the content and format of an NDA for rare diseases; and

- Submitting under § 314.50(d)(5) and (d)(5)(iv) clinical data of a drug, including a description of any other data information relevant to an evaluation of the safety and effectiveness of a drug.

- Submissions under 21 CFR part 314, subpart H, to grant accelerated approval of new drugs for serious or life-threatening illnesses.

- Submissions under §§ 312.47 and 312.82 for requesting meetings with FDA about drug development programs.

The following collections of information in the final guidance have been approved under OMB control number 0910–0014:

- Submitting under 21 CFR 312.23(a)(6)(i) (§ 312.23(a)(6)(i)) a protocol for the duration of a trial and the criteria to enter a trial and under § 312.23(a)(6)(i), (a)(6)(iii)(d) and (g) a description of an estimate of patients that will be involved in a trial, including a description of the safety exclusions and a description of clinical procedures, laboratory, or other methods.

- Submitting under § 312.23(a)(3)(i) a brief introductory statement and general investigational plan, including the route of administration of a drug;

- Submitting under § 312.23(a)(7) and (a)(7)(iv)(a) chemistry, manufacturing, and controls information for the content and format of an investigational new drug application (IND) and the safety and effectiveness of such information;

- Submitting under § 312.23(a)(8) and (a)(8)(i) pharmacology, toxicology, and drug disposition information for rare diseases;

- Submitting under 312.23(a)(10)(iii) plans for assessing pediatric safety and effectiveness;

- Submitting under § 312.32(c)(1) IND safety reports;

- Submissions under §§ 312.305(b) and 312.310(b) for expanded access uses and treatment of an individual patient.

The collections of information in 21 CFR part 316 for submitting the content and format of NDAs for orphan drugs have been approved under OMB control number 0910–0167. The collections of information pertaining to postmarketing adverse drug experience reporting have been approved under OMB control number 0910–0230. The collections of

information pertaining to expedited review programs for serious conditions, accelerated approval, breakthrough therapy-designation, and fast-track designation, have been approved under OMB control number 0910–0765. The collections of information in 21 CFR part 58 pertaining to good laboratory practices have been approved under OMB control number 0910–0119. The collection of information pertaining to current good manufacturing practices have been approved under OMB control number 0910–0139.

III. Electronic Access

Persons with access to the internet may obtain the guidance at <https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs>, <https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics>, <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>, or <https://www.regulations.gov>.

Dated: December 18, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–28310 Filed 12–22–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–30D]

Agency Information Collection Request. 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before January 25, 2024.

ADDRESSES: Submit your comments to Sherrette.Funn@hhs.gov or by calling (202) 264–0041 and PRA@HHS.GOV

FOR FURTHER INFORMATION CONTACT: When submitting comments or requesting information, please include the document identifier 0990–0313 and project title for reference, to Sherrette A. Funn, email: Sherrette.Funn@hhs.gov,

PRA@HHS.GOV or call (202) 264–0041 the Reports Clearance Officer.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: National Blood Collection & Utilization Survey (NBCUS)

Type of Collection: Revision

OMB No. 0990–30D–0313 Office of the Assistant Secretary for Health/HHS

Abstract

The Office of the Assistant Secretary for Health (OASH) is requesting approval for a three-year revised information collection request (ICR) titled “National Blood Collection & Utilization Survey (NBCUS).” The NBCUS is a biennial survey that includes a core of standard questions on blood collection, processing, and utilization practices. Questions on transfusion-transmitted infections, transfusion associated circulatory overload, acute hemolysis, delayed hemolysis, and severe allergic reactions are also included in the survey. The rapidly changing environment in blood supply and demand makes it important to have regular, periodic data describing the state of U.S. blood collections and transfusions for understanding the dynamics of blood safety and availability. In 2023, two sections were removed from the survey related to the impact of the COVID–19 pandemic on the blood supply during the course of 2020.

Survey respondents will consist of blood collection centers and hospitals that perform blood transfusions, except those reporting fewer than 100 inpatient surgeries per year. For the purposes of this ICR, federal burden is only being placed on facilities located within the fifty states and the District of Columbia. The total estimated burden is 5,106 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
Transfusing Hospitals	2754	1	1 hour, 46 min	4,865
Hospital Blood Banks	83	1	1 hour, 46 min	147
Community-based blood center	53	1	1 hour, 46 min	94
Total	2,890	.....	.....	5,106

James Berger,

*Senior Advisor for Blood and Tissue Safety,
Office of the Assistant Secretary for Health.*

[FR Doc. 2023–28412 Filed 12–22–23; 8:45 am]

BILLING CODE 4150–41–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Notice of Purchased/Referred Care Delivery Area Redesignation for the Spokane Tribe of Indians in the State of Washington

AGENCY: Indian Health Service, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Indian Health Service (IHS) has decided to expand the geographic boundaries of the Purchased/Referred Care Delivery Area (PRCDA) for the Spokane Tribe to include the counties of Spokane and Whitman in the State of Washington. The final PRCDA for the Spokane Tribe now includes the Washington counties of Ferry, Lincoln, Spokane, Stevens, and Whitman. The sole purpose of this expansion is to authorize additional Spokane Tribal members and beneficiaries to receive Purchased/Referred Care (PRC) services.

DATES: This expansion is effective as of the publication date of this notice.

ADDRESSES: This notice can be found at <https://www.federalregister.gov>. Written requests for information should be delivered to: CAPT John Rael, Director, Office of Resource Access and Partnerships, Indian Health Service, 5600 Fishers Lane, Mail Stop 10E85C, Rockville, MD 20857, or by phone at (301) 443–0969 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The IHS provides services under regulations in effect as of September 15, 1987, and republished at 42 CFR part 136, subparts A–C. Subpart C defines a Contract Health Service Delivery Area (CHSDA), now referred to as a PRCDA, as the geographic area within which PRC will be made available by the IHS to members of an identified Indian

community who reside in the PRCDA. Residence within a PRCDA by a person who is within the scope of the Indian health program, as set forth in 42 CFR 136.12, creates no legal entitlement to PRC but only potential eligibility for services. Services needed, but not available at an IHS/Tribal facility, are provided under the PRC program depending on the availability of funds, the relative medical priority of the services to be provided, and the actual availability and accessibility of alternate resources in accordance with the regulations.

The regulations at 42 CFR part 136, subpart C provide that, unless otherwise designated, a PRCDA shall consist of a county which includes all or part of a reservation and any county or counties which have a common boundary with the reservation. 42 CFR 136.22(a)(6). The regulations also provide that after consultation with the Tribal governing body or bodies on those reservations included within the PRCDA, the Secretary may from time to time, redesignate areas within the United States for inclusion in or exclusion from a PRCDA. 42 CFR 136.22(b). The regulations require that certain criteria must be considered before any redesignation is made. The criteria are as follows:

- (1) The number of Indians residing in the area proposed to be so included or excluded;
- (2) Whether the Tribal governing body has determined that Indians residing in the area near the reservation are socially and economically affiliated with the Tribe;
- (3) The geographic proximity to the reservation of the area whose inclusion or exclusion is being considered; and
- (4) The level of funding which would be available for the provision of PRC.

Additionally, the regulations require that any redesignation of a PRCDA must be made in accordance with the procedures of the Administrative Procedure Act (5 U.S.C. 553). 42 CFR 136.22(c). In compliance with this requirement, the IHS published a proposed notice of redesignation and requested public comments on August 9, 2023 (88 FR 53899). The IHS did not

receive any comments to the notice of the proposed expansion.

Two other Tribes currently have PRCDAs which include one or both of the counties to be included in the Spokane Tribe's expanded PRCDA—the Coeur d'Alene Tribe (both Spokane and Whitman Counties) and the Kalispel Tribe of Indians (Spokane County only). On December 10, 2021, the Portland Area Director notified both Tribes of the Spokane Tribe's request to expand their PRCDA, and requested any comments in response. The Kalispel Tribe of Indians did not provide any comments. The Coeur d'Alene Tribe responded with objections to the proposed expansion. The Portland Area IHS engaged in further conversations and correspondence with the Coeur d'Alene Tribe throughout 2021 and 2022.

Through letters from the Spokane Tribe, dated May 31, 2022 and August 8, 2022, the Tribe expressed its support for the expansion, described the geographic proximity of Spokane and Whitman counties to the Tribe's reservation, and explained that the Tribe's reservation expanded into Spokane County in 2001 and that some of the Tribe's members reside in Whitman County.

In support of this expansion, the IHS adopts the following findings:

1. By expanding the PRCDA to include Spokane County and Whitman County, the Spokane Tribe's eligible population will be increased by an estimated 480 Tribal members. Although the Coeur d'Alene Tribe has a PRCDA which includes these two counties, the Coeur d'Alene Tribe does not provide PRC services to Spokane Tribal members residing in those counties. Expansion of the Spokane Tribe's PRCDA to include Spokane and Whitman Counties will therefore increase access to care for those individuals.

2. The IHS finds that the Tribal members within the expanded PRCDA are socially and economically affiliated with the Spokane based on letters from the Spokane Tribe, dated May 31, 2022 and August 8, 2022, which noted that the Spokane Tribal Council had

determined that Tribal members residing in Spokane and Whitman counties are socially and economically affiliated with the Tribe.

3. Spokane and Whitman Counties in the State of Washington are “on or near” the reservation, as they maintain common boundaries with the current PRCDA consisting of the counties of Ferry, Lincoln, and Stevens in the State of Washington. Additionally, Spokane County includes part of the Spokane reservation, and Whitman County includes the Tribe’s aboriginal territory.

4. The IHS administers the Wellpinit Service Unit PRC program and will use its existing Federal allocation for PRC to provide services to the expanded population. No additional financial resources will be allocated by the IHS to the Portland Area IHS to provide services to Spokane Tribal members residing in Spokane and Whitman Counties in the State of Washington.

An updated listing of the PRCDA’s for all federally-recognized Tribes may be accessed via a link under the “Purchased/Referred Care Delivery Area” heading on the IHS PRC Resources website (<https://www.ihs.gov/prc/resources>).

Public Comments: The IHS did not receive any comments to the notice of the proposed expansion.

Roselyn Tso,

Director, Indian Health Service.

[FR Doc. 2023–28311 Filed 12–22–23; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Notice of Purchased/Referred Care Delivery Area Redesignation for the Mid-Atlantic Tribes in the States of Maryland, North Carolina, and Virginia

AGENCY: Indian Health Service, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Indian Health Service (IHS) has decided to view the seven Mid-Atlantic Tribes in the Commonwealth of Virginia collectively and to expand the geographic boundaries of their current Purchased/Referred Care Delivery Areas (PRCDAs). The seven Mid-Atlantic Tribes include the Pamunkey Indian Tribe, Chickahominy Indian Tribe, Chickahominy Indian Tribe—Eastern Division, Upper Mattaponi Tribe, Rappahannock Tribe, Monacan Indian Nation, and Nansemond Indian Tribe.

DATES: This expansion is effective as of the publication date of this notice.

ADDRESSES: This notice can be found at <https://www.federalregister.gov>. Written requests for information should be delivered to: CAPT John Rael, Director, Office of Resource Access and Partnerships, Indian Health Service, 5600 Fishers Lane, Mail Stop 10E85C, Rockville, MD 20857, or by phone at (301) 443–0969 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The final collective PRCDA for the seven Mid-Atlantic Tribes now includes the following counties and independent cities:

Counties in the Commonwealth of Virginia: Accomack, Albemarle, Alleghany, Amelia, Amherst, Appomattox, Arlington, Augusta, Bath, Bedford, Botetourt, Buckingham, Campbell, Caroline, Charlotte, Chesterfield, Clarke, Cumberland, Culpeper, Dinwiddie, Essex, Fauquier, Floyd, Fluvanna, Gloucester, Greene, Greensville, Goochland, Hanover, Henrico, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoun, Louisa, Lunenburg, Mathews, Mecklenburg, Middlesex, Montgomery, Nelson, New Kent, Newport News, Norfolk, Nottoway, Orange, Page, Patrick, Pittsylvania, Powhatan, Prince Edward, Prince George, Prince William, Pulaski, Richmond, Rockbridge, Rockingham, Southampton, Spotsylvania, Stafford, Warren, Westmoreland, and York.

Independent Cities in the Commonwealth of Virginia: Alexandria, Buena Vista, Charlottesville, Chesapeake, Colonial Heights, Covington, Emporia, Fairfax, Falls Church, Franklin, Fredericksburg, Hampton, Harrisonburg, Hopewell, Lexington, Lynchburg, Manassas, Manassas Park, Newport News, Norfolk, Petersburg, Poquoson, Portsmouth, Radford, Richmond, Roanoke, Salem, Staunton, Suffolk, Virginia Beach, Waynesboro, and Williamsburg.

Counties in the State of Maryland: Allegany, Anne Arundel, Baltimore, Calvert, Carroll, Cecil, Charles, Frederick, Harford, Howard, Kent, Montgomery, Prince George’s, Queen Anne’s, St. Mary’s, and Washington.

Independent Cities in the State of Maryland: Baltimore City.

Counties in the State of North Carolina: Alexander, Camden, Catawba, Chowan, Currituck, Davidson, Davie, Durham, Forsyth, Franklin, Gates, Granville, Guilford, Johnston, Orange, Pasquotank, Randolph, Rowan, Stanly, Stokes, and Wake.

The sole purpose of this expansion is to authorize additional Tribal members

and beneficiaries to receive Purchased/Referred Care (PRC) services.

The IHS provides services under regulations in effect as of September 15, 1987, and republished at 42 CFR part 136, subparts A–C. Subpart C defines a Contract Health Service Delivery Area (CHSDA), now referred to as a PRCDA, as the geographic area within which PRC will be made available by the IHS to members of an identified Indian community who reside in the PRCDA. Residence within a PRCDA by a person who is within the scope of the Indian health program, as set forth in 42 CFR 136.12, creates no legal entitlement to PRC but only potential eligibility for services. Services needed, but not available at an IHS/Tribal facility, are provided under the PRC program depending on the availability of funds, the relative medical priority of the services to be provided, and the actual availability and accessibility of alternate resources in accordance with the regulations.

The regulations at 42 CFR part 136, subpart C provide that, unless otherwise designated, a PRCDA shall consist of a county which includes all or part of a reservation and any county or counties which have a common boundary with the reservation. 42 CFR 136.22(a)(6). The regulations also provide that after consultation with the Tribal governing body or bodies on those reservations included within the PRCDA, the Secretary may, from time to time, redesignate areas within the United States for inclusion in or exclusion from a PRCDA. 42 CFR 136.22(b). The regulations require that certain criteria must be considered before any redesignation is made. The criteria are as follows:

(1) The number of Indians residing in the area proposed to be so included or excluded;

(2) Whether the Tribal governing body has determined that Indians residing in the area near the reservation are socially and economically affiliated with the Tribe;

(3) The geographic proximity to the reservation of the area whose inclusion or exclusion is being considered; and

(4) The level of funding which would be available for the provision of PRC.

Additionally, the regulations require that any redesignation of a PRCDA must be made in accordance with the procedures of the Administrative Procedure Act (5 U.S.C. 553). 42 CFR 136.22(c). In compliance with this requirement, the IHS published a proposed notice of redesignation and requested public comments on August 1, 2023 (88 FR 50160). In response, the IHS received one comment. The

comment received expressed support of the proposed expansion.

Representatives from all seven Mid-Atlantic Tribes unanimously sought to move forward collectively to request re-designation of their PRCDA to include the entire Commonwealth of Virginia. Following consultation with those Tribes, the IHS also considered portions of Maryland and North Carolina that are close to the border of Virginia. Since all seven of the Mid-Atlantic Tribes requested the same PRCDA, the IHS considered these Tribes collectively for purposes of the PRCDA expansion. This included considering their Tribal members collectively under the criteria set forth in 42 CFR 136.22(b). In support of this expansion, the IHS adopts the following findings:

1. By expanding each Tribe's PRCDA and creating one collective PRCDA, the seven Mid-Atlantic Tribes estimate the current eligible population will collectively increase by 1006 individuals.

2. The seven Mid-Atlantic Tribes have determined that these 1006 individuals are members of the federally recognized Tribes in the Commonwealth of Virginia and that these members are socially and economically affiliated with these Mid-Atlantic Tribes.

3. Members of one or more of the Tribes reside in each county that is included in the proposed expansion, and those members live near enough to their Tribe's seat of government to maintain close social and economic ties with their Tribe. According to the leadership for each of the Tribes, those members live close enough to regularly participate—in-person—in Tribal affairs, events, activities, or other functions held by or carried out by the Tribe within its current PRCDA. Furthermore, the expanded PRCDA counties and independent cities form a contiguous area with the existing PRCDA. Considering the seven Mid-Atlantic Tribes collectively, the IHS has determined the additional counties and independent cities proposed for inclusion herein to be geographically proximate, meaning "on or near," to the area analogous to reservations for the seven Mid-Atlantic Tribes.

4. PRC programs operated by/for the seven Mid-Atlantic Tribes will use their existing Federal allocation for PRC funds to provide services to the expanded population. No additional financial resources will be allocated by the IHS to these programs to provide services to members residing in the expanded counties and independent cities in the Commonwealth of Virginia, State of Maryland, or State of North Carolina.

An updated listing of the PRCDA for all federally recognized Tribes may be accessed via a link under the "Purchased/Referred Care Delivery Area" heading on the IHS PRC Resources website (<https://www.ihs.gov/prc/resources>).

Public Comments: The IHS received one comment. The comment received expressed support of the proposed expansion.

Roselyn Tso,

Director, Indian Health Service.

[FR Doc. 2023–28313 Filed 12–22–23; 8:45 am]

BILLING CODE 4166–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group; Fellowships in Digestive Diseases and Nutrition.

Date: February 15–16, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIDDK, Democracy II, Suite 7000A, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jian Yang, Ph.D., Scientific Review Officer, Review Branch, Division of Extramural Activities, NIDDK, National Institutes of Health, Room 7111, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7799, yangj@extra.niddk.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: December 20, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28388 Filed 12–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Dominantly Inherited Alzheimer Network.

Date: March 22, 2024.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Joshua Jin-Hyouk Park, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg, Suite 2W200, Bethesda, MD 20892, (301) 496–6208, joshua.park4@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 20, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28390 Filed 12–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as

amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Review of Centers of Biomedical Research Excellence (COBRE) Phase III—Transitional Centers (P30) Applications.

Date: March 12–13, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Manas Chattopadhyay, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12N, Bethesda, Maryland 20892, 301–827–5320, manasc@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program No. 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: December 20, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28392 Filed 12–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which

would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Mechanism-Based Adult Stem Cell Treatments for Aging Pathologies.

Date: January 19, 2024.

Time: 12:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Birgit Neuhuber, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg. Suite 3208, Bethesda, MD 20892, 301–496–3562, neuhuber@ninds.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 20, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28394 Filed 12–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Cancellation of Meeting

Notice is hereby given of the cancellation of the National Cancer Institute Special Emphasis Panel, SEP–11: NCI Clinical and Translational Cancer Research, March 7, 2024, 10:00 a.m. to March 7, 2024, 1:30 p.m., National Cancer Institute Shady Grove, Resources and Training Review Branch, Division of Extramural Activities, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland, 20850 which was published in the **Federal Register** on December 20, 2023, FR Doc. 2023–27963, 88 FR 88100.

This meeting is being cancelled and will be rescheduled with a new contact person.

Dated: December 20, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28371 Filed 12–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Cancer Institute Clinical Trials and Translational Research Advisory Committee.

The meeting will be held as a virtual meeting and is open to the public. Individuals who plan to view the virtual meeting and need special assistance or other reasonable accommodations to view the meeting, should notify the Contact Person listed below in advance of the meeting. The meeting can be accessed from the NIH VideoCast at the following link: <https://videocast.nih.gov/>.

Name of Committee: National Cancer Institute Clinical Trials and Translational Research Advisory Committee.

Date: March 13, 2024.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: Strategic Discussion of NCI's Clinical and Translational Research Programs.

Place: National Cancer Institute, 9609 Medical Center Drive, Rockville, MD 20850 (Virtual Meeting).

Contact Person: Sheila A. Prindiville, M.D., M.P.H., Director, Coordinating Center for Clinical Trials, National Cancer Institute, National Institutes of Health, 9609 Medical Center Drive Room 6W136, Rockville, MD 20850 240–276–6173 prindivs@mail.nih.gov.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: <http://deainfo.nci.nih.gov/advisory/ctac/ctac.htm>, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 19, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28329 Filed 12–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****Request for Public Comments on Co-Occurring Conditions in Autism**

AGENCY: National Institutes of Health, HHS.

ACTION: Request for Information.

SUMMARY: On behalf of the Interagency Autism Coordinating Committee (IACC), the National Institute of Mental Health (NIMH) Office of National Autism Coordination (ONAC) is seeking public comments to assist the IACC in identifying priorities related to physical and mental health conditions, and other related conditions that commonly co-occur with autism. The IACC is requesting public comments on the impact of these co-occurring conditions, as well as research, services, and policy needs that may be helpful to consider in addressing issues related to these conditions.

DATES: Responses to this notice are voluntary and the public comment period will be open from January 3, 2024, through February 14, 2024.

ADDRESSES: All comments must be submitted electronically via the web-based form at: <https://iacc.hhs.gov/meetings/public-comments/requests-for-information/2023/co-occurring-conditions.shtml>.

FOR FURTHER INFORMATION CONTACT:

Specific questions about this Request for Public Comment should be directed to: Ana Cappuccio by phone at 301-402-4837 or email at iaccpublicinquiries@mail.nih.gov.

SUPPLEMENTARY INFORMATION: The IACC <http://www.iacc.hhs.gov/> is a federal advisory committee composed of federal and public members that provides advice to the Secretary of Health and Human Services on autism spectrum disorder. The Committee is authorized under the Autism CARES Act of 2019, Public Law 116-60. The *2021-2023 IACC Strategic Plan for Autism Research, Services, and Policy* at <https://iacc.hhs.gov/publications/strategic-plan/2023/> provides an overview of priorities identified by the IACC to improve health and well-being for autistic individuals and their families.

The Committee seeks public comment on the following questions related to the impact of co-occurring physical and mental health conditions:

1. What are the most significant challenges caused by co-occurring physical health conditions in autistic

people? (Examples of co-occurring physical health conditions: gastrointestinal disorders, sleep disturbances, epilepsy, sensory and motor challenges)

2. What are the most significant challenges caused by co-occurring mental health conditions in autistic people? (Examples of mental health co-occurring conditions: depression, anxiety, aggressive or self-injurious behavior, suicidality)

3. What are the most significant challenges caused by other conditions that co-occur with autism, such as learning disabilities, developmental disabilities, intellectual disabilities, and communication disabilities?

4. What additional research is needed to help address co-occurring conditions for autistic people?

5. What could be improved in autism services and supports to help address co-occurring conditions for autistic people? (Examples: Equitable access to and accessibility of services, insurance coverage, service systems issues, patient-provider interactions)

6. What lasting impact has COVID-19 infection and illness had on co-occurring physical and/or mental health conditions for autistic people?

7. What lasting positive or negative impacts have societal changes due to the COVID-19 pandemic had on physical or mental health for autistic people? (Examples of societal changes: disruptions in services, increased remote work and school, increased use of telehealth, reduced in-person social interactions and obligations)

Feedback provided in this RFI may be used by the IACC to inform future activities and reports.

Submission Information: For each topic/question in the Request for Public Comment, commenters may provide input on what they consider to be the most important research, services, and policy issues and remaining gaps in the subject area covered by that question.

Please note that the web form will accept a maximum of 1,500 characters (including letters, numbers, punctuation, etc.) per topic area. A valid email address is required for submission, and only one submission per email address will be accepted. If duplicate submissions are received (i.e., form letters), only one example of such a submission will be included in the final set of comments.

The information that commenters provide will become part of the public record; as such, please do not include any personally identifiable or confidential information in the comments. The web form will provide the option of submitting responses

anonymously, or the choice to include a name and/or organization associated with the comment.

Comments are subject to redaction in accordance with federal policies and the IACC's public comment guidelines and privacy policy. To view the IACC's public comment guidelines and privacy policy, visit: <https://iacc.hhs.gov/meetings/public-comments/guidelines/>. All comments or summaries of comments received will be made publicly available on the IACC website www.iacc.hhs.gov within 90 days of the closing deadline for this notice. Email addresses associated with comments will not be included as part of the public disclosure. After the closing deadline, responses cannot be edited or withdrawn. No basis for claims against the U.S. Government shall arise as a result of a response to this request for information or from the Government's use of such information.

Instructions: All comments must be submitted through the web form at <https://iacc.hhs.gov/meetings/public-comments/requests-for-information/2023/co-occurring-conditions.shtml>. Individuals submitting comments will receive an onscreen confirmation acknowledging receipt of the comment, but commenters will not receive individualized responses or feedback from the IACC or ONAC except in the cases of requests for technical assistance with the web form, etc. Only one comment per email address will be accepted, and if duplicate comments are received, only one example will be provided to the IACC.

Dated: December 20, 2023.

Susan A. Daniels,

Director, Office of National Autism Coordination, National Institute of Mental Health.

[FR Doc. 2023-28425 Filed 12-22-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**National Institutes of Health****National Advisory Child Health and Human Development Council Task Force on Research Specific to Pregnant Women and Lactating Women (PRGLAC) Implementation Working Group Meeting**

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The *Eunice Kennedy Shriver National Institute of Child Health and Human Development (NICHD) PRGLAC*

Implementation Working Group of Council is charged with monitoring and reporting on implementation of the recommendations from the PRGLAC. This includes monitoring and reporting on implementation, updating regulations, and guidance, as applicable, regarding the inclusion of pregnant women and lactating women in clinical trials.

DATES: The virtual meeting will be held on January 19, 2023, from 12:00 p.m. to 4:00 p.m. EST.

ADDRESSES: The virtual meeting will be videocast and can be accessed from the NIH Videocasting website at <http://videocast.nih.gov/>.

FOR FURTHER INFORMATION CONTACT: For information concerning this meeting, Dr. Emma Carpenter, Health Science Policy Analyst Office of Legislation and Public Policy, NICHD, NIH, 6710B Rockledge Drive, Bethesda, MD 20892–7510, emma.carpenter@nih.gov, 301–594–2572.

SUPPLEMENTARY INFORMATION: This notice is pursuant to 42 U.S.C. 285g. The National Advisory Child Health and Human Development Council Task Force on Research Specific to Pregnant Women and Lactating Women (PRGLAC) Implementation Working Group meeting will be open to the public as a virtual meeting. Individuals who need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed in advance of the meeting.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person. Information is also available on the Institute's/Center's home page: <https://www.nichd.nih.gov/about/advisory>, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS).

Alison N. Cernich,

Deputy Director, Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health.

[FR Doc. 2023–28445 Filed 12–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Topics in Autoimmunity.

Date: January 3, 2024.

Time: 2:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Xinrui Li, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 594–2084, xinrui.li@nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 20, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28395 Filed 12–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the

provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Gene Delivery Systems for AD/ADRD Therapy Development.

Date: January 16, 2024.

Time: 12:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Birgit Neuhuber, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Gateway Bldg., Suite 3208, Bethesda, MD 20892, 301–496–3562, neuhuber@ninds.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 20, 2023

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28387 Filed 12–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Diabetes and Digestive and Kidney Diseases Advisory Council, January 10, 2024, 08:30 a.m. to January 11, 2024, 04:30 p.m., National Institutes of Health, Building 31, 31 Center Drive, C Wing 6th Floor Conf. Room F&G, Bethesda, MD, 20892 which was published in the **Federal Register** on September 19, 2023, 88 FR 64448.

This meeting is being amended to reflect the change in time on the second day of the meeting, January 11, 2024 from 04:30 p.m. to 12:00 p.m., and to add the conference room to the meeting location Building 31, 6th Floor Conference Room F&G. The meeting is partially closed to the public.

Dated: December 20, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28389 Filed 12–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group; Neurological Sciences and Disorders C Study Section Translational Neural, Brain, and Pain Relief Devices (NSD–C).

Date: January 31–February 1, 2024.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Ana Olariu, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Blvd., Bethesda, MD 20892, 301–496–9223, Ana.Olariu@nih.gov.

Name of Committee: Neurological Sciences Training Initial Review Group; NST–2 Study Section NINDS K99 and K01.

Date: February 1–2, 2024.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Historic Menger Hotel, 204 Alamo Plaza, San Antonio, TX 78205.

Contact Person: DeAnna Lynn Adkins, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Blvd., Bethesda, MD 20892, 301–496–9223, deanna.adkins@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854,

Biological Basis Research in the Neurosciences, National Institutes of Health, HHS.)

Dated: December 19, 2023.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28331 Filed 12–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Initial Review Group; Training and Workforce Development Study Section—A Review of Applications for Medical Scientist Training Program and Basic Biomedical Predoctoral T32 awards.

Date: February 20–21, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute of General Medical Sciences, Natcher Building, 45 Center Drive, Bethesda, Maryland 20892 (Virtual Meeting).

Contact Person: Isaah S. Vincent, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12L, Bethesda, Maryland 20892, 301–594–2948, isaah.vincent@nih.gov.

(Catalogue of Federal Domestic Assistance Program No. 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: December 20, 2023.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–28393 Filed 12–22–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002]

Final Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below. The FIRM and FIS report are the basis of the floodplain management measures that a community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP).

DATES: The date of May 8, 2024 has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at <https://msc.fema.gov> by the date indicated above.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes has been published in newspapers of local circulation and 90

days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

This final notice is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for

floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at <https://msc.fema.gov>.

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
San Bernardino County, California and Incorporated Areas Docket No.: FEMA-B-2296	
City of Chino	City Hall, 13220 Central Avenue, Chino, CA 91710.
City of Chino Hills	City Hall, 14000 City Center Drive, Chino Hills, CA 91709.
City of Colton	Colton Corporate Yard, 160 South 10th Street, Colton, CA 92324.
City of Rialto	City Hall, 150 South Palm Avenue, Rialto, CA 92376.
Unincorporated Areas of San Bernardino County	San Bernardino County Department of Public Works, 825 East 3rd Street, San Bernardino, CA 92415.
Carroll County, Indiana and Incorporated Areas Docket No.: FEMA-B-2300	
City of Delphi	Carroll County Area Plan Commission, Carroll County Courthouse, 101 West Main Street, Delphi, IN 46923.
Unincorporated Areas of Carroll County	Carroll County Area Plan Commission, Carroll County Courthouse, 101 West Main Street, Delphi, IN 46923.
Black Hawk County, Iowa and Incorporated Areas Docket No.: FEMA-B-1975, B-2145 and B-2303	
City of Cedar Falls	City Hall, 220 Clay Street, Cedar Falls, IA 50613.
City of Dunkerton	City Hall, 200 Tower Street, Dunkerton, IA 50626.
City of Elk Run Heights	City Hall, 5042 Lafayette Road, Elk Run Heights, IA 50707.
City of Gilbertville	City Hall, 1321 5th Street, Gilbertville, IA 50634.
City of Hudson	City Hall, 525 Jefferson Street, Hudson, IA 50643.
City of La Porte City	City Hall, 202 Main Street, La Porte City, IA 50651.
City of Raymond	City Hall, 101 First Street, Raymond, IA 50667.
City of Waterloo	City Hall, Planning and Zoning Department, 715 Mulberry Street, Waterloo, IA 50703.
Unincorporated Areas of Black Hawk County	Black Hawk County Courthouse, 316 East 5th Street, Waterloo, IA 50703.
Breckinridge County, Kentucky and Incorporated Areas Docket No.: FEMA-B-2289	
City of Cloverport	City Hall, 212 West Main Street, Cloverport, Kentucky 40111.
Unincorporated Areas of Breckinridge County	Breckinridge County Courthouse, 208 South Main Street, Hardinsburg, Kentucky 40143.
Hancock County, Kentucky and Incorporated Areas Docket No.: FEMA-B-2289	
City of Hawesville	City Hall, 395 Main Street, Hawesville, Kentucky 42348.
City of Lewisport	City Hall, 405 2nd Street, Lewisport, Kentucky 42351.
Unincorporated Areas of Hancock County	Hancock County Administrative Building, 225 Main Cross Street, Hawesville, Kentucky 42348.
Henderson County, Kentucky and Incorporated Areas Docket No.: FEMA-B-2289	
City of Henderson	Henderson County Planning Commissioner's Office, 1990 Barret Court, Suite C, Henderson, Kentucky 42420.
Unincorporated Areas of Henderson County	Henderson County Planning Commissioner's Office, 1990 Barrett Court, Suite A, Henderson, Kentucky 42420.
Preble County, Ohio and Incorporated Areas Docket No.: FEMA-B-2288	
City of Eaton	Municipal Building, 328 North Maple Street, Eaton, OH 45320.
Unincorporated Areas of Preble County	Preble County Courthouse, Land Use Management Office, 101 East Main Street, Eaton, OH 45320.

Community	Community map repository address
Village of Camden	Village Office, 56 West Central Avenue, Camden, OH 45311.
Village of Gratis	Village Office, 404 East Harrison Street, Gratis, OH 45330.
Village of Lewisburg	Municipal Office, 112 South Commerce Street, Lewisburg, OH 45338.
Village of Verona	Municipal Building, 138 Mill Street, Verona, OH 45378.
Village of West Alexandria	Village Office, 1 Water Street, West Alexandria, OH 45381.
Hutchinson County, South Dakota and Incorporated Areas Docket No.: FEMA-B-2296	
City of Freeman	City Hall, 185 East 3rd Street, Freeman, SD 57029.
City of Menno	City Hall, 236 South 5th Street, Menno, SD 57045.
City of Parkston	City Hall, 207 West Main Street, Parkston, SD 57366.
Town of Olivet	Town Hall, 125 South 3rd Street, Olivet, SD 57052.
Unincorporated Areas of Hutchinson County	Hutchinson County Courthouse, 201 West Mentor Street, Olivet, SD 57052.
Comal County, Texas and Incorporated Areas Docket No.: FEMA-B-2221	
City of New Braunfels	City Hall, 550 Landa Street, New Braunfels, TX 78130.
Unincorporated Areas of Comal County	Comal County Engineer's Office, 195 David Jonas Drive, New Braunfels, TX 78132.
Chesterfield County, Virginia (All Jurisdictions) Docket No.: FEMA-B-2271	
Unincorporated Areas of Chesterfield County	Chesterfield County Community Development Building, 9800 Government Center Parkway, Chesterfield, VA 23832.
Thurston County, Washington and Incorporated Areas Docket No.: FEMA-B-2292	
City of Lacey	City Hall, 420 College Street SE, Lacey, WA 98503.
City of Olympia	City Hall, 601 4th Avenue E, Olympia, WA 98501.
City of Rainier	City Hall, 102 Rochester Street W, Rainier, WA 98576.
City of Tumwater	City Hall, 555 Israel Road SW, Tumwater, WA 98501.
Unincorporated Areas of Thurston County	Thurston County Courthouse, 2000 Lakeridge Drive SW, Building One, Olympia, WA 98502.
Door County, Wisconsin and Incorporated Areas Docket No.: FEMA-B-2297	
City of Sturgeon Bay	City Hall, 421 Michigan Street, Sturgeon Bay, WI 54235.
Unincorporated Areas of Door County	Door County Government Center, 421 Nebraska Street, Sturgeon Bay, WI 54235.
Village of Egg Harbor	Village Administration Office—Paul J. Bertschinger Community Center, 7860 State Highway 42, Egg Harbor, WI 54209.
Village of Ephraim	Administrative Offices, 10005 Norway Street, Ephraim, WI 54211.
Village of Sister Bay	Village Hall, 2383 Maple Drive, Sister Bay, WI 54234.

[FR Doc. 2023-28367 Filed 12-22-23; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Docket ID FEMA-2023-0002]

Final Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations

(BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below. The FIRM and FIS report are the basis of the floodplain management measures that a community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP).

DATES: The date of April 25, 2024 has been established for the FIRM and, where applicable, the supporting FIS

report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at <https://msc.fema.gov> by the date indicated above.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit

the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate

Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

This final notice is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the new or revised FIRM and FIS report

available at the address cited below for each community or online through the FEMA Map Service Center at <https://msc.fema.gov>.

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Lonoke County, Arkansas and Incorporated Areas Docket No.: FEMA-B-2285	
City of Cabot	City Hall, 101 North 2nd Street, Cabot, AR 72023.
Unincorporated Areas of Lonoke County	Lonoke County Floodplain Administrator Office, 210 North Center Street, Lonoke, AR 72086.
La Plata County, Colorado and Incorporated Areas Docket No.: FEMA-B-2206	
City of Durango	City Hall, 949 East 2nd Avenue, Durango, CO 81301.
Town of Bayfield	Town Hall, 1199 Bayfield Parkway, Bayfield, CO 81122.
Town of Ignacio	Town Hall, 540 Goddard Avenue, Ignacio, CO 81137.
Unincorporated Areas of La Plata County	La Plata County Commissioner's Office, 1101 East 2nd Avenue, Durango, CO 81301.
Morgan County, Indiana and Incorporated Areas Docket No.: FEMA-B-2283	
City of Martinsville	City Hall, 59 S Jefferson Street, Martinsville, IN 46151.
Unincorporated Areas of Morgan County	Morgan County Administration Building, 180 S Main Street, Martinsville, IN 46151.
Berrien County, Michigan (All Jurisdictions) Docket No.: FEMA-B-2065 and FEMA-B-2288	
Charter Township of Benton	Benton Township Office, 1725 Territorial Road, Benton Harbor, MI 49022.
Charter Township of Lake	Lake Township Hall, 3220 Shawnee Road, Bridgman, MI 49106.
Charter Township of Lincoln	Lincoln Township Hall, 2055 W John Beers Road, Stevensville, MI 49127.
Charter Township of St. Joseph	Township Hall, 3000 Washington Avenue, St. Joseph, MI 49085.
City of Benton Harbor	City Hall, 200 E Wall Street, Benton Harbor, MI 49022.
City of Bridgman	City Hall, 9765 Maple Street, Bridgman, MI 49106.
City of New Buffalo	City Hall, 224 W Buffalo Street, New Buffalo, MI 49117.
City of St. Joseph	City Hall, 700 Broad Street, St. Joseph, MI 49085.
Township of Chikaming	Chickaming Township Center, 13535 Red Arrow Highway, Harbert, MI 49115.
Township of Hagar	Hagar Township Hall, 3900 Riverside Road, Riverside, MI 49084.
Township of New Buffalo	Township Office, 17425 Red Arrow Highway, New Buffalo, MI 49117.
Township of Royalton	Royalton Township Hall, 980 Miners Road, St. Joseph, MI 49085.
Village of Grand Beach	Village Hall, 48200 Perkins Boulevard, Grand Beach, MI 49117.
Village of Michiana	Village Hall, 4000 Cherokee Drive, Michiana, MI 49117.
Village of Shoreham	Shoreham Village Hall, 2120 Brown School Road, St. Joseph, MI 49085.
Village of Stevensville	Village Hall, 5768 St. Joseph Avenue, Stevensville, MI 49127.
Pipestone County, Minnesota and Incorporated Areas Docket No.: FEMA-B-2308	
City of Edgerton	City Hall, 801 1st Avenue W, Edgerton, MN 56128.
City of Hatfield	City Hall, 320 C Avenue, Hatfield, MN 56164.
City of Holland	City Hall, 210 Rock Street, Holland, MN 56139.
City of Ihlen	City Hall, 110 Holman Street W, Ihlen, MN 56164.
City of Jasper	City Hall, 105 E Wall Street, Jasper, MN 56144.
City of Pipestone	City Hall, 119 2nd Avenue SW, Suite 9, Pipestone, MN 56164.
City of Trosky	City Hall, 220 Broadway Street S, Trosky, MN 56144.

Community	Community map repository address
Unincorporated Areas of Pipestone County	Pipestone County Courthouse, 416 Hiawatha Avenue S, Pipestone, MN 56164.
Mineral County, Montana and Incorporated Areas Docket No.: FEMA-B-2211	
Town of Alberton	Mineral County Courthouse, 300 River Street, Superior, MT 59872.
Town of Superior	Mineral County Courthouse, 300 River Street, Superior, MT 59872.
Unincorporated Areas of Mineral County	Mineral County Courthouse, 300 River Street, Superior, MT 59872.
Fairfield County, Ohio and Incorporated Areas Docket No.: FEMA-B-2318	
City of Pickerington	City Hall, 100 Lockville Road, Pickerington, OH 43147.
Unincorporated Areas of Fairfield County	Fairfield County GIS Department, 108 N High Street, Lancaster, OH 43130.
Roberts County, South Dakota and Incorporated Areas Docket No.: FEMA-B-2273	
City of Peever	Roberts County Courthouse, 411 2nd Avenue E, Sisseton, SD 57262.
City of Rosholt	Roberts County Courthouse, 411 2nd Avenue E, Sisseton, SD 57262.
City of Sisseton	City Hall, 406 2nd Avenue W, Sisseton, SD 57262.
City of Wilmot	Roberts County Courthouse, 411 2nd Avenue E, Sisseton, SD 57262.
Sisseton Wahpeton Oyate Tribe	Sisseton Wahpeton Oyate Emergency Management Office, 114 Lake Traverse Drive, Sisseton, SD 57262.
Town of Claire City	Roberts County Courthouse, 411 2nd Avenue E, Sisseton, SD 57262.
Town of Corona	Roberts County Courthouse, 411 2nd Avenue E, Sisseton, SD 57262.
Town of New Effington	Community Center, 303 Main Street, New Effington, SD 57255.
Town of Ortley	Community Center, 212 New Main Street, Ortley, SD 57256.
Town of Summit	Roberts County Courthouse, 411 2nd Avenue E, Sisseton, SD 57262.
Town of White Rock	Roberts County Courthouse, 411 2nd Avenue E, Sisseton, SD 57262.
Unincorporated Areas of Roberts County	Roberts County Courthouse, 411 2nd Avenue E, Sisseton, SD 57262.
Jackson County, Tennessee and Incorporated Areas Docket No.: FEMA-B-2290	
Town of Gainesboro	City Hall, 402 East Hull Avenue, Gainesboro, TN 38562.
Unincorporated Areas of Jackson County	Jackson County Courthouse, 101 East Hull Avenue, Gainesboro, TN 38562.
Wilson County, Tennessee and Incorporated Areas Docket No.: FEMA-B-2290	
City of Lebanon	City Hall, 200 North Castle Heights Avenue, Suite 300, Lebanon, TN 37087.
Unincorporated Areas of Wilson County	Wilson County Courthouse, 228 East Main Street, Planning Office, Room 5, Lebanon, TN 37087.
Fauquier County, Virginia and Incorporated Areas Docket No.: FEMA-B-2110 and B-2312	
Town of Remington	Town Office, 105 E Main Street, Remington, VA 22734.
Town of The Plains	Post Office, 4314 Fauquier Avenue, The Plains, VA 20198.
Town of Warrenton	Town Office, 21 Main Street, Warrenton, VA 20186.
Unincorporated Areas of Fauquier County	Fauquier County GIS Department, 29 Ashby Street, Warrenton, VA 20186.
Henrico County, Virginia (All Jurisdictions) Docket No.: FEMA-B-2235	
Unincorporated Areas of Henrico County	Henrico County Administration Annex, Department of Public Works, 4305 E Parham Road, Henrico, VA 23228.

DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency**

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2392]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before March 25, 2024.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables below. Additionally,

the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

You may submit comments, identified by Docket No. FEMA–B–2392, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) patrick.sacbibit@fema.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown

on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at https://www.floodsrp.org/pdfs/srp_overview.pdf.

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, “Flood Insurance.”)

Nicholas A. Shufro,
Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Fairfield County, Connecticut (All Jurisdictions)	
Project: 16–01–0277S Preliminary Date: July 26, 2023	
City of Bridgeport	City Hall Annex, 999 Broad Street, Bridgeport, CT 06604.
City of Danbury	City Hall, 155 Deer Hill Avenue, Danbury, CT 06810.
City of Norwalk	Planning and Zoning Department, 125 East Avenue, Norwalk, CT 06851.
City of Shelton	City Hall, 54 Hill Street, Shelton, CT 06484.
City of Stamford	Government Center, 888 Washington Boulevard, Stamford, CT 06901.
Town of Bethel	Clifford J. Hurgin Municipal Center, 1 School Street, Bethel, CT 06801.
Town of Darien	Town Hall, 2 Renshaw Road, Darien, CT 06820.
Town of Easton	Town Hall, 225 Center Road, Easton, CT 06612.
Town of Fairfield	John J. Sullivan Independence Hall, 725 Old Post Road, Fairfield, CT 06824.
Town of Greenwich	Town Hall, 101 Field Point Road, Greenwich, CT 06830.

Community	Community map repository address
Town of Monroe	Town Hall, 7 Fan Hill Road, Monroe, CT 06468.
Town of New Canaan	Town Hall, 77 Main Street, New Canaan, CT 06840.
Town of Newtown	Municipal Center, 3 Primrose Street, Newtown, CT 06470.
Town of Redding	Town Hall, 100 Hills Road, Redding, CT 06875.
Town of Ridgefield	Town Hall, 400 Main Street, Ridgefield, CT 06877.
Town of Stratford	Town Hall, 2725 Main Street, Stratford, CT 06615.
Town of Trumbull	Town Hall, 5866 Main Street, Trumbull, CT 06611.
Town of Weston	Town Hall, 56 Norfield Road, Weston, CT 06883.
Town of Westport	Town Hall, 110 Myrtle Avenue, Westport, CT 06880.
Town of Wilton	Town Hall, 238 Danbury Road, Wilton, CT 06897.

Yates County, New York (All Jurisdictions)
Project: 19-02-0013S Preliminary Date: May 01, 2023

Town of Barrington	Barrington Town Hall, 4424 Bath Road, Penn Yan, NY 14527.
Town of Benton	Benton Town Hall, 1000 Route 14A, Penn Yan, NY 14527.
Town of Italy	Italy Town Hall, 6060 Italy Valley Road, Naples, NY 14512.
Town of Jerusalem	Jerusalem Town Hall, 3816 Italy Hill Road, Branchport, NY 14418.
Town of Middlesex	Town Hall, 1216 Route 245, Middlesex, NY 14507.
Town of Milo	Milo Town Hall, 137 Main Street, Penn Yan, NY 14527.
Town of Potter	Potter Town Hall, 1226 Phelps Road, Middlesex, NY 14507.
Town of Starkey	Starkey Town Hall, 40 Seneca Street, Dundee, NY 14837.
Town of Torrey	Torrey Town Building, 56 Geneva Street, Dresden, NY 14441.
Village of Dresden	Village Office, 3 Firehouse Avenue, Dresden, NY 14441.
Village of Dundee	Code Officers Office, 12 Union Street, Dundee, NY 14837.
Village of Penn Yan	Municipal Building, 111 Elm Street, Penn Yan, NY 14527.

Lunenburg County, Virginia and Incorporated Areas
Project: 20-03-0028S Preliminary Date: May 18, 2023

Unincorporated Areas of Lunenburg County	Lunenburg County Administration, 11413 Courthouse Road, Lunenburg, VA 23952.

[FR Doc. 2023-28369 Filed 12-22-23; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA-2023-0002; Internal Agency Docket No. FEMA-B-2393]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the

Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before March 25, 2024.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

You may submit comments, identified by Docket No. FEMA-B-2393, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services

Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646-7659, or (email) patrick.sacbibit@fema.dhs.gov; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at https://www.floodmaps.fema.gov/fhm/fmx_main.html.

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any

request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of

the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at https://www.floodsrp.org/pdfs/srp_overview.pdf.

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location <https://hazards.fema.gov/femaportal/prelimdownload> and the respective Community Map Repository address

listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at <https://msc.fema.gov> for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Adair County, Missouri and Incorporated Areas Project: 19-07-0064S Preliminary Date: June 16, 2023	
City of Brashear	City Hall, 105 East Main Street, Brashear, MO 63533.
City of Kirksville	City Hall, 201 South Franklin Street, Kirksville, MO 63501.
City of Novinger	City Hall, 302 Marion Avenue, Novinger, MO 63559.
Unincorporated Areas of Adair County	Adair County Courthouse, 106 West Washington Street, Kirksville, MO 63501.

[FR Doc. 2023-28370 Filed 12-22-23; 8:45 am]

BILLING CODE 9110-12-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-7070-N-95]

30-Day Notice of Proposed Information Collection: Data Collection for HUD's Innovative Housing Showcase; OMB Control No.: 2528-New

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.
ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* January 25, 2024.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular

information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. Interested persons are also invited to submit comments regarding this proposal and comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Anna Guido, Clearance Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410-5000; email PaperworkReductionActOffice@hud.gov.

FOR FURTHER INFORMATION CONTACT:

Anna P. Guido, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410; email: PaperworkReductionActOffice@hud.gov; telephone (202) 402-5535. This is not a toll-free number, HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit: <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>. Copies of available documents submitted to OMB may be obtained from Ms. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is

seeking approval from OMB for the information collection described in Section A. The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on September 15, 2023 at 88 FR 63597.

A. Overview of Information Collection

Title of Information Collection: Data Collection for HUD's Innovative Housing Showcase.

OMB Approval Number: 2528-New.

Type of Request: This is a new collection.

Form Number: N/A.

Description of the need for the information and proposed use: HUD seeks to collect information that will be used to identify exhibitors for the Innovative Housing Showcase (Showcase). HUD accepts applications for the Showcase. A template application form will streamline information collection. Below is a brief description of the Innovative Housing Showcase: The Innovative Housing Showcase (Showcase) is a public event to raise awareness of new, innovative housing technologies, especially offsite constructed or factory-built housing. HUD is seeking potential exhibitors who have developed innovative housing technologies to show their technologies to the public.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hours per response	Annual burden hours	Hourly cost per response	Annual cost
Appendix A. Data Collection for HUD's Innovative Housing Showcase	100	1	100	3	300	\$76.10	\$22,830
Total	100	1	100	3	300	76.10	22,830

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

(5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology. HUD encourages interested parties to submit comments in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Anna P. Guido,

*Department Reports Management Office,
Office of Policy Development and Research,
Chief Data Officer.*

[FR Doc. 2023-28309 Filed 12-22-23; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-7070-N-96]

30-Day Notice of Proposed Information Collection: Training and Technical Assistance (TTA) Surveys; OMB Control No.: 2528-0325

AGENCY: Office of Policy Development and Research, Chief Data Officer, HUD.
ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for an additional 30 days of public comment.

DATES: *Comments Due Date:* January 25, 2024.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. Interested persons are also invited to submit comments regarding this proposal and comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Anna Guido, Clearance Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410-5000; email PaperworkReductionActOffice@hud.gov.

FOR FURTHER INFORMATION CONTACT: Anna P. Guido, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street

SW, Room 8210, Washington, DC 20410; email: PaperworkReductionActOffice@hud.gov. telephone (202)-402-5535. This is not a toll-free number, HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit: <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs>. Copies of available documents submitted to OMB may be obtained from Ms. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on September 12, 2023 at 88 FR 62588.

A. Overview of Information Collection

Title of Information Collection: Training and Technical Assistance (TTA) Surveys.

OMB Approval Number: 2528-0325.

Type of Request: Reinstatement with change.

Form Number: N/A.

Description of the need for the information and proposed use: The surveys in this collection of information are necessary to systematically gather user feedback and outcomes data to evaluate and improve HUD's deployment and management of its Training and Technical Assistance (TTA) resources. This type of outcomes data has been consistently requested by both the Office of Management and Budget (OMB) and Congressional Appropriations Committee staff. Technical assistance and training outcomes measurement and evaluation is authorized under Sec. 501 of Title V of the HUD Act of 1970. The surveys are voluntary on the part of respondents.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
TA Survey for TA Provider	1,140	1.1	1,254	0.25	313.5	\$47.20	\$14,797.20
TA Survey for Recipient	1,140	1.1	1,254	0.25	313.5	33.11	10,379.99
Survey for In-Person Training	3,500	1.3	4,550	0.20	910	27.37	24,906.70
Survey for Online Training	5,000	1.3	6,500	0.20	1,300	27.37	35,581.00

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Totals	10,780	.....	13,558	.....	2,837	.....	85,664.89

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

(5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology. HUD encourages interested parties to submit comments in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Anna P. Guido,

*Department Reports Management Office,
Office of Policy Development and Research,
Chief Data Officer.*

[FR Doc. 2023-28306 Filed 12-22-23; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-HQ-FAC-2023-N065;
FXFR13360900000-FF09F14000-234]

Draft Revised National European Green Crab Management and Control Plan

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: The U.S. Fish and Wildlife Service announces the availability of the

draft revised National European Green Crab Management and Control Plan (2023 EGC plan). The Aquatic Nuisance Species Task Force recently approved the 2023 EGC plan to be posted in the **Federal Register** for public comment. We invite comment from the public and local, State, Tribal, Federal agencies, and other relevant parties.

DATES: Written comments should be received on or before February 9, 2024.

ADDRESSES: *Obtaining Documents:* An electronic copy of the draft revised 2023 EGC plan is available at <https://www.fws.gov/media/management-plan-european-green-crab>.

Submitting Written Comments: Please send written comments using one of the following methods:

- *Email (preferred method):* anstaskforce@fws.gov. Please include your name and return mailing address in your email message.
- *U.S. Mail:* U.S. Fish and Wildlife Service Headquarters Office, Aquatic Nuisance Species Task Force; 5275 Leesburg Pike; Falls Church, VA 22041-3803 (Attn: Susan Pasko, Executive Secretary).

FOR FURTHER INFORMATION CONTACT:

Susan Pasko, Executive Secretary, Aquatic Nuisance Species Task Force, by email at susan_pasko@fws.gov or via phone at (703) 358-2466. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

The ANSTF is an intergovernmental organization dedicated to preventing and controlling aquatic nuisance species (ANS) and coordinating governmental efforts of the United States with the private sector and other North American interests. The ANSTF was established by Congress with the passage of the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (NANPCA; Pub. L. 101-646, 104 Stat. 4761, 16 U.S.C. 4701-4741), and reauthorized with the passage of the National Invasive Species Act of 1996 (NISA; Pub. L. 104-332, 110 Stat. 4073).

Section 1201(d) of NANPCA designates the Undersecretary of Commerce for Oceans and Atmosphere and the Director of the U.S. Fish and Wildlife Service as the ANSTF co-chairpersons. The ANSTF is regulated by the Federal Advisory Committee Act of 1972 (5 U.S.C. Ch. 10), which provides the ANSTF with its core structure and ensures an open and public forum for its activities. Membership of the ANSTF consists of 13 Federal agency representatives and 13 representatives from ex-officio member organizations who work in conjunction with six regional panels and issue-specific subcommittees to meet the challenges of developing and implementing a coordinated and complementary Federal program for ANS activities.

The NANPCA (as amended by NISA, 1996) establishes that the ANSTF is responsible for coordination of national efforts to prevent the introduction and spread of ANS. These responsibilities include the development of species management and control plans for specific high-risk invasive species. These plans focus on tasks that are essential to prevent spread into additional habitats and minimize the impact to areas where the species have already invaded. The plans are developed through a cooperative process and undergo review by the ANSTF members and regional panels. Successful implementation of these plans requires the participation of States, regional and Tribal entities, Federal agencies, and other relevant parties.

History of the National European Green Crab Management and Control Plan

European green crab (EGC; *Carcinus maenas*) is one of the most pervasive invasive predators in coastal marine systems, having established populations on five continents. The ecological and economic damage caused by EGC is well documented on both coasts of North America. On the U.S. Atlantic coast, EGC has been an established invader for at least 200 years, although its geographic range continues to expand into Atlantic Canada. On the Pacific coast, EGC arrived in the late 1980s and, consequently, is still at an earlier stage of range expansion and population growth. EGC has been implicated in historic declines and current losses of commercial bivalves in the eastern United States and maritime Canada and

is also thought to have impacts to habitats of native species, including eelgrass beds, along both coasts of North America. Recognizing the taxon's potential for negative cultural, ecological, and economic impacts and its expanding geographic range, the ANSTF first designated EGC as an ANS in 1998. Following this designation, a EGC control committee was appointed by the ANSTF and subsequently worked, through several years of planning and research, to develop the first National Management Plan for European Green Crab (2002 EGC plan), which was approved by the ANSTF in 2002. For 20 years, the plan guided natural resource managers on EGC management and served as a reference for regional plans. In June 2021, the ANSTF Control Subcommittee recommended that the 2002 EGC plan be updated to reflect the current knowledge, range, and control options of the species. In 2022, a working group was established to revise and update the 2002 EGC plan. Input on development of the updated plan was sought through multiple forums, including email submissions, in-person meetings (local, regional, and national), regional listening sessions, and informal public comment periods. Comments received were addressed and, where appropriate, incorporated into the new draft revised 2023 EGC plan.

The draft 2023 EGC plan was submitted to the ANSTF on July 19, 2023, and was approved to be posted in the **Federal Register** for public comment. Distribution of the 2023 EGC plan for public comment, and the consideration of comments received, are the final steps before the ANSTF can consider the plan for final approval (NANPCA; Pub. L. 101–646, 104 Stat. 4761, 16 U.S.C. 4722).

Proposed Updates to the 2002 Management Plan for the European Green Crab

The 2023 EGC plan proposes to update the 2002 plan by providing a more focused set of approaches for future management, based on significant changes in the distribution of EGC, new technologies available for identifying sources and mechanisms of spread, better information regarding the tradeoffs for different management efforts, and new methods for data management and sharing. The 2023 EGC plan also describes current strategies for coordinating the activities of scientists, resource agencies, Tribal and First Nation organizations, and other entities. The 2002 EGC plan provided significant information about the geographic distribution, mechanisms for spread,

biology, ecology, and impacts. The 2023 EGC plan adds new distribution information and summarizes recent research on population genetics, physiology, and range limits. It also provides detailed trapping protocols, recommendations for coordinating ongoing management efforts, and a summary of the legal framework and relevant statutes for EGC across the United States. The 2023 EGC plan includes 11 goals, 23 objectives, and 12 specific strategies, as well as prioritized actions and evaluation criteria.

The purpose of the 2023 EGC plan is to provide guidance for efforts to prevent future introductions, to rapidly detect and respond to new invasions of EGC before they become established and create ecological and economic damage, and to manage current populations that pose an undue threat to resources of importance for ecosystems and local cultures. This plan also serves as a baseline for the development and implementation of, as well as the integration with, local and regional plans, such as the Salish Sea Transboundary Action Plan for Invasive European Green Crab and the Early Detection and Rapid Response Plan for Invasive European Green Crab (*Carcinus maenas*) in Alaska 2023–2028 (previously known as the Alaska Action Plan for Invasive European Green Crab).

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public view, we cannot guarantee that we will be able to do so.

Authority

This document is published under the authority of the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (NANPCA; Pub. L. 101–646, 104 Stat. 4761, 16 U.S.C. 4701–4741), as reauthorized with the passage of the National Invasive Species Act of 1996 (NISA; Pub. L. 104–332, 110 Stat. 4073).

David A. Miko,

Co-chair, Aquatic Nuisance Species Task Force.

[FR Doc. 2023–28361 Filed 12–22–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–R7–ES–2023–0209; FXES111607MRG01–245–FF07CAMM00]

Marine Mammals; Incidental Take During Specified Activities; Proposed Incidental Harassment Authorization for the Southern Beaufort Sea Stock of Polar Bears on the North Slope of Alaska

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of application; proposed incidental harassment authorization; notice of availability of draft environmental assessment; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, in response to a request under the Marine Mammal Protection Act of 1972, as amended, from the Bureau of Land Management, propose to authorize nonlethal incidental take by harassment of small numbers of Southern Beaufort Sea (SBS) polar bears (*Ursus maritimus*) for 1 year from the date of issuance. The applicant requested this authorization for take by harassment that may result from activities associated with oil well plugging and reclamation, soil sampling, snow trail, pad, and airstrip construction, and summer cleanup activities in the North Slope Borough of Alaska between the Wainwright and Oliktok Areas. This proposed authorization, if finalized, will be for up to 18 takes of polar bears by Level B harassment and up to 3 takes of polar bears by non-serious Level A harassment. No serious Level A or lethal take is requested, expected, or proposed to be authorized.

DATES: Comments on this proposed incidental harassment authorization and the accompanying draft environmental assessment must be received by January 25, 2024.

ADDRESSES: Document availability: You may view this proposed incidental harassment authorization, the application package, supporting information, draft environmental assessment, and the list of references cited herein at <https://www.regulations.gov> under Docket No. FWS–R7–ES–2023–0209. Alternatively, you may request these documents from the person listed under **FOR FURTHER INFORMATION CONTACT**.

Comment submission: You may submit comments on the proposed authorization by one of the following methods:

• *U.S. mail*: Public Comments Processing, Attn: Docket No. FWS-R7-ES-2023-0209, U.S. Fish and Wildlife Service, MS: PRB (JAO/3W), 5275 Leesburg Pike, Falls Church, VA 22041-3803.

• *Electronic submission*: <https://www.regulations.gov>. Follow the instructions for submitting comments to Docket No. FWS-R7-ES-2023-0209.

We will post all comments at <https://www.regulations.gov>. You may request that we withhold personal identifying information from public review; however, we cannot guarantee that we will be able to do so. See Request for Public Comments for more information.

FOR FURTHER INFORMATION CONTACT:

Charles Hamilton, by email at r7mmmregulatory@fws.gov, by telephone at 1-800-362-5148, or by U.S. mail at U.S. Fish and Wildlife Service, MS 341, 1011 East Tudor Road, Anchorage, Alaska 99503. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(D) of the Marine Mammal Protection Act of 1972 (MMPA; 16 U.S.C. 1361, *et seq.*) authorizes the Secretary of the Interior (Secretary) to allow, upon request, the incidental, but not intentional, taking by harassment of small numbers of marine mammals in response to requests by U.S. citizens (as defined in title 50 of the Code of Federal Regulations (CFR) in part 18, at 50 CFR 18.27(c)) engaged in a specified activity (other than commercial fishing) in a specified geographic region during a period of not more than 1 year. The Secretary has delegated authority for implementation of the MMPA to the U.S. Fish and Wildlife Service (Service or we). According to the MMPA, the Service shall allow this incidental taking by harassment if we make findings that the total of such taking for the 1-year period:

- (1) is of small numbers of marine mammals of a species or stock;
- (2) will have a negligible impact on such species or stocks; and
- (3) will not have an unmitigable adverse impact on the availability of the species or stock for taking for subsistence use by Alaska Natives.

If the requisite findings are made, we issue an authorization that sets forth the following, where applicable:

- (a) permissible methods of taking;
- (b) means of effecting the least practicable adverse impact on the species or stock and its habitat and the availability of the species or stock for subsistence uses; and
- (c) requirements for monitoring and reporting of such taking by harassment, including, in certain circumstances, requirements for the independent peer review of proposed monitoring plans or other research proposals.

The term “take” means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. “Harassment” for activities other than military readiness activities or scientific research conducted by or on behalf of the Federal Government means any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (the MMPA defines this as “Level A harassment”), or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (the MMPA defines this as “Level B harassment”).

The terms “negligible impact” and “unmitigable adverse impact” are defined in 50 CFR 18.27 (*i.e.*, regulations governing small takes of marine mammals incidental to specified activities) as follows: “Negligible impact” is an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival. “Unmitigable adverse impact” means an impact resulting from the specified activity: (1) that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

The term “small numbers” is also defined in 50 CFR 18.27. However, we do not rely on that definition here as it conflates “small numbers” with “negligible impacts.” We recognize “small numbers” and “negligible impacts” as two separate and distinct

requirements when reviewing requests for incidental harassment authorizations (IHA) under the MMPA (see *Natural Res. Def. Council, Inc. v. Evans*, 232 F. Supp. 2d 1003, 1025 (N.D. Cal. 2003)). Instead, for our small numbers determination, we estimate the likely number of marine mammals to be taken and evaluate if that number is small relative to the size of the species or stock.

The term “least practicable adverse impact” is not defined in the MMPA or its enacting regulations. For this IHA, we ensure the least practicable adverse impact by requiring mitigation measures that are effective in reducing the impact of specified activities, but they are not so restrictive as to make specified activities unduly burdensome or impossible to undertake and complete.

If the requisite findings are made, we shall issue an IHA, which may set forth the following, where applicable: (i) permissible methods of taking; (ii) other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for subsistence uses by coastal-dwelling Alaska Natives (if applicable); and (iii) requirements for monitoring and reporting take by harassment.

Summary of Request

On May 22, 2023, the Service received a request from the Department of the Interior’s Bureau of Land Management (BLM) for authorization to take by nonlethal incidental harassment small numbers of Southern Beaufort Sea (SBS) polar bears (*Ursus maritimus*) during oil well plugging and reclamation, soil sampling, snow trail, pad, and runway construction, and summer cleanup activities in the North Slope Borough of Alaska between the Wainwright and Oliktok Areas, for a period of 1 year from the date of issuance and beginning during the winter of 2023/2024. Their request also included a proposed Polar Bear Awareness and Interaction Plan. The Service requested further information on June 8, June 16, July 10, August 7, September 15, and September 19, 2023. BLM submitted clarifying information on June 26, July 18, August 10, September 20, and October 5, 2023. The Service received a revised application on October 5, 2023. The Service deemed the revised request dated September 2023 (received October 5, 2023; hereafter referred to as the “Request”), adequate and complete on October 5, 2023.

Description of Specified Activities and Specified Geographic Region

The specified activities described in the Request consist of oil well plugging

and reclamation, soil sampling, snow trail, pad, and airstrip construction, and summer cleanup activities in the North Slope Borough of Alaska between the

Wainwright and Oliktok Areas (figure 1; BLM 2023).

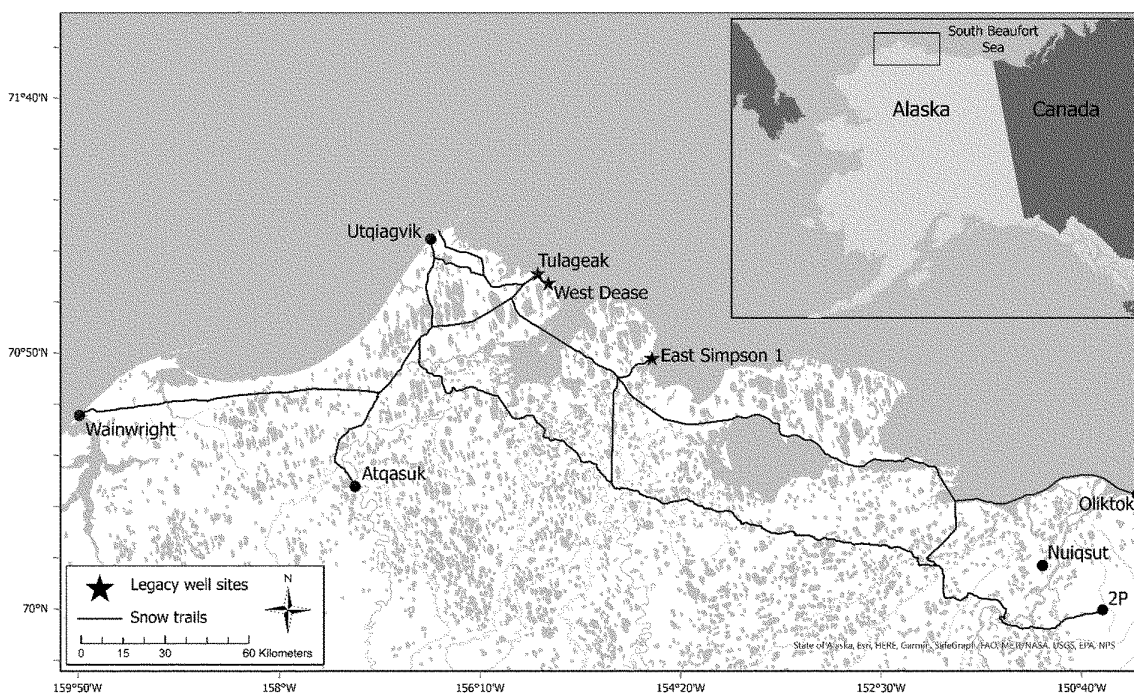


Figure 1. Specific geographic region of the proposed legacy well plugging and reclamation in the North Slope Borough of Alaska.

Maternal Den Surveys

BLM will conduct two aerial infrared (AIR) maternal den surveys to identify any active polar bear dens in the area prior to beginning operations within a 2-mile corridor along the northern route from Oliktok to the Tulageak well site. The surveyors will use AIR cameras on fixed-wing aircraft with flights flown between 245–457 meters (m) (800–1,500 feet [ft]) above ground level at a speed of <185 kilometers per hour (km/h) (<115 miles per hour [mph]). These surveys will be concentrated on areas within 1.6 kilometers (km) (1 mile [mi]) of project activities that would be suitable for polar bear denning activity such as drainages, banks, bluffs, or other areas of topographic relief. The first survey will be conducted between December 1 and 25, 2023, and the second survey will be conducted between December 15, 2023, and January 10, 2024, with a minimum of 24 hours between surveys.

Snow Trail, Pad, and Airstrip Construction

There are no permanent roads available to access any of the three legacy wells included in this project;

therefore, construction of temporary snow trails is required. Snow trail construction will occur during January or February of 2024, after “prepacking” a minimum of 15 centimeters (cm) (6 inches [in]) of base snow via all terrain smooth-tracked vehicles approved for off-road tundra travel. Prepacking promotes lower tundra soil temperatures and accelerates freezing of soils prior to use, thereby helping to protect the tundra during snow trail and pad grooming, maintenance, and use. Snow will also be packed around stream crossings to protect stream banks and vegetation. Exact locations may vary up to 1 mile on either side of the center lines depicted in figure 1 based on field conditions. This project will require the use of up to approximately 1,001 km (622 mi) of 9-m (30-ft) wide snow trails; however, some of the trails utilized will include annually constructed trail systems such as the North Slope Borough Community Winter Access Trail (CWAT; BLM 2023). Snow trail usage will cease with the spring thaw (April/May 2024), and the majority of cleanup will occur during demobilization at this time. Final stages of cleanup and trail inspection will occur by air (see *Equipment*

Mobilization, Demobilization, and Summer Clean-up).

A 610-m (2,000-ft) long by 30-m (100-ft) wide snow airstrip will be constructed at the Tulageak well site. No fuel will be stored at the airstrip. A 2.4-hectare (ha) (6-acre [ac], 152-m-by-152 m, 500-ft-by-500-ft) snow pad will be constructed at the Tulageak well site to support testing, cleanup, plugging, and other associated activities. Small snow pads (approximately 0.2 ha [0.5 ac]) will also be constructed to stage materials and equipment for soil-sampling activities at the West Dease and East Simpson 1 well sites. No water will be used for snow trail, pad, or airstrip construction.

Equipment Mobilization, Demobilization, and Summer Clean-Up

Large equipment, including mobile camp trailers, drill rigs, along with other support equipment and supplies, will be moved to the Tulageak, West Dease, or East Simpson 1 well sites from either the 2P gravel pads or existing pads at Oliktok (figure 1) based on sea ice and other environmental conditions. Equipment will be hauled along snow trails by Steiger Tractors, Tucker Sno-Cats, and D-7 Caterpillar Tractors. Trips

to or from Oliktok will take the northern snow trail route, and trips from the 2P pad will take the southern snow trail route (figure 1; BLM 2023). A total of up to 13 round trips could be required between January and mid-May 2024, along either or a combination of these 2 routes including 3–4 round trips during both mobilization (January or February) and demobilization (April or early May), and up to 5 round trips for resupply during operations.

Additionally, there are two planned resupply routes from Utqiagvik to the well sites. A 30-mile resupply snow trail will follow the Barrow Gas Field Road from Utqiagvik to the Tulageak well site, while a second resupply snow road branches off the CWAT south of Utqiagvik, heading east to the Tulageak project area (figure 1). The resupply routes would be used to bring in crews, fuel, water, ancillary equipment, and supplies throughout the operations period. As with the other routes, Steiger Tractors, Tucker Sno-cats, and D–7 Caterpillar Tractors would be used to pull sleds and sleighs on the resupply routes. During winter operations, there would be approximately one to three round trips every day along the resupply routes from Utqiagvik to the Tulageak well site for fuel, personnel, water, and supplies. There would be approximately 36–50 total round trips on these routes during the winter season. Access routes from Wainwright and Atkasuk may also be used to transport crews, equipment, and vehicles (with the exception of the drill rigs and camp trailers) to Utqiagvik or the well sites (figure 1). There would be up to five to eight round trips expected to occur along these trail sections during operations.

In addition to ground resupply, two to three fixed-wing support flights from Deadhorse to the Tulageak snow airstrip will occur over the course of 8 weeks (up to 24 flights) during winter project activities. The majority of snow trail and camp cleanup, such as trash removal and stick-picking, will occur during demobilization in the spring of 2024. Trash and other waste generated by camp and routine equipment maintenance will be contained appropriately and transported to Prudhoe Bay for disposal (BLM 2023).

Camp Setup

Three mobile camps will be required to provide crew lodging during well site activities. A mobile camp of 20–25 trailers will be required for the Tulageak well plugging and reclamation. Smaller camps of up to 10 trailers will be necessary for soil-sampling activities at both the West Dease and East Simpson

1 well sites. Generation of potable water from snow and disposal of grey water will follow Alaska Department of Environmental Conservation guidance and regulation. Further information on camp setup is available in BLM's application (BLM 2023).

Tulageak Well Site Surface Debris Removal, Well Plugging, and Reclamation

Removal of surface debris will occur prior to well plugging. The amount of debris is expected to be minor because structures, pilings, and solid waste were removed in 1981. Any remaining debris is likely to consist of scattered scrap metal or wood near the well and may require a variety of equipment to fully remove, including excavators, loaders, cutting torches, power tools, chainsaws, hand tools, and debris containers (e.g., dumpsters for recyclable scrap metal and solid waste). Embedded debris that cannot be easily removed will be cut off below surface and buried with soil. All surface debris removed from site will be contained and transported back to Prudhoe Bay for appropriate disposal. In addition to surface debris, a total of 524 cubic meters (m³) (685 cubic yards [yd³]) of diesel-contaminated soil (total cubic yards based on previous sampling; see application, BLM 2023) will be removed preceding any well-plugging activities and shipped to an appropriate disposal facility.

In 1981, at the conclusion of drilling and evaluation operations, cement and mechanical plugs were set at a depth of 792 m (2,600 ft) in the casing followed by 183 m (600 ft) of mining mud and then the upper 610 m (2,000 ft) of casing filled with diesel. Well-plugging operations will begin by excavating an area of approximately 5-m-by-5-m (15-ft-by-15-ft) wide and 3 m (10 ft) deep around the well casing. The 610 m (2,000 ft) of well casing diesel will be removed using an environmentally safe brine solution, sampled, containerized, and transported offsite for appropriate hazardous materials disposal, along with the 183 m (600 ft) of drilling mud. This plugging activity will generate up to 18,930 liters (l) (5,000 gallons [gal]) of fluids and up to 24 m³ (30 yd³) of drilling mud. The fluids and mud will be stored in appropriate onsite hazardous waste storage containers and transported offsite for disposal (see application for disposal details, BLM 2023). Upon removal of diesel and drilling mud, the casing will be filled with arctic blend cement in accordance with BLM regulations. Once the cement is fully set, the well casing will be cut off at a minimum of 3 m (10 ft) below sea level, marked with a welded steel

marker plate, and the excavation backfilled with soil to sea level.

Soil Sampling

In addition to the plugging and cleanup activities at the Tulageak well site, soil sampling, and site characterization of the West Dease and East Simpson 1 well sites will also be conducted to determine the type, location, and volume of drilling waste and contaminated soils at each location. The sampling will assist in planning future cleanup activities at the sites (these specific future cleanup activities are not included in this proposed IHA). Samples will be collected from the reserve and flare pits, around the wellheads, and where suspected drilling wastes or piles of wastes are located. Up to 25 samples will be collected at each site using a small track mounted drill following Alaska Department of Environmental Conservation site characterization requirements. The drill borings will be approximately 10 cm (4 in) in diameter and approximately 3 m (10 ft) deep. At both well locations (West Dease and East Simpson 1), approximately 25 samples will be collected: 12 samples from the reserve pits, 4 from the flare pits, 4 from the wellheads, and 5 from piles of known or suspected drilling waste.

Summer Cleanup

The majority of snow trail and camp cleanup, such as trash removal and stick-picking, will occur during demobilization in the spring of 2024 (April–May). However, a single A-star or Jet Ranger type helicopter will fly the overland snow trail routes and visit each of the three legacy well sites for a final inspection and to remove any trash or debris potentially missed during demobilization. Summer cleanup activities by helicopter will total up to 15 trips with 46 takeoff and landings.

Description of Marine Mammals in the Specified Geographic Region

Polar bears are the only species of marine mammal managed by the Service likely to be found within the specified geographic region. Information on range, stocks, biology, and climate change impacts on polar bears can be found in appendix A of the supplemental information (available as described above in **ADDRESSES**).

Potential Impacts of the Specified Activities on Marine Mammals

Surface-Level Impacts on Polar Bears

Disturbance impacts on polar bears will be influenced by the type, duration, intensity, timing, and location of the source of disturbance. Disturbance from

the specified activities would originate primarily from aircraft overflights (helicopter and fixed wing), tundra travel, well site plugging and reclamation, well site soil sampling, mobilization and demobilization, and cleanup activities. The noises, sights, and smells produced by these activities could elicit variable responses from polar bears, ranging from avoidance to attraction. When disturbed by noise, animals may respond behaviorally by walking, running, or swimming away from a noise source, or physiologically via increased heart rates or hormonal stress responses (Harms et al. 1997, Tempel and Gutierrez 2003). However, individual response to noise disturbance can be influenced by previous interactions, sex, age, and maternal status (Anderson and Aars 2008, Dyck and Baydack 2004). Noise and odors could also attract polar bears to work areas (Proposed Deterrence Guidelines; 75 FR 21571, April 26, 2010). Attracting polar bears to these locations could result in human–polar bear interactions, unintentional harassment, intentional hazing, or possible lethal take in defense of human life. This proposed IHA, if finalized, would authorize only the nonlethal, incidental, unintentional take of polar bears that may result from the specified activities and would require mitigation measures to manage attractants in work areas and reduce the risk of human–polar bear interactions.

Human–Polar Bear Interactions

A larger percentage of polar bears are spending more time on land during the open-water season, which may increase the risk for human–polar bear interactions (Atwood et al. 2016, Rode et al. 2022). Polar bear interaction plans, personnel training, attractants management, and polar bear monitoring are mitigation measures used to reduce human–polar bear interactions and

minimize the risks to humans and polar bears when interactions occur. Polar bear interaction plans detail the policies and procedures that will be implemented by BLM to avoid attracting and interacting with polar bears as well as minimizing impacts to the polar bears. Interaction plans also detail how to respond to the presence of polar bears, the chain of command and communication, and required training for personnel. Efficient management of attractants (e.g., human food, garbage) can prevent polar bears from associating humans with food, which mitigates the risk of human–polar bear interactions (Atwood and Wilder 2021). Information gained from monitoring polar bears near industrial infrastructure can be useful for better understanding polar bear distribution, behavior, and interactions with humans. Technology that may be used to facilitate detection and monitoring of polar bears includes bear monitors, closed-circuit television, video cameras, thermal cameras, radar devices, and motion-detection systems. It is possible that human–polar bear interactions may occur during the specified activities, and mitigation measures, as described in the applicant's Polar Bear Awareness and Interaction Plan, will be implemented by BLM to minimize the risk of human–polar bear interactions during the specified activities.

From mid-July to mid-November, SBS stock polar bears can be found in large numbers and high densities on barrier islands, along the coastline, and in the nearshore waters of the Beaufort Sea, particularly on and around Barter and Cross Islands (Wilson et al. 2017). This distribution leads to a significantly higher number of human–polar bear interactions on land and at offshore structures during the open-water season than other times of the year.

On land, most polar bear observations occur within 2 km (1.2 mi) of the

coastline based on polar bear monitoring reports. Facilities within the offshore and coastal areas are more likely to be approached by polar bears, and they may act as physical barriers to polar bear movements. As polar bears encounter these facilities, the chances for human–polar bear interactions increase. However, polar bears have frequently been observed crossing existing roads and causeways, and they appear to traverse the human-developed areas as easily as the undeveloped areas based on monitoring reports.

Effects of Aircraft Overflights on Polar Bears

Polar bears experience increased noise and visual stimuli when fixed-wing aircraft or helicopters fly above them, which may elicit a biologically significant behavioral response. Sound frequencies produced by aircraft will likely fall within the hearing range of polar bears (Nachtigall et al. 2007) and will be audible to polar bears during flyovers or when operating in proximity to polar bears. Polar bears likely have acute hearing, with previous sensitivities demonstrated between 1.4 and 22.5 kilohertz (kHz) (tests were limited to 22.5 kHz, Nachtigall et al. 2007). When exposed to high-energy sound, this hearing range may become impaired temporarily (called temporary threshold shift, or TTS) or permanently (called permanent threshold shift, or PTS). Species-specific TTS and PTS thresholds have not been established for polar bears at this time, but TTS and PTS thresholds have been established for the general group “other marine carnivores” which includes polar bears (Southall et al. 2019). Through a series of systematic modeling procedures and extrapolations, Southall et al. (2019) generated modified noise exposure thresholds for both in air and underwater sound (table 1).

TABLE 1—TEMPORARY THRESHOLD SHIFT (TTS) AND PERMANENT THRESHOLD SHIFT (PTS) THRESHOLDS ESTABLISHED BY SOUTHALL ET AL. (2019) THROUGH MODELING AND EXTRAPOLATION FOR “OTHER MARINE CARNIVORES,” WHICH INCLUDES POLAR BEARS

	TTS				PTS			
	Non impulsive	Impulsive			Non impulsive	Impulsive		
		SEL _{CUM}	SEL _{CUM}	Peak SPL		SEL _{CUM}	SEL _{CUM}	Peak SPL
Air	157	146	170	177	161	176		
Water	199	188	226	219	203	232		

Values are weighted for other marine carnivores' hearing thresholds and given in cumulative sound exposure level (SEL_{CUM} dB re 20μPa in air and SEL_{CUM} dB re 1 μPa in water) for impulsive and non-impulsive sounds, and unweighted peak sound pressure level in air (dB re 20μPa) and water (dB 1μPa) (impulsive sounds only).

During a Federal Aviation Administration test, test aircraft

produced sound at all frequencies measured (50 Hz to 10 kHz) (Healy

1974). At frequencies centered at 5 kHz, jets flying at 300 m (984 ft) produced 1/3

octave band noise levels of 84 to 124 dB, propeller-driven aircraft produced 75 to 90 dB, and helicopters produced 60 to 70 dB (Richardson et al. 1995). Thus, the frequency and level of airborne sounds typically produced by aircraft is unlikely to cause TTS or PTS unless polar bears are very close to the sound source.

Although neither TTS nor PTS are anticipated during the specified activities, impacts from aircraft overflights have the potential to elicit biologically significant behavioral responses from polar bears. Exposure to aircraft overflights is expected to result in short-term behavior changes, such as ceasing to rest, walking, or running, and, therefore, has the potential to be energetically costly. Polar bears observed during intentional aircraft overflights, conducted to study impacts of aircraft on polar bear responses, with an average flight altitude of 143 m (469 ft) exhibited biologically meaningful behavioral responses during 66.6 percent of aircraft overflights. These behavioral responses were significantly correlated with the aircraft's altitude, the bear's location (e.g., coastline, barrier island), and the bear's activity (Quigley et al. 2022). Polar bears associated with dens exhibited various responses when exposed to low-flying aircraft, ranging from increased head movement and observation of the disturbance to the initiation of rapid movement and/or den abandonment (Larson et al. 2020). Aircraft activities can impact polar bears across all seasons; however, aircraft have a greater potential to disturb both individuals and groups of polar bears on land during the summer and fall. These onshore polar bears are primarily fasting or seeking alternative terrestrial foods (Cherry et al. 2009, Griffen et al. 2022), and polar bear responses to aircraft overflights may result in metabolic costs to limited energy reserves. To reduce potential disturbance of polar bears during aircraft activities, mitigation measures, such as minimum flight altitudes over polar bears and their frequently used areas and flight restrictions around known polar bear aggregations, will be required when safe to perform these operations during aircraft activities.

Effects to Denning Polar Bears

Known polar bear dens around the oilfield and other areas of the North Slope, discovered opportunistically and/or during planned surveys for tracking marked polar bears and detecting polar bear dens, are monitored by the Service. However, these sites are only a small percentage of the total

active polar bear dens for the SBS stock in any given year. Each year, entities conducting operations on the North Slope coordinate with the Service to conduct surveys to determine the location of their activities relative to known polar bear dens and denning habitat. Under past IHAs and ITRs (incidental take regulations), operators have been required to avoid known polar bear dens by 1.6 km (1 mi). However, an unknown polar bear den may be encountered during BLM's activities. In instances, when a previously unknown den was discovered in proximity to human activity, the Service implemented mitigation measures such as the 1.6-km (1-mi) activity exclusion zone around the den and 24-hour monitoring of the den site.

The responses of denning polar bears to disturbance and the consequences of these responses can vary throughout the denning process. We divide the denning period into four stages when considering impacts of disturbance: den establishment, early denning, late denning, and post-emergence; definitions and descriptions are provided by Woodruff et al. (2022) and are also located in the 2021–2026 Beaufort Sea ITR (86 FR 42982, August 5, 2021).

Impacts of the Specified Activities on Polar Bear Prey Species

Information on the potential impacts of the specified activities on polar bear prey species can be found in the supplemental information to this document (available as described above in ADDRESSES).

Estimated Take

Definitions of Incidental Take Under the Marine Mammal Protection Act

Below we provide definitions of three potential types of take of polar bears. The Service does not anticipate and is not authorizing lethal take as a part of this IHA; however, the definitions of these take types are provided for context and background.

Lethal Take

Human activity may result in biologically significant impacts to polar bears. In the most serious interactions (e.g., vehicle collision, running over an unknown den causing its collapse), human actions can result in the mortality of polar bears. We also note that, while not considered incidental, in situations where there is an imminent threat to human life, polar bears may be killed. Additionally, though not considered incidental, polar bears have

been accidentally killed during efforts to deter polar bears from a work area for safety and from direct chemical exposure (81 FR 52276, August 5, 2016). Unintentional disturbance of a female polar bear by human activity during the denning season may cause the female either to abandon her den prematurely with cubs or abandon her cubs in the den before the cubs can survive on their own. Either scenario may result in the incidental lethal take of the cubs.

Level A Harassment

Human activity may result in the injury of polar bears. Level A harassment, for nonmilitary readiness activities, is defined as any act of pursuit, torment, or annoyance that has the potential to injure a marine mammal or marine mammal stock in the wild. We have divided Level A harassment into events that are likely (≤ 50 percent chance) to result in the animal's mortality (referred to as "serious Level A harassment") and events that are not likely (< 50 percent chance) to result in the animal's mortality (referred to as "non-serious Level A harassment"). Numerous actions can cause take by Level A harassment, such as creating a disturbance that separates mothers from dependent cubs (Amstrup 2003), inducing early den emergence (Amstrup and Gardner 1994, Rode et al. 2018), or repeatedly interrupting the nursing or resting of cubs to the extent that it impacts the cubs' body condition.

Level B Harassment

Level B harassment for nonmilitary readiness activities means any act of pursuit, torment, or annoyance that has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, feeding, or sheltering. Changes in behavior that disrupt biologically significant behaviors or activities for the affected animal are indicative of take by Level B harassment under the MMPA. Such reactions include, but are not limited to, the following:

- Fleeing (running or swimming away from a human or a human activity);
- Displaying a stress-related behavior such as jaw or lip-popping, front leg stomping, vocalizations, circling, intense staring, or salivating;
- Abandoning or avoiding preferred movement corridors such as ice floes, leads, polynyas, a segment of coastline, or barrier islands;
- Using a longer or more difficult route of travel instead of the intended path;

- Interrupting breeding, sheltering, or feeding;
- Moving away at a fast pace (adult) and cubs struggling to keep up;
- Temporary, short-term cessation of nursing or resting (cubs);
- Ceasing to rest repeatedly or for a prolonged period (adults);
- Loss of hunting opportunity due to disturbance of prey; or
- Any interruption in normal denning behavior that does not cause injury, den abandonment, or early departure of the female with cubs from the den site.

This list is not meant to encompass all possible behaviors; other behavioral responses may be indicative of take by Level B harassment. Relatively minor changes in behavior such as the animal raising its head or temporarily changing its direction of travel are not likely to disrupt biologically important behavioral patterns, and the Service does not view such minor changes in behavior as indicative of a take by Level B harassment. It is also important to note that eliciting behavioral responses that equate to take by Level B harassment repeatedly may result in Level A harassment.

Surface Interactions

We analyzed take by Level B harassment for polar bears that may potentially be encountered and impacted during BLM's oil well plugging and reclamation, soil sampling, snow trail, pad, and airstrip construction, and summer cleanup activities within the specified geographic region.

Impact Area

To assess the area of potential impact from the project activities, we calculate the area affected by project activities where harassment is possible. We refer to this area as an impact area. Behavioral response rates of polar bears to disturbances are highly variable, and data to support the relationship between distance to polar bears and disturbance is limited. Dyck and Baydack (2004) found sex-based differences in the frequencies of vigilance bouts, which involves an animal raising its head to visually scan its surroundings, by polar bears in the presence of vehicles on the tundra. However, in their summary of polar bear behavioral response to ice-breaking vessels in the Chukchi Sea, Smultea et al. (2016) found no difference between reactions of males, females with cubs, or females without cubs. During the Service's coastal aerial surveys, 99 percent of polar bears that responded in a way that indicated possible Level B harassment (polar bears that were running when detected or

began to run or swim in response to the aircraft) did so within 1.6 km (1 mi), as measured from the ninetieth percentile horizontal detection distance from the flight line. Similarly, Andersen and Aars (2008) found that female polar bears with cubs (the most conservative group observed) began to walk or run away from approaching snowmobiles at a mean distance of 1,534 m (0.95 mi). Thus, while future research into the reaction of polar bears to anthropogenic disturbance may indicate a different zone of potential impact is appropriate, the current literature suggests that the 1.6-km (1.0-mi) impact area will encompass most polar bear harassment events.

Estimated Harassment

We estimated Level B harassment using the spatio-temporally specific encounter rates and temporally specific harassment rates derived in the 2021–2026 Beaufort Sea ITR (86 FR 42982, August 5, 2021) in conjunction with the specified project activity information. Some portion of SBS bears may occur within the Chukchi Sea at a given time. However, the Beaufort Sea ITR rates do not explicitly account for this possibility, and the project area for this proposed IHA occurs only within the geographical boundary of the SBS subpopulation. Therefore, our analyses account only for SBS bears located within the SBS subpopulation boundary. Distribution patterns of polar bears along the coast of the SBS were estimated in Wilson et al. (2017) by dividing the North Slope Coastline into 10 equally sized grids and applying a Bayesian hierarchical model based on 14 years of aerial surveys in late summer and early fall. Wilson et al. (2017) estimated 140 polar bears per week along the coastline (a measurement that included barrier islands), however not with uniform distributions. The study found that disproportionality high densities of bears occur in grids 6 and 9, which contain known large congregating areas such as Kaktovik and Cross Island and has required polar bear density correction factors in previously issued ITAs. The vast majority of the coastline within the project area in this proposed IHA falls within grids 1–4 (although a small portion of the project area is located outside of Wilson et al.'s (2017) study area near the City of Wainwright). The Wilson et al. 2017 values for grids 1–4 are similar to those in the North Slope area where the 2021–2026 Beaufort Sea ITR (86 FR 42982, August 5, 2021) encounter rates were developed; therefore, we believe those values are applicable to the project area

in this proposed IHA and do not require any correction factor for polar bear densities in our analyses.

TABLE 2—DEFINITIONS OF VARIABLES USED IN HARASSMENT ESTIMATES OF POLAR BEARS ON THE COAST OF THE NORTH SLOPE OF ALASKA

Variable	Definition
B_{es}	bears encountered in an impact area for the entire season.
a_c	coastal exposure area.
a_i	inland exposure area.
r_o	occupancy rate.
e_{co}	coastal open-water season bear-encounter rate in bears/season.
e_{ci}	coastal ice season bear-encounter rate in bears/season.
e_{io}	inland open-water season bear-encounter rate in bears/season.
e_{ii}	inland ice season bear-encounter rate in bears/season.
t_i	ice season harassment rate.
t_o	open-water season harassment rate.
B_t	number of estimated Level B harassment events.

Table 2 provides the definition for each variable used in the formulas to calculate the number of potential harassment events. The variables defined in table 2 were used in a series of formulas to estimate the total harassment from surface-level interactions. Encounter rates were originally calculated as polar bears encountered per square km per season. As a part of their Request, BLM provided the Service with digital geospatial files that included the maximum expected human occupancy (*i.e.*, rate of occupancy [r_o] for each individual structure (*e.g.*, snow trails, snow pads) of their specified activities for each season of the IHA period. Using the buffer tool in ArcGIS, we created a spatial file of a 1.6-km (1-mi) buffer around all industrial structures. We binned the structures according to their seasonal occupancy rates by rounding them up into tenths (10 percent, 20 percent, etc.). We determined the impact area of each bin by first calculating the area within the buffers of 100 percent occupancy locations. We then removed the area of the 100 percent occupancy buffers from the project impact area and calculated the area within the 90 percent occupancy buffers. This iterative process continued until we calculated the area within all buffers. The areas of impact were then clipped by coastal and inland zone geospatial files to determine the coastal areas of impact (a_c) and inland areas of impact (a_i) for each occupancy bin. This

process was repeated for each season of the project.

Impact areas were multiplied by the appropriate encounter rate to obtain the number of polar bears expected to be encountered in the impact area per season (B_{es}). The equation below (equation 1) provides an example of the calculation of polar bears encountered in the ice season for an impact area in the coastal zone.

$$B_{es} = a_c * e_{ci}$$

Equation 1

To generate the number of estimated Level B harassments for each area of interest, we multiplied the number of polar bears in the area of interest per season by the proportion of the season the area is occupied, the rate of occupancy, and the harassment rate (equation 2).

$$B_i = B_{es} * S_p * r_o * t_i$$

Equation 2

Aircraft Impacts on Polar Bears

Polar bears in the project area will likely be exposed to the visual and auditory stimulation associated with the applicant's fixed-wing and helicopter activities; however, these impacts are likely to be minimal and short-term. Aircraft activities may cause disruptions in the normal behavioral patterns of polar bears as either an auditory or visual stimulus, thereby resulting in incidental Level B harassment. Mitigation measures, such as minimum flight altitudes over polar bears and restrictions on sudden changes to aircraft movements and direction, will be required if this authorization is finalized to reduce the likelihood that polar bears are disturbed by aircraft.

Estimating Harassment Rates of Aircraft Activities

We updated the analysis used to estimate aircraft impacts on polar bears from the 2021–2026 Beaufort Sea ITR (86 FR 42982, August 5, 2021) to include altitude-specific harassment rates. These altitude-specific harassment rates were estimated using observational data from fixed-wing aircraft overflights (Quigley 2022) and helicopter activities (Quigley et al. in review). In these studies, aerial searches along the northern coast of Alaska between Point Barrow and the western Canadian border were flown and polar bears were approached at different altitudes. Researchers recorded behavioral changes during these approaches and evaluated when and if Level B harassment occurred. Polar bears that did not exhibit behavioral changes consistent with harassment were then re-approached at progressively lower altitudes, reaching as low as 38 m (100 ft). Because polar bears were encountered at discrete-valued altitudes that differed by hundreds of feet, the actual altitude at which harassment would not occur likely exists between the altitude of observed harassment and the lowest altitude at which harassment was not observed. We estimated this theoretical harassment altitude by calculating the average of the observed harassment altitude and lowest non-harassment altitude. Polar bears that exhibited a behavioral change consistent with harassment on their first approach could potentially have shown this same response if the aircraft were at a higher altitude, thus we could not identify an

altitude at which no harassment would occur due to a lack of a “non-harassment” observation of that polar bear. To avoid negatively biasing results by using these altitudes unadjusted, theoretical harassment altitudes were estimated using the average theoretical altitude of harassment for all observations of an equal or greater altitude (*i.e.*, only including polar bears with two or more observed altitudes and excluding other polar bears harassed on initial approach). Where there were three or fewer observations to make such an average, theoretical harassment altitude was estimated as the average of 610 m (2,000 ft) and the observed harassment altitude. We chose 610 m (2,000 ft) because it was the lowest altitude at which no harassment was observed by either aircraft type.

Using the altitude-specific harassment rates, five categories of flights were created: takeoffs, landings, low-altitude flights (defined as those between 122 m [400 ft] and 305 m [1,000 ft] altitude), mid-altitude flights (defined as those between 305 m [1,000 ft] and 457 m [1,500 ft] altitude), and high-altitude flights (defined as those between 457 m [1,500 ft] and 610 m [2,000 ft] altitude). Harassment rates were assigned to each of these flight categories using the harassment rate for the lowest altitude in the category (*e.g.*, for low-altitude flights, the harassment rate estimated for 122 m [400 ft] was used). This binning method of using the lowest harassment rate in the bin allowed our estimates to be inclusive of possible changes in altitude due to variable flight conditions (table 3).

TABLE 3—HARASSMENT RATES FOR THE FIVE CATEGORIES OF FLIGHTS FOR FIXED-WING AIRCRAFT AND HELICOPTER OVERFLIGHTS

Flight category	Fixed-wing	Helicopter
Takeoffs	0.89	0.99
Landings	0.89	0.99
Low-altitude flights (122–305 m)	0.56	0.97
Mid-altitude flights (305–457 m)	0.005	0.14
High-altitude flights (457–610 m)	<0.001	0.002

We used the harassment rate associated with 61 m (200 ft) for takeoffs and landings.

Estimating Area of Impact for Aircraft Activities

For each category of the flight path (*i.e.*, takeoff, low-altitude travel, mid-altitude travel, high-altitude travel, and landing), we calculated an impact area and duration of impact using flight hours or flight path information provided in the Request. We used flights logs available through www.flightaware.com (FlightAware), a

website that maintains flight logs in the public domain, to estimate impact areas and flight hours for takeoffs and landings. We estimated a takeoff distance of 2.41 km (1.5 mi) that would be impacted for 10 minutes. We estimated a landing distance of 4.83 km (3 mi) per 305 m (1,000 ft) of altitude that would be impacted for 10 minutes per landing. To estimate the impact area of traveling segments, we subtracted the takeoff and landing areas from the total

area of the flight path. The duration of impact for traveling flights was either provided in the Request or calculated using the length of the flight and estimated flight speeds, provided by BLM, of 193 km per hour (120 mi per hour) or 257 km per hour (160 mi per hour) for fixed-winged aircraft. Polar bear encounter rates vary both spatial and temporally (table 4). We accounted for temporal variation by determining if the flight takes place during the open-

water (July 19–November 11) or the ice season (November 12–July 18). Spatial variation was accounted for by determining total proportion of the flight over coastal or inland zones. The coastal zone is defined as the offshore and onshore areas within 2 km (1.2 mi) of the coastline, and the inland zone is defined as the onshore area greater than 2 km (1.2 mi) from the coastline. Once spatially referenced, all flight paths were buffered by 1.6 km (1 mi), which is consistent with aircraft surveys conducted by the Service and the U.S. Geological Survey (USGS) between August and October during most years from 2000 to 2014 (Schliebe et al. 2008, Atwood et al. 2015, Wilson et al. 2017). In these surveys, 99 percent of groups of polar bears that exhibited behavioral responses consistent with Level B harassment were observed within 1.6 km (1 mi) of the aircraft.

TABLE 4—SEASONAL POLAR BEAR ENCOUNTER RATES BY ZONE, TABLE ADAPTED FROM 2021–2026 BEAUFORT SEA ITR

[86 FR 42982, August 5, 2021]

Coastal Zone Seasonal Encounter Rate	
Ice Season (July 19–November 11) 0.05 bears/km ² .	
Open-water Season (November 12–July 18) 1.48 bears/km ² .	
Inland Zone Seasonal Encounter Rate	
Ice Season (July 19–November 11) 0.004 bears/km ² .	
Open-water Season (November 12–July 18) 0.005 bears/km ² .	

To calculate the total number of Level B harassment events estimated due to the specified activities, we calculated the number of flight hours for each flight category (*i.e.*, takeoffs, low-altitude travel, mid-altitude travel, high-altitude travel, and landings) for each zone and season combination. These

values were then used to calculate the proportion of the season that aircraft occupied their impact areas (*i.e.*, takeoff area, landing area, or traveling segment impact areas). This proportion-of-season metric is equivalent to the occupancy rate (r_o) generated for surface-level interaction harassment estimates. The total impact area for each of the flight categories was multiplied by the zone and season-specific polar bear encounter rate to determine the number of polar bears expected in that area for the season (*i.e.*, B_{es} , as seen in equation 1). This number was then multiplied by the proportion of the season to determine the number of polar bears expected in that area when flights are occurring, and the appropriate harassment rate based on flight altitude to estimate the number of polar bears that may be harassed as a result of the flights (as seen in equation 2). Table 5 shows a summary of aircraft operations during the specified activities and the values used to estimate Level B harassment of polar bears during aircraft operations.

TABLE 5—SUMMARY OF AIRCRAFT OPERATIONS BY SEASON AND ACTIVITY DURING THE PROPOSED IHA PERIOD

Activity	Ice season (fixed-wing aircraft only)		Open-water season (helicopter only)			
	Winter support	Forward-looking infrared	Tulageak inspection and cleanup	East Simpson 1 inspection and cleanup	West Dease inspection and cleanup	Snow trail inspection and cleanup
Altitude *	High	Low	High	High	Low	Low
Total Flights	24	12	7	2	2	4
Proportion of Season	0.00444	0.01200	0.00041	0.00017	0.00002	0.00451
Proportion of Flight						
in Coastal Zone	0.6688	0.1454	0.096	0.5541	1	0.077
Proportion of Flight						
in Inland Zone	0.3312	0.8546	0.904	0.4459	0	0.923
Total Encounter Rate						
(bears/km ² /season) **	0.0347	0.0107	0.1466	0.8223	1.4800	0.1186
Harassment Rate	0.001	0.56	0.002	0.002	0.97	0.97
Total Takeoffs and Landings	24	0	14	4	4	24
Landing Time/Season	0.0007	0	0.0008	0.0002	0.0002	0.0014
Takeoff Time/Season	0.0007	0	0.0008	0.0002	0.0002	0.0014
Landing and Takeoff Harassment Rate ...	0.89	0.89	0.99	0.99	0.99	0.99
Number of Level B Harassment of Activity	0.0012	0.0006	0.0490	0.0140	0.0142	0.0883
Total number of Level B harassment across all aircraft activities			0.1673	.....		

* High-altitude flight is defined as between 457 m (1,500 ft) and 610 m (2,000 ft) altitude. Low altitude is defined as between 122 m (400 ft) and 305 m (1,000 ft) altitude. There are no mid-altitude flights considered for this project.

** Accounts for unequal encounter rates over coastal and inland zones.

Analysis Approach for Estimating Harassment During Aerial Infrared (AIR) Surveys

Typically, entities operating on the North Slope conduct polar bear den surveys using AIR during every denning season. Although the purpose for these surveys is to detect polar bear dens to mitigate impacts, polar bears on the surface can be harassed by the overflights. These surveys are not

conducted along specific flight paths and generally overlap previously surveyed areas within the same flight. Therefore, we used different methodology to estimate harassment of surface polar bears during AIR surveys.

We estimated the period of AIR surveys to last 12 days with a maximum of 6 hours of flight time per day, resulting in a maximum total of 72 flight-hours per year. To determine the

number of hours AIR flights are likely to survey coastal and inland zones, we identified the area where project activities and denning habitat overlap and buffered this area by 1.6 km (1 mi). We then divided the buffered denning habitat by zone and determined the proportion of coastal and inland denning habitat. Using this proportion, we estimated the number of flight hours spent within each zone and determined

the proportion of the ice season in which AIR surveys impacted each zone (see *Estimating Area of Impact for Aircraft Activities*). We then estimated the aircraft's impact area for takeoffs, survey altitude, and landings. The area impacted by AIR surveys was multiplied by the seasonal encounter rates of polar bears for the appropriate zones and the proportion of the ice season in which AIR flights were flown to determine the number of polar bears encountered. We then multiplied the number of polar bears encountered per zone by the altitude harassment rate to determine the number of polar bears harassed during AIR surveys.

Estimated Harassment from Aircraft Activities

Using the approaches described above, we estimated the total number of polar bears expected to be harassed by the aircraft activities during the proposed IHA period. Total number of expected Level B harassment events for this proposed IHA by aircraft activities, including AIR surveys, is 0.1673 bears, rounded up to one bear.

Denning Analysis

Below we provide a complete description and results of the polar bear den simulation model used to assess impacts to denning polar bears from disturbance associated with all phases of the specified activities. We updated the analysis used to estimate impacts on denning polar bears from the 2021–2026 Beaufort Sea ITR (86 FR 42982, August 5, 2021) to include information on anticipated survival rates for recently emerged polar bear cubs.

Den Simulation

We simulated dens across the entire North Slope of Alaska, ranging from the areas identified as denning habitat (Durner et al. 2006, 2013; Durner and Atwood 2018) contained within the National Petroleum Reserve–Alaska (NPRa) in the west to the Canadian border in the east. To simulate dens on the landscape, we relied on the estimated number of dens in three different regions of northern Alaska provided by Atwood et al. (2020). These included the NPRa, the area between the Colville and Canning rivers (CC), and the Arctic National Wildlife Refuge (NWR). The mean estimated number of dens in each region during a given winter were as follows: 12 dens (95 percent confidence interval [CI]: 3–26) in the NPRa, 25 dens (11–47) in the CC region, and 14 dens (5–30) in the Arctic NWR (Patil et al. 2022). For each iteration of the model (described below), we drew a random sample from a

gamma distribution for each of the regions based on the above parameter estimates, which allowed uncertainty in the number of dens in each area to be perpetuated through the modeling process. Specifically, we used the method of moments (Hobbs and Hooten 2015) to develop the shape and rate parameters for the gamma distributions as follows: NPRa ($12^2/5.8^2, 12/5.8^2$), CC ($25^2/9.5^2, 25/9.5^2$), and Arctic NWR ($14^2/6.3^2, 14/6.3^2$).

Because not all areas in northern Alaska are equally used for denning and some areas do not contain the requisite topographic attributes required for sufficient snow accumulation for den excavation, we did not simply randomly place dens on the landscape. Instead, we followed a similar approach to that used by Wilson and Durner (2020) with some additional modifications to account for the differences in denning ecology in the CC region related to a preference to den on barrier islands and a general (but not complete) avoidance of actively used industrial infrastructure. Using the USGS polar bear den catalogue (Durner et al. 2020), we identified polar bear dens that occurred on land in the CC region and that were identified either by Global Positioning System (GPS)-collared polar bears or through systematic surveys for denning polar bears (Durner et al. 2020). This process resulted in a sample of 37 dens of which 22 (*i.e.*, 60 percent) occurred on barrier islands. For each iteration of the model, we then determined how many of the estimated dens in the CC region occurred on barrier islands versus the mainland.

To make this determination, we first took a random sample from a binomial distribution to determine the expected number of dens from the den catalogue (Durner et al. 2020) that should occur on barrier islands in the CC region during that given model iteration; $n_{\text{barrier}} \sim \text{Binomial}(37, 22/37)$, where 37 represents the total number of dens in the den catalogue (Durner et al. 2020) in the CC region suitable for use (as described above) and 22/37 represents the observed proportion of dens in the CC region that occurred on barrier islands. We then divided n_{barrier} by the total number of dens in the CC region suitable for use (*i.e.*, 37) to determine the proportion of dens in the CC region that should occur on barrier islands (*i.e.*, p_{barrier}). We then multiplied p_{barrier} with the simulated number of dens in the CC region (rounded to the nearest whole number) to determine how many dens were simulated to occur on barrier islands in the region.

In NPRa, the den catalogue (Durner et al. 2020) data indicated that two dens

occurred outside of defined denning habitat (Durner et al. 2013), so we took a similar approach as with the barrier islands to estimate how many dens occur in areas of NPRa with the den habitat layer during each iteration of the model; $n_{\text{habitat}} \sim \text{Binomial}(15, 13/15)$, where 15 represents the total number of dens in NPRa from the den catalogue (Durner et al. 2020) suitable for use (as described above), and 13/15 represents the observed proportion of dens in NPRa that occurred in the region with den habitat coverage (Durner et al. 2013). We then divided n_{habitat} by the total number of dens in NPRa from the den catalogue (*i.e.*, 15) to determine the proportion of dens in the NPRa region that occurred in the region of the den habitat layer (p_{habitat}). We then multiplied p_{habitat} with the simulated number of dens in NPRa (rounded to the nearest whole number) to determine the number of dens in NPRa that occurred in the region with the den habitat layer. Because no infrastructure exists and no activities are proposed to occur in the area of NPRa without the den habitat layer, we considered the potential impacts of activity only to those dens simulated to occur in the region with denning habitat identified (Durner et al. 2013).

To account for the potential influence of BLM's activities on the distribution of polar bear selection of den sites, we again relied on the subset of dens from the den catalogue (Durner et al. 2020) discussed above. We further restricted the dens to only those occurring on the mainland because no permanent infrastructure occurred on barrier islands with identified denning habitat. We then determined the minimum distance to permanent infrastructure that was present during the year when the den was identified. The proportion of empirical dens ≤ 5 km (3.1 mi) from infrastructure was 0.25. Thus, for the mainland portion of simulated dens in the CC region, we determined how many should be simulated to occur ≤ 5 km from infrastructure, and how many should be simulated to occur > 5 km from infrastructure at each iteration of the model. The number of mainland dens ≤ 5 km from infrastructure was modeled as $n_{\leq 5\text{km}} \sim \text{Binomial}(n_{\text{CC\_mainland}}, 0.25)$ where $n_{\text{CC\_mainland}}$ is the number of dens simulated to occur on the mainland portion of the CC region during one iteration of the model. The number of dens > 5 km from infrastructure in the mainland portion of the CC region was calculated as:

$$n_{>5\text{km}} = n_{\text{CC\_mainland}} - n_{\leq 5\text{km}}$$

To determine the distribution of dens, we used a scaled adaptive kernel

density estimator applied to observed den locations, which took the form

$$f(s) \propto \frac{\theta}{n} \sum_i^n k\left(\frac{s-s_i}{h(s)}\right)$$

where the adaptive bandwidth for the location of the i th den and each location in the study area. The indicator functions allowed the bandwidth to vary abruptly between the mainland and barrier islands. The parameters were chosen so that the density estimate approximated the observed density of dens and our understanding of likely den locations in areas with low sampling effort.

To simulate dens on the landscape, we first assigned each section of potential den habitat with a relative probability of use by polar bears based on the utilization distribution described above. We then randomly assigned dens to a section of potential denning habitat with a multinomial distribution based on the assigned relative probabilities for each section of potential denning habitat. For dens being simulated on the mainland in the CC region, an additional step was required. We first assigned a simulated den whether it should occur near infrastructure (*i.e.*, ≤ 5 km) or away (*i.e.*, > 5 km) from infrastructure. We subset the kernel density grid cells that occurred ≤ 5 km from infrastructure and those that occurred > 5 km. We then selected a section of potential denning habitat to simulate the den from the appropriate kernel density subset (*i.e.*, near/far from infrastructure) based on their underlying probabilities using a multinomial distribution.

For each simulated den, we assigned dates of key denning events; den entrance, birth of cubs, when cubs reached 60 days of age, den emergence, and departure from the den site after emergence. These represent the chronology of each den under undisturbed conditions.

We selected the entrance date for each den from a normal distribution parameterized by entrance dates of radio-collared polar bears in the SBS stock that denned on land included in Rode et al. (2018) and published in USGS (2018; $n=52$, mean=November 11, standard deviation [SD]=18 days); we truncated this distribution to ensure that all simulated dates occurred within the range of observed values (*i.e.*, September 12 to December 22).

We selected a date of birth for each litter from a normal distribution with a mean birth date of December 15 and an SD of 10 days. We then restricted random samples of birth dates to occur between December 1 and January 15,

which is believed to be when most cubs are born (Messier et al. 1994, Van de Velde et al. 2003).

We selected the emergence date as a random draw from an asymmetric Laplace distribution with parameters $\mu=81.0$, $\sigma=4.79$, and $p=0.79$ estimated from the empirical emergence dates in Rode et al. (2018) and published in USGS (2018, $n=52$) of radio-collared polar bears in the SBS subpopulation that denned on land using the mleALD function from package 'ald' (Galarzar and Lachos 2018) in program R (R Core Development Team). We constrained simulated emergence dates to occur within the range of observed emergence dates (January 9 to April 9) and not to occur prior to cubs reaching an age of 60 days.

Finally, we assigned the number of days each family group spent at the den site post-emergence based on values reported in three behavioral studies, Smith et al. (2007, 2010, 2013), and Robinson (2014), which monitored dens near the target area immediately after emergence ($n=25$ dens). Specifically, we used the mean (8.0) and SD (5.5) of the dens monitored in these studies to parameterize a gamma distribution using the method of moments (Hobbs and Hooten 2015) with a shape parameter equal to $8.0^2/5.5^2$ and a rate parameter equal to $8.0/5.5^2$; we selected a post-emergence, pre-departure time for each den from this distribution.

Additionally, we assigned each den a litter size by drawing the number of cubs from a multinomial distribution with probabilities derived from litter sizes ($n=25$ litters) reported in Smith et al. (2007, 2010, 2013) and Robinson (2014). Because there is some probability that a female naturally emerges with 0 cubs, we also wanted to ensure this scenario was captured. However, it is difficult to parameterize the probability of litter size equal to 0 because it is rarely observed.

Therefore, we assumed that dens with denning durations less than 79 days, which is the shortest den duration in which a female was later observed with cubs, had a litter size equal to 0. Only 3 polar bears in the USGS (2018) data met these criteria, leading to an assumed probability of a litter size of 0 at emergence being 0.07. We therefore assigned the probability of 0, 1, 2, or 3 cubs as 0.07, 0.15, 0.71, and 0.07, respectively.

Impact Area of Specified Activities

The model developed by Wilson and Durner (2020) provides a template for estimating the level of potential impact on denning polar bears during the

specified activities while also considering the natural denning ecology of polar bears in the region. The approach developed by Wilson and Durner (2020) also allows for the incorporation of uncertainty in both the metric associated with denning polar bears and in the timing and spatial patterns of the specified activities when precise information on those activities is unavailable. We assumed any dens within 1.6 km (1 mi) from project activities were exposed to disturbance.

AIR Surveys

We assumed that all exploration and transit areas would have two AIR surveys flown each winter. The first survey would occur between December 1 and December 25, 2023, and the second survey between December 15, 2023, and January 10, 2024, with a minimum of 24 hours between surveys. During each iteration of the model, each AIR survey was randomly assigned a probability of detecting dens. Whereas previous analyses have used the results of Wilson and Durner (2020) to inform this detection probability, two additional studies (Smith et al. 2020, Woodruff et al. 2022b) have been conducted since Wilson and Durner (2020) was published. Woodruff et al. (2022b) considered the probability of detecting heat signatures from artificial polar bear dens. They did not find a relationship between den snow depth and detection and estimated a mean detection rate of 0.24. A recent study by Smith et al. (2020) estimated that the detection rate for actual polar bear dens in northern Alaska was 0.45 and also did not report any relationship between detection and den snow depth. Because the study by Wilson and Durner (2020) reported detection probability only for dens with less than 100 cm (39.4 in) snow depth, we needed to correct it to also include those dens with greater than 100 cm (39.4 in) snow depth. Based on the distribution of snow depths used by Wilson and Durner (2020) derived from data in Durner et al. (2003), we determined that 24 percent of dens have snow depths greater than 100 cm. After taking these into account, the overall detection probability from Wilson and Durner (2020) including dens with snow depths greater than 100 cm was estimated to be 0.54. This led to a mean detection of 0.41 and a SD of 0.15 across the three studies. We used these values, and the method of moments (Hobbs and Hooten 2015), to inform a Beta distribution:

$$p \sim \text{Beta} \left(\frac{0.41^2 - 0.41^3 - 0.41 \times 0.154^2}{0.154^2}, \frac{0.41 - 2 \times 0.41^2 + 0.41^3 - 0.154^2 + 0.41 \times 0.154^2}{0.154^2} \right)$$

from which we drew a detection probability (p) for each of the simulated AIR surveys during each iteration of the model.

Model Implementation

For each iteration of the model, we first determined which dens were exposed to the specified activities. We assumed that any den within 1.6 km (1 mi) of human activities was exposed (MacGillivray et al. 2003, Larson et al. 2020), excluding those detected during an AIR survey (but only if activity did not occur prior to AIR surveys). We then identified the stage in the denning period when the exposure occurred based on the date range of the activities the den was exposed to: den establishment (*i.e.*, initial entrance into den until cubs are born), early denning (*i.e.*, birth of cubs until they are 60 days old), late denning (*i.e.*, date cubs are 60 days old until den emergence) and post-emergence (*i.e.*, the date of den emergence until permanent departure from the den site). We then determined whether the exposure elicited a response by the denning polar bear based on probabilities derived from the reviewed case studies (Woodruff et al. 2022a).

Specifically, we divided the number of cases that documented responses associated with either a Level B harassment (*i.e.*, potential to cause a disruption of behavioral patterns), Level A harassment (*i.e.*, potential to injure an animal), or lethal take (*i.e.*, cub abandonment) of polar bears by the total number of cases with that combination of period and exposure type (table 6). Level B harassment was applicable to both adults and cubs, if present, whereas Level A harassment and lethal take were applicable to only cubs. AIR surveys were considered to be a source of potential impact because these surveys are conducted with fixed-wing aircraft that fly at altitudes below 457 m (1,500 ft). Level B harassment as a result of AIR surveys was applicable to only adults and only during the den establishment period because this period is the only denning period when AIR surveys have been observed to cause disturbance to denning polar bears (Amstrup 1993, Woodruff et al. 2022b). In thousands of hours of AIR surveys conducted in northern Alaska

over the last decade, we are not aware of a single instance of a polar bear abandoning its den during the early denning period due to an AIR survey overflight. These responses would be readily observable on the thermal cameras, and the fact that none have been observed indicates that den abandonment very likely does not occur given the brief duration of the aircraft overflight and the distance and altitude of the aircraft from the den site.

For dens exposed to activity, we used a multinomial distribution with the probabilities of different levels of take for that period (table 6) to determine whether a den was disturbed or not. If a lethal take was simulated to occur, a den was not allowed to be disturbed again during the subsequent denning periods because the outcome of that denning event was already determined.

The level of impact associated with a disturbance varied according to the severity and timing of the exposure (table 6). Exposures that resulted in emergence from dens prior to cubs reaching 60 days of age were considered lethal takes of cubs. If an exposure resulted in a Level A harassment during the late denning period, we first assigned that den a new random emergence date from a uniform distribution that ranged between the first date of exposure during the late denning period and the original den emergence date. We then determined whether that den was disturbed during the post-emergence period, but the probability of disturbance was dependent on whether a den was disturbed (*i.e.*, Level A harassment) during the late denning period or not (table 6). If an exposure resulted in a Level A harassment during the post-emergence period, we assigned the den a new time spent at the den site post-emergence from a uniform distribution that ranged from 0 to the original simulated time at the den post-emergence.

Recent research suggests that litter survival is related to the date of den emergence and time spent at the den post-emergence (Andersen et al. in review), with litters having higher survival the later they emerge in the spring and the longer they spend at the den site after emergence. To determine if dens disturbed during the late

denning and/or post-emergence period(s) experienced serious Level A harassment, we relied on estimates of litter survival until approximately 100 days post emergence derived from the analysis of empirical data on the dates of emergence from the den and departure from the den site (Anderson et al. in review). These estimates are dependent on the date of emergence and time spent at the den site post-emergence. For each den disturbed during the late denning and/or post-emergence periods, we obtained a random sample of regression coefficients from the posterior distribution and calculated the probability of a litter surviving approximately 100 days post-emergence with the following equation:

$$\text{logit}(\mathbf{s}) = \beta_0 + \beta_1 \text{emerge} + \beta_2 \text{depart}$$

where $\mathbf{s}$ is the probability of at least one cub being alive approximately 100 days post-emergence, β_0 is the intercept coefficient, β_1 is the coefficient associated with the Julian date of emergence (*emerge*), and β_2 is the coefficient associated with the number of days the family group stayed at the den site post-emergence before departing (*depart*). If s was calculated to be <0.50 , then the cubs in that simulated litter were assigned a take by serious Level A harassment, otherwise they were assigned a take by non-serious Level A harassment. These probabilities are based on estimates of litter survival derived from the analysis of empirical data on the dates of emergence from the den and departure from the den site (Anderson et al. in review).

We developed the code to run this model in program R (R Core Development Team 2020) and ran 10,000 iterations of the model (*i.e.*, Monte Carlo simulation) to derive the estimated number of dens disturbed and associated levels of harassment. We then determined the number of cubs that would have lethal take, serious Level A harassment, non-serious Level A harassment, and Level B harassment, and the number of females that would experience Level B harassment. Table 6 shows the probability of an exposure resulting in the types of harassment of denning polar bears.

TABLE 6—PROBABILITY THAT AN EXPOSURE ELICITED A RESPONSE BY DENNING POLAR BEARS THAT WOULD RESULT IN LEVEL B HARASSMENT, LEVEL A HARASSMENT, LETHAL TAKE, AND NO TAKE

Period	Level B	Level A	Lethal	No take
Den Establishment	0.380	NA	NA	0.620
Early Denning	NA	NA	0.180	0.820
Late Denning	0.000	* 0.490	0.000	0.510
Post-emergence—Undisturbed	0.220	* 0.780	0.000	0.000
Post-emergence—Disturbed	0.429	* 0.571	0.000	0.000

Level B harassment was applicable to both adults and cubs, if present; Level A harassment and lethal take were applicable to cubs only and were not possible during the den establishment period, which ended with the birth of the cubs. Probabilities were calculated from the analysis of 56 case studies of polar bear responses to human activity. During the early denning period, there was no Level A harassment for cubs, only lethal take. Level A harassment is considered “serious” when the disturbed emergence and/or time at den site post emergence led to an estimate of litter survival <0.50. We provide two sets of take probabilities for the post-emergence period. The first (Post-emergence—Undisturbed) is the set of probabilities when a den has not been disturbed during the late denning period. The second (Post-emergence—Disturbed) is the set of probabilities for a den that was disturbed during the late denning period (Rode et al. 2018, Andersen et al. in review).

*The assignment of serious and non-serious Level A harassment is a function of when a simulated disturbance occurred in comparison to the anticipated emergence date and/or den departure date.

Model Results

On average, we estimated 3.18 (median=3; 95 percent CI: 0–8) land-based dens in the area that were potentially exposed to disturbance from the specified activities during the proposed IHA period. Estimates for different levels of take are presented in table 7. We also estimated that take by Level B harassment from AIR surveys was never greater than a mean of 0.43 (median=0; 95 percent CI: 0–2). The distributions of both non-serious Level A harassment, serious Level A harassment, and lethal take were non-normal and heavily skewed, as indicated by markedly different mean and median values. The heavily skewed nature of these distributions has led to a mean value that is not representative of the most common model result.

The median number, which is the midpoint value of a frequency

distribution of all model results, for serious Level A harassment is 0 and the median number for lethal take is 0, indicating the most common model result is 0 for both serious Level A harassment and lethal take over the 1-year IHA period. The probability of greater than or equal to 1 serious Level A harassment is 0.15, and the probability of greater than or equal to 1 lethal take is 0.33.

In considering whether a polar bear’s mortality may result from the specified activities, we use the combined probability that a greater than or equal to 1 serious Level A harassment or lethal take will occur because both types of take are likely to result in a polar bear’s mortality. The combined probability that a greater than or equal to 1 serious Level A harassment or lethal take occur within a simulation iteration will be less than or equal to the

sum of probabilities for each of those types of takes considered separately. This is because iterations where both types of take occur will be counted only once when considering the combined probability, not once for each type of take. Due to the low probability (0.42) of greater than or equal to 1 serious Level A harassment/lethal take that could occur within the proposed IHA period, combined with the median of 0, we do not anticipate the specified activities will result in either serious Level A harassment or lethal take of polar bears during the proposed IHA period. The median number of non-serious Level A harassment was 2. The probability of greater than or equal to 1 take by non-serious Level A harassment is over a 50 percent chance (0.67), indicating that less than half of the models resulted in 0 takes by non-serious Level A harassment.

TABLE 7—RESULTS OF THE DEN DISTURBANCE MODEL FOR THE SPECIFIED ACTIVITIES

Type of take	Probability	Mean	Median	95 percent CI
Level B Harassment	0.90	3.60	3	0–11
Non-Serious Level-A Harassment	0.67	2.26	2	0–8
Serious Level-A Harassment	0.15	0.34	0	0–3
Lethal	0.33	0.79	0	0–4

Estimates are provided for the probability, mean, median, and 95 percent confidence interval (CI) for Level B harassment, non-serious Level A harassment, serious Level A harassment, and lethal take. The probabilities represent the probability of ≥ 1 take of a polar bear during each denning season.

Critical Assumptions

To conduct this analysis and estimate the potential amount of Level B and non-serious Level A harassment, several critical assumptions were made.

Level B harassment is equated herein with behavioral responses that indicate harassment or disturbance but not to the extent that cause the animal to experience significant biological consequences. Our estimates do not account for variable responses by polar bear age and sex; however, sensitivity of denning polar bears was incorporated into the analysis. The available information suggests that polar bears are

generally resilient to low levels of disturbance. Females with dependent young and juvenile polar bears are physiologically the most sensitive (Andersen and Aars 2008) and most likely to experience harassment from disturbance. Not enough information on composition of the SBS polar bear stock in the specified project area is available to incorporate individual variability based on age and sex or to predict its influence on harassment estimates. Our estimates are derived from a variety of sample populations with various age and sex structures, and we assume the exposed population will have a similar

composition and, therefore, the response rates are applicable.

The estimates of behavioral response presented here do not account for the individual movements of animals in response to the specified activities. Our assessment assumes animals remain stationary (*i.e.*, density does not change). Not enough information is available about the movement of polar bears in response to specific disturbances to refine this assumption.

SBS polar bears create maternal dens on the sea ice as well as on land. The

den simulation used in our analysis does not simulate dens on the sea ice. However, the specified activities will be conducted entirely on land and only a small percentage of the activities will occur within 1.6 km (1 mi) of the coastline. Therefore, the impact of the activities will be primarily limited to land-based dens within 1.6 km (1 mi) of the project infrastructure, and this impact area will be surveyed during AIR surveys to mitigate impacts on denning polar bears.

The specific segments of the snow roads depicted in figure 1 that will be used for mobilization, resupply, and demobilization are not currently known. For the purposes of the above analyses and estimates of take by non-serious Level A and Level B harassment, and the risks of lethal take or take by serious Level A harassment, we assumed that all routes might potentially be used at some point during the specified activities. This assumption results in an overestimate of the take that is likely to occur over the 1-year IHA period but accounts for all possible operational scenarios.

Sum of Harassment From All Sources

A summary of total estimated take via Level B and non-serious Level A harassment during the projects by source is provided in table 8. The potential for serious Level A and lethal take was also explored. Lethal take or serious Level A harassment would not occur outside of denning polar bears because the level of sound and visual stimuli experienced by polar bears on the surface would not be significant enough to result in injury or death. Denning polar bears, however, may be subject to repeated exposures, significant energy expenditure from den abandonment or departure, and/or potential impacts to a cub if the den is abandoned or departed prematurely. The Service estimated a low probability (0.35) for greater than or equal to 1 serious Level A harassment/lethal take of a denning polar bear and a median of 0 takes of denning polar bears by serious Level A harassment and lethal take for the 1-year duration of the IHA period.

TABLE 8—TOTAL ESTIMATED TAKES BY HARASSMENT OF POLAR BEARS AND SOURCE

Source and type of harassment	Number of estimated harassment events
Bears on the surface—summer—Level B harassment	7
Bears on the surface—winter—Level B harassment ..	6

TABLE 8—TOTAL ESTIMATED TAKES BY HARASSMENT OF POLAR BEARS AND SOURCE—Continued

Source and type of harassment	Number of estimated harassment events
Aircraft activities—summer and winter—Level B harassment	1
Denning bears—Level B harassment	4
Denning bears—non-serious Level A harassment	3
Total	21

Determinations and Findings

In making these draft findings, we considered the best available scientific information, including: the biological and behavioral characteristics of the species, the most recent information on species distribution and abundance within the area of the specified activities, the current and expected future status of the stocks (including existing and foreseeable human and natural stressors), the potential sources of disturbance caused by the project, and the potential responses of marine mammals to this disturbance. In addition, we reviewed applicant-provided materials, information in our files and datasets, published reference materials, and consulted with species experts.

Small Numbers

For our small numbers determination, we consider whether the estimated number of polar bears to be subjected to incidental take is respectively small relative to the population size of the species or stock.

1. We estimate that BLM's proposed specified activities in the specified geographic region will cause the take of no more than 18 polar bears by Level B harassment and no more than 3 polar bears by non-serious Level A harassment during the 1-year period of this proposed IHA (see table 8). Take of 21 animals is 2.32 percent of the best available estimate of the current SBS stock size of 907 animals (Bromaghin et al. 2015, Atwood et al. 2020) $((21+907) \times 100 \approx 2.32 \text{ percent})$ and represents a "small number" of polar bears of that stock.

2. The footprint of the specified activities within the specified geographic region is small relative to the range of the SBS stock of polar bears. Polar bears from the SBS range well beyond the boundaries of the proposed IHA region. As such, the IHA region itself represents only a subset of the

potential area in which the polar bear may occur. Thus, the Service concludes that a small portion of the SBS polar bear populations may be present in the specified geographic region during the time of the specified activities.

Small Numbers Conclusion

We propose a finding that take of up to 21 SBS polar bears represents a small number of the SBS stock of polar bears.

Negligible Impact

For our negligible impacts determination, we consider the following:

1. The distribution and habitat use patterns of polar bears indicate that relatively few polar bears will occur in the specified areas of activity at any particular time and, therefore, few polar bears are likely to be affected.

2. The documented impacts of previous activities similar to the specified activities on polar bears, taking into consideration the baseline of existing impacts from factors such as oil and gas activities in the area and other ongoing or proposed ITAs, suggests that the types of activities analyzed for this proposed IHA will have minimal effects limited to short-term, temporary behavioral changes. This is true not only for Level B harassment but also for the non-serious Level A harassment. While non-serious Level A harassment has the potential to result in the injury of one or more cubs during the denning period, this type of harassment is not anticipated to result in long-term impacts that are likely to result in mortality. Therefore, we anticipate the specified activities will not have lasting impacts that could significantly affect an individual polar bear's health, reproduction, or survival. The limited extent of anticipated impacts on polar bears is unlikely to adversely affect annual rates of polar bear survival or recruitment.

3. The IHA, if finalized, would require implementation of monitoring requirements and mitigation measures designed to reduce the potential impacts of their operations on polar bears. Den detection surveys for polar bears and adaptive mitigation and management responses based on real-time monitoring information (described in this proposed authorization) will be used to avoid or minimize interactions with polar bears and, therefore, limit potential disturbance of these animals.

4. The Service does not anticipate any lethal take or serious Level A harassment that would remove individual polar bears from the population or prevent their successful reproduction. This proposed IHA does

not authorize serious injury take that will likely result in the death of a polar bear.

We also consider the conjectural or speculative impacts associated with these specified activities. The specific congressional direction described below justifies balancing the probability of such impacts with their severity: If potential effects of a specified activity are conjectural or speculative, a finding of negligible impact may be appropriate. A finding of negligible impact may also be appropriate if the probability of occurrence is low, but the potential effects may be significant. In this case, the probability of occurrence of impacts must be balanced with the potential severity of harm to the species or stock when determining negligible impact. In applying this balancing test, the Service will thoroughly evaluate the risks involved and the potential impacts on marine mammal populations. Such determination will be made based on the best available scientific information (54 FR 40338, September 29, 1989, quoting 53 FR 8474, March 15, 1988 and 132 Cong. Rec. S 16305 (October 15, 1986)).

The potential effects of most concern here are the serious injury or mortality of cubs that could result from disturbances during certain periods of the denning season. The Service estimated that the probability of greater than or equal to one lethal take or take by serious Level A harassment that is likely to result in the mortality of a denning polar bear is 0.32, combined with a median of 0 takes, within the 1-year period of this proposed IHA. Therefore, the Service does not anticipate any lethal take or serious Level A harassment will occur during the IHA period. If a den is disturbed and lethal take or take by serious Level A harassment were to occur, this take would be limited to only cubs during the denning period. Denning females are limited to take by Level B harassment. Therefore, the number of potentially available reproductive females that would contribute to recruitment for the SBS stock would remain unaffected if a den disturbance were to result in the mortality of the cubs. The loss of a cub or litter would reduce the annual recruitment rate for the SBS stock of polar bears.

The SBS stock of polar bears is currently estimated as 907 polar bears (Bromaghin et al. 2015, 2021; Atwood 2020). The loss of one litter ranges from 0 percent (0 cubs) to approximately 0.33 percent (3 cubs) of the annual SBS stock size of polar bears $((0 \text{ cubs to } 3 \text{ cubs}) \div 907) \times 100 \approx 0 \text{ to } 0.33$. Cub litter survival was estimated at 50 percent (90

percent CI: 33–67 percent) for the SBS stock during 2001–2006 (Regehr et al. 2010). A female may lose her litter for several reasons separate from den disturbance. The determining factor for polar bear stock growth is adult female survival (Eberhardt 1990). Consequently, the loss of female cubs has a greater impact on annual recruitment rates for the SBS stock of polar bears compared to male cubs. If a den disturbance were to result in the mortality of the entire litter, the female would be available to breed during the next mating season and could produce another litter during the next denning season.

Based on the relatively low potential for cub mortality associated with these specified activities, and the recognition that even if a den is disturbed, the number of potentially affected cubs would be minimal and the number of reproductive females in the stock would remain the same, the Service does not anticipate that the conjectural or speculative impacts associated with these specified activities warrant a finding of non-negligible impact or otherwise preclude issuance of this proposed IHA. We reviewed the effects of the specified well-plugging and reclamation activities on polar bears, including impacts from surface interactions, aircraft overflights, and den disturbance. Based on our review of these potential impacts, past monitoring reports, and the biology and natural history of polar bears, we anticipate that such effects will be limited to short-term behavioral disturbances.

We have evaluated climate change regarding polar bears as part of the environmental baseline. Climate change is a global phenomenon and was considered as the overall driver of effects that could alter polar bear habitat and behavior. The Service is currently involved in research to understand how climate change may affect polar bears. As we gain a better understanding of climate change effects, we will incorporate the information in future authorizations.

We find that the impacts of these specified activities cannot be reasonably expected to, and are not reasonably likely to, adversely affect SBS polar bears through effects on annual rates of recruitment or survival. We therefore find that the total take estimated above and proposed for authorization will have a negligible impact on SBS polar bears. We do not propose to authorize lethal take or take by serious Level A harassment, and we do not anticipate that any lethal take or take by serious Level A harassment will occur.

Impact on Subsistence Use

Based on past community consultations, locations of hunting areas, no anticipated overlap of hunting areas and project activities, and the best scientific information available, including monitoring data from similar activities, we propose a finding that take caused by the oil well plugging and reclamation, soil sampling, snow trail, pad, and airstrip construction, and summer cleanup activities in the project area will not have an unmitigable adverse impact on the availability of polar bears for taking for subsistence uses during the proposed timeframe.

While polar bears represent a small portion, in terms of the number of animals, of the total subsistence harvest for the Utqiagvik, Nuiqsut, Wainwright and Atkasuk communities, their harvest is important to Alaska Natives. BLM will be required to notify the cities of Wainwright and Utqiagvik and the Native Villages of Atkasuk and Nuiqsut of the planned activities and document any discussions of potential conflict. BLM must make reasonable efforts to ensure that activities do not interfere with subsistence hunting and that adverse effects on the availability of polar bears are minimized. Should such a concern be voiced, development of plans of cooperation (POC), which must identify measures to minimize any adverse effects, will be required. The POC will ensure that project activities will not have an unmitigable adverse impact on the availability of the species or stock for subsistence uses. This POC must provide the procedures addressing how BLM will work with the affected Alaska Native communities and what actions will be taken to avoid interference with subsistence hunting of polar bears, as warranted.

The Service has not received any reports and is not aware of information that indicates that polar bears are being or will be deterred from hunting areas or impacted in any way that diminishes their availability for subsistence use by oil well plugging and reclamation, soil sampling, snow trail, pad, and airstrip construction, and summer cleanup. If there is evidence that these activities are affecting the availability of polar bears for take for subsistence uses, we will reevaluate our findings regarding permissible limits of take and the measures required to ensure continued subsistence hunting opportunities.

Least Practicable Adverse Impact

We evaluated the practicability and effectiveness of mitigation measures based on the nature, scope, and timing of the specified activities, the best

available scientific information, and monitoring data during BLM's activities in the specified geographic region. We propose a finding that the mitigation measures included within BLM's Request will ensure least practicable adverse impacts on polar bears (BLM 2023)

Polar bear den surveys at the beginning of the winter season, the resulting 1.6-km (1-mi) operational exclusion zone around any known polar bear dens, and restrictions on the timing and types of activities in the vicinity of dens will ensure that impacts to denning female polar bears and their cubs are minimized during this critical period. Minimum flight elevations over polar bear areas and flight restrictions around observed polar bears and known polar bear dens will reduce the potential for aircraft disturbing polar bears. Finally, BLM will implement mitigation measures to prevent the presence and impact of attractants in camps such as the use of wildlife-resistant waste receptacles, daily food waste incineration, and storing hazardous materials in drums or other secure containers. These measures are outlined in a polar bear interaction plan that was developed in coordination with the Service and is part of BLM's application for this IHA. Based on the information we currently have regarding den and aircraft disturbance and polar bear attractants, we concluded that the mitigation measures outlined in BLM's Request (BLM 2023) and incorporated into this authorization will minimize impacts from the specified oil well plugging and reclamation, soil sampling, snow trail, pad, and airstrip construction, and summer cleanup activities to the extent practicable.

Several mitigation measures were considered but determined to be not practicable. These measures are listed below:

- *Grounding all flights if they must fly below 457 m (1,500 ft)*—Requiring all aircraft to maintain an altitude of 457 m (1,500 ft) at all times is not practicable as some operations may require flying below 457 m (1,500 ft) to perform necessary inspections or maintain safety of flight crew. Aircraft are required to fly above 457 m (1,500 ft) at all times within 805 m (0.5 mi) of an observed polar bear unless there is an emergency.

- *One-mile buffer around all known polar bear denning habitat*—One-mile (1.6-km) buffer around all known polar bear denning habitat is not practicable as much of BLM's proposed project area occurs within 1.6 km (1 mi) of denning habitat; thus, to exclude all areas within 1.6 km of denning habitat would

preclude the planned activities from occurring.

- *Prohibition of driving over high relief areas, embankments, or stream and river crossings*—While the denning habitat, such as high relief areas, embankments, and streams or river banks, must be considered during tundra travel, complete prohibition is not practicable. High relief areas, embankments, streams, and rivers occur throughout the project area. To completely avoid these types of areas would likely cause personnel to drive further away from established operational areas and unnecessarily create additional safety concerns. Furthermore, other mitigation measures to minimize impact to denning habitats are included and will minimize the risk imposed by driving over high relief areas, embankments, or stream and river crossings

- *Use of a broader definition of "denning habitat" for operational offsets*—There is no available data to support broadening the defining features of denning habitat beyond that established by USGS. Such a redefinition would cause an increase in the area surveyed for maternal dens, and the associated increase in potential harassment of polar bears on the surface would outweigh the mitigative benefits.

- *Establishment of corridors for sow and cub transit to the sea ice*—As there is no data to support the existence of natural transit corridors to the sea ice, establishment of corridors in the IHA area would be highly speculative. Therefore, there would be no mitigative benefit realized by their establishment.

- *Require all activities to cease if a polar bear is injured or killed until an investigation is completed*—The Service has incorporated reporting requirements into this proposed authorization for all polar bear interactions. While it may aid in any subsequent investigation, ceasing all activities may not be practicable or safe and, thus, will not be mandated.

- *Require use of den detection dogs*—It is not practicable or safe to require scent-trained dogs to detect dens due to the large spatial extent that would need to be surveyed within activity areas.

- *Require the use of handheld or vehicle-mounted Forward Looking Infrared (FLIR)*—The efficacy rates for AIR have been found to be four times more likely to detect dens versus ground-based FLIR (handheld or vehicle-mounted FLIR) due to impacts of blowing snow on detection. BLM has incorporated into their mitigation measures the use of handheld or vehicle-mounted FLIR when transiting rivers occurring in suitable denning

habitat, but it is not practicable to use the equipment during all transit.

- *Construct safety gates, fences, and enclosures to prevent polar bears from accessing facilities*—This project will require no permanent facility/structures and encompasses a large area. Construction and deconstruction of barriers for a moving camp would increase potential human–polar bear interactions and impacts to polar bear habitat.

- *Employ protected species observers (PSOs) for monitoring, recording, reporting, and implementing mitigation measures*—All personnel will be trained in wildlife observation, employment of PSOs would not be anticipated to reduce impacts to polar bears. Monitoring, recording, reporting are described in the IHA application.

- *Avoid areas of high-density polar bear use (e.g., barrier islands and coastline) including the establishment of camps and pads*—This measure is not practicable because the legacy wells that this project is focused on are all located along the coastline, and snow trail must also cross through these areas to reach the well sites.

- *Avoid predominantly coastal routes for flight pathways*—This measure is not practicable because the remediation sites are located along the coast, and aviation access routes to project sites must occur over the coast.

- *Restrict activity and travel over polar bear denning habitat to eliminate or lessen risk of den collapse*—This project has activities that will travel over potential polar bear denning habitat. BLM has committed to multiple effective mitigation measures to minimize their potential impacts to polar bear denning habitat and reduce to chance of den collapse. Therefore, we believe that the probability of this project's activities causing a den collapse is near zero and additional mitigation measures would not further reduce the probability.

Required Determinations

National Environmental Policy Act (NEPA)

We have prepared a draft environmental assessment in accordance with the NEPA (42 U.S.C. 4321 *et seq.*). We have preliminarily concluded that authorizing the nonlethal, incidental, unintentional take of 18 SBS polar bears by Level B harassment and 3 SBS polar bears by non-serious Level A harassment during the proposed harassment authorization period would not significantly affect the quality of the human environment and, thus, preparation of an environmental

impact statement for this incidental harassment authorization is not required by section 102(2) of NEPA or its implementing regulations. We are accepting comments on the draft environmental assessment as specified above in **DATES** and **ADDRESSES**.

Endangered Species Act

Under the Endangered Species Act (ESA) (16 U.S.C. 1536(a)(2)), all Federal agencies are required to ensure the actions they authorize are not likely to jeopardize the continued existence of any threatened or endangered species or result in destruction or adverse modification of critical habitat. Prior to issuance of a final IHA, the Service will complete intra-Service consultation under section 7 of the ESA on our proposed issuance of an IHA. These evaluations and findings will be made available on the Service's website at <https://ecos.fws.gov/ecp/report/biological-opinion>.

Government-to-Government Consultation

It is our responsibility to communicate and work directly on a Government-to-Government basis with federally recognized Alaska Native Tribes in developing programs for healthy ecosystems. We seek their full and meaningful participation in evaluating and addressing conservation concerns for protected species. It is our goal to remain sensitive to Alaska Native culture, and to make information available to Alaska Tribal organizations and communities. Our efforts are guided by the following policies and directives:

- (1) The Native American Policy of the Service (January 20, 2016);
- (2) The Alaska Native Relations Policy (currently in draft form; see 87 FR 66255, November 3, 2022);
- (3) Executive Order 13175 (January 9, 2000);
- (4) Department of the Interior Secretarial Orders 3206 (June 5, 1997), 3225 (January 19, 2001), 3317 (December 1, 2011), 3342 (October 21, 2016), and 3403 (November 15, 2021) as well as Director's Order 227 (September 8, 2022);
- (5) The Alaska Government-to-Government Policy (a departmental memorandum issued January 18, 2001); and

(6) the Department of the Interior's policies on consultation with Alaska Native Tribes and organizations.

We have evaluated possible effects of the proposed IHA on federally recognized Alaska Native Tribes and ANCSA (Alaska Native Claims Settlement Act) Corporations. The Service has determined that authorizing

the Level B harassment of up to 18 polar bears and non-serious Level A harassment of up to 3 polar bears from BLM's specified activities would not have any Tribal implications or ANCSA Corporation implications and, therefore, Government-to-Government consultation or Government-to-ANCSA Corporation consultation is not necessary. However, we invite continued discussion, either about the project and its impacts or about our coordination and information exchange throughout the IHA/POC public comment process.

Paperwork Reduction Act

This rule does not contain any new collection of information that requires approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). OMB has previously approved the information collection requirements associated with IHAs and assigned OMB Control Number 1018-0194 (expires 08/31/2026). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Proposed Authorization

We propose to authorize the nonlethal, incidental take by Level B harassment of up to 18 polar bears and nonlethal, incidental take by non-serious Level A harassment of up to 3 polar bears from the SBS stock of polar bears. Authorized take will be limited to disruption of behavioral patterns that may be caused by the oil well plugging and reclamation, soil sampling, snow trail, pad, and airstrip construction, and summer cleanup activities by BLM in the North Slope Borough of Alaska between the Wainwright and Oliktok Areas for 1 year from date of issuance. We do not anticipate or authorize any take by Level A serious, injury, or death to polar bears resulting from these activities.

A. General Conditions for the IHA for BLM

1. Activities must be conducted in the manner described in the revised Request dated September 2023 (received October 5, 2023) for an IHA and in accordance with all applicable conditions and mitigation measures. The taking of polar bears whenever the required conditions, mitigation, monitoring, and reporting measures are not fully implemented as required by the IHA is prohibited. Failure to follow the measures specified both in the revised Request and within this proposed authorization may result

in the modification, suspension, or revocation of the IHA.

2. For the purposes of this authorization, non-serious forms of Level A harassment accrue to one or more cubs where project-related activities cause a sow to emerge from a den on or later than February 14, and either:

i. The operator's observations establish that the cub departed the denning location with the sow on or later than March 5 and that the cub was approximately average or greater size and/or weight, able to nurse uninterrupted, and able to maintain close proximity to the sow when traveling; or

ii. The date of the sow and cub's departure from the denning location is unknown but the operator's first observation of tracks indicating that the sow and cub departed from the denning location occurs on or later than March 20.

3. If project activities cause unauthorized take (*i.e.*, take of more than 18 polar bears from the SBS stock by Level B harassment or more than 3 polar bears from the SBS stock by non-serious Level A harassment, a form of take other than Level B or non-serious Level A harassment, or take of 1 or more polar bears through methods not described in the IHA), then BLM must take the following actions:

- i. Cease its activities immediately (or reduce activities to the minimum level necessary to maintain safety);
- ii. Report the details of the incident to the Service within 48 hours; and
- iii. Suspend further activities until the Service has reviewed the circumstances and determined whether additional mitigation measures are necessary to avoid further unauthorized taking.

4. All operations managers, aircraft pilots, and vehicle operators must receive a copy of this IHA and maintain access to it for reference at all times during project work. These personnel must understand, be fully aware of, and be capable of implementing the conditions of the IHA at all times during project work.

5. This IHA will apply to activities associated with the proposed project as described in this document and in BLM's revised Request. Changes to the proposed project without prior authorization may invalidate the IHA.

6. BLM's revised Request is approved and fully incorporated into this IHA unless exceptions are specifically noted herein. The revised Request includes:

- i. BLM's original *Request for an IHA*, dated May 22, 2023, which includes BLM's *Polar Bear Safety, Awareness,*

and Interaction Plan and geospatial files;

ii. BLM's revised *Request for an IHA*, dated September 2023 (received by the Service October 5, 2023).

7. Operators will allow Service personnel or the Service's designated representative to visit project work sites to monitor for impacts to polar bears and subsistence uses of polar bears at any time throughout project activities so long as it is safe to do so. "Operators" are all personnel operating under BLM's authority, including all contractors and subcontractors.

BLM must implement the following policies and procedures to avoid interactions and minimize to the greatest extent practicable any adverse impacts on polar bears, their habitat, and the availability of these marine mammals for subsistence uses.

B. General Avoidance Measures

1. BLM must cooperate with the Service and other designated Federal, State, and local agencies to monitor and mitigate the impacts of activities on polar bears.

2. Trained and qualified personnel must be designated to monitor for the presence of polar bears, initiate mitigation measures, and monitor, record, and report the effects of the activities on polar bears. BLM must provide all operators with polar bear awareness training prior to their participation in project activities.

3. A Service-approved polar bear safety, awareness, and interaction plan must be on file with the Service Marine Mammal Management office and available onsite. The interaction plan must include:

- i. A description of the proposed activity (*i.e.*, a summary of the plan of operations during the proposed activity);
- ii. A food, waste, and other attractants management plan;
- iii. Personnel training policies, procedures, and materials;
- iv. Site-specific polar bear interaction risk evaluation and mitigation measures;
- v. Polar bear avoidance and encounter procedures; and
- vi. Polar bear observation and reporting procedures.

4. BLM must contact potentially affected subsistence communities and hunter organizations to discuss potential conflicts caused by the activities and provide the Service documentation of communications as described in *D. Measures to Reduce Impacts to Subsistence Users*.

5. *Mitigation measures for aircraft.* BLM must undertake the following

activities to limit disturbance from aircraft activities:

i. Operators of support aircraft shall, at all times, conduct their activities at the maximum distance practicable from concentrations of polar bears.

ii. Fixed-wing aircraft and helicopter operations within the IHA area must maintain a minimum altitude of 457 m (1,500 ft) above ground level when safe and operationally possible.

iii. Under no circumstances, other than an emergency, will aircraft operate at an altitude lower than 457 m (1,500 ft) within 805 m (0.5 mi) of a polar bear observed on ice or land measured in a straight line between the polar bear and the ground directly underneath the aircraft. Helicopters may not hover or circle above such areas or within 805 m (0.5 mi) of such areas. If weather conditions or operational constraints necessitate operation of aircraft at altitudes below 457 m (1,500 ft), the operator must avoid areas of known polar bear concentrations and should take precautions to avoid flying directly over or within 805 m (0.5 mi) of these areas.

iv. Aircraft may not be operated in such a way as to separate individual polar bears from a group (*i.e.*, two or more polar bears).

6. *Mitigation measures for winter activities.* BLM must undertake the following activities to limit disturbance around known polar bear dens:

i. BLM must obtain record of two aerial infrared (AIR) surveys of all denning habitat located within 1.6 km (1 mi) of specified activities in an attempt to identify maternal polar bear dens. The first survey obtained must occur between December 1 and December 25, 2023, and the second survey obtained must occur between December 15, 2023, and January 10, 2024, with at least 24 hours occurring between the completion of the first survey and the beginning of the second survey.

ii. All observed or suspected polar bear dens must be reported to the Service prior to the initiation of activities.

iii. If a suspected den site is located, BLM will immediately consult with the Service to analyze the data and determine if additional surveys or mitigation measures are required. The Service will determine whether the suspected den is to be treated as a putative den for the purposes of this IHA.

iv. Operators must observe a 1.6-km (1-mi) operational exclusion zone around all putative polar bear dens during the denning season (November–April, or until the female and cubs leave

the areas). Should a suspected den be discovered within 1 mile of activities, work must cease, and the Service contacted for guidance. The Service will evaluate these instances on a case-by-case basis to determine the appropriate action. Potential actions may range from cessation or modification of work to conducting additional monitoring, and BLM must comply with any additional measures specified.

v. In determining the denning habitat that requires surveys, use the den habitat map developed by the USGS. A map of potential coastal polar bear denning habitat can be found at: https://www.usgs.gov/centers/asc/science/polar-bear-maternal-denning?qt-science_center_objects=4#qt-science_center_objects.

C. Monitoring

1. Operators must provide onsite observers and implement the Service-approved polar bear safety, awareness, and interaction plan to apply mitigation measures, monitor the project's effects on polar bears and subsistence uses, and evaluate the effectiveness of mitigation measures.

2. Onsite observers must be present during all operations and must record all polar bear observations, identify and document potential harassment, and work with personnel to implement appropriate mitigation measures.

3. Operators shall cooperate with the Service and other designated Federal, State, and local agencies to monitor the impacts of project activities on polar bears. Where information is insufficient to evaluate the potential effects of activities on polar bears and the subsistence use of this species, BLM may be required to participate in joint monitoring efforts to address these information needs and ensure the least practicable impact to this resource.

5. Operators must allow Service personnel or the Service's designated representative to visit project work sites to monitor impacts to polar bears and subsistence use at any time throughout project activities so long as it is safe to do so.

D. Measures To Reduce Impacts to Subsistence Users

BLM must conduct its activities in a manner that, to the greatest extent practicable, minimizes adverse impacts on the availability of polar bears for subsistence uses.

1. BLM will be required to develop a Service-approved POC if, through community consultation, concerns are raised regarding impacts to subsistence harvest or Alaska Native Tribes and organizations.

2. If required, BLM will implement the Service-approved POC.

3. Prior to conducting the work, BLM will take the following steps to reduce potential effects on subsistence harvest of polar bears:

i. Avoid work in areas of known polar bear subsistence harvest;

ii. Notify the cities Wainwright and Utqiagvik and the Native Villages of Atkasuk and Nuiqsit of the proposed project activities;

iii. Work to resolve any concerns of potentially affected Alaska Native Tribal organizations and corporations regarding the project's effects on subsistence hunting of polar bears;

iv. If any unresolved or ongoing concerns of potentially affected Alaska Native Tribal organizations and corporations remain, modify the POC in consultation with the Service and subsistence stakeholders to address these concerns; and

v. Implement Service-required mitigation measures that will reduce impacts to subsistence users and their resources.

E. Reporting Requirements

BLM must report the results of monitoring to the Service Marine Mammals Management office via email at: fw7_mmm_reports@fws.gov.

1. *In-season monitoring reports.*

2. *Activity progress reports.* BLM must:

(i) Notify the Service at least 48 hours prior to the onset of activities;

(ii) Provide the Service weekly progress reports of any significant changes in activities and/or locations; and

(iii) Notify the Service within 48 hours after ending of activities.

3. *Polar bear observation reports.*

BLM must report, within 48 hours, all observations of polar bears and potential polar bear dens during any project activities. Upon request, monitoring report data must be provided in a common electronic format (to be specified by the Service). Information in the observation report must include, but need not be limited to:

i. Date and time of each observation;

ii. Locations of the observer and polar bears (GPS coordinates if possible);

iii. Number of polar bears;

iv. Sex and age class—adult, subadult, cub (if known);

v. Observer name and contact information;

vi. Weather, visibility, and if at sea, sea state, and sea-ice conditions at the time of observation;

vii. Estimated closest distance of polar bears from personnel and facilities;

viii. Type of work being conducted at time of sighting;

ix. Possible attractants present;

x. Polar bear behavior—initial behavior when first observed (e.g., walking, swimming, resting, etc.);

xi. Potential reaction—behavior of polar bear potentially in response to presence or activity of personnel and equipment;

xii. Description of the encounter;

xiii. Duration of the encounter; and

xiv. Mitigation actions taken.

4. *Human—polar bear interaction reports.* BLM must report all human—polar bear interaction incidents immediately, and not later than 48 hours after the incident. Human—polar bear interactions include:

i. Any situation in which there is a possibility for unauthorized take. For instance, when project activities exceed those included in an IHA, when a mitigation measure was required but not enacted, or when the injury or death of a polar bear occurs. Reports must include all information specified for an observation report in paragraphs (3)(i)–(xiv) of this section E, a complete detailed description of the incident, and any other actions taken.

ii. Injured, dead, or distressed polar bears that are clearly not associated with project activities (e.g., animals found outside the project area, previously wounded animals, or carcasses with moderate to advanced decomposition or scavenger damage) must also be reported to the Service immediately, and not later than 48 hours after discovery. Photographs, video, location information, or any other available documentation must be included.

6. *Final report.* The results of monitoring and mitigation efforts identified in the marine mammal avoidance and interaction plan must be submitted to the Service for review within 90 days of the expiration of this IHA. Upon request, final report data must be provided in a common electronic format (to be specified by the Service). Information in the final report must include, but need not be limited to:

i. Copies of all observation reports submitted under the IHA;

ii. A summary of the observation reports;

iii. A summary of monitoring and mitigation efforts including areas, total hours, total distances, and distribution;

iv. Analysis of factors affecting the visibility and detectability of polar bears during monitoring;

v. Analysis of the effectiveness of mitigation measures;

vi. A summary and analysis of the distribution, abundance, and behavior of all polar bears observed; and

vii. Estimates of take in relation to the specified activities.

Request for Public Comments

If you wish to comment on this proposed authorization, the associated draft environmental assessment, or both documents, you may submit your comments by either of the methods described in **ADDRESSES**. Please identify whether you are commenting on the proposed authorization, draft environmental assessment, or both, make your comments as specific as possible, confine them to issues pertinent to the proposed authorization, and explain the reason for any changes you recommend. Where possible, your comments should reference the specific section or paragraph that you are addressing. The Service will consider all comments that are received before the close of the comment period (see **DATES**). The Service does not anticipate extending the public comment period beyond the 30 days required under section 101(a)(5)(D)(iii) of the MMPA.

Comments, including names and street addresses of respondents, will become part of the administrative record for this proposal. Before including your address, telephone number, email address, or other personal identifying information in your comment, be advised that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comments to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Peter Fasbender,

Assistant Regional Director Fisheries and Ecological Services, Alaska Region.

[FR Doc. 2023–28428 Filed 12–21–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–37150; PPWOCRADIO, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.
ACTION: Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the significance of properties nominated before December 16, 2023, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by January 10, 2024.

ADDRESSES: Comments are encouraged to be submitted electronically to *National_Register_Submissions@nps.gov* with the subject line “Public Comment on <property or proposed district name, (County) State.>” If you have no access to email, you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Sherry A. Frear, Chief, National Register of Historic Places/National Historic Landmarks Program, 1849 C Street NW, MS 7228, Washington, DC 20240, *sherry_frear@nps.gov*, 202–913–3763.

SUPPLEMENTARY INFORMATION:

The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before December 16, 2023. Pursuant to section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Nominations submitted by State or Tribal Historic Preservation Officers:

Key: State, County, Property Name, Multiple Name(if applicable), Address/Boundary, City, Vicinity, Reference Number.

ALABAMA

Jefferson County

Seaboard Air Line Railway Freight Depot, 30 Twentieth St. S, Birmingham, SG100009643

ARKANSAS

Phillips County

Helm. Levon. Boyhood Home, Northeast Corner of Carruth Avenue and North Elm Street, Marvell, SG100009863

Pulaski County

Roland Cutoff site, Address Restricted, Roland vicinity, SG100009787
Mooshian-Brewer House, 4701 N Lookout Road, Little Rock, SG100009788

CALIFORNIA

Los Angeles County

Hollywood Bowl, 2301 N Highland Avenue, Los Angeles, SG100009637
Jones, A. Quincy, Barn, 10300 W Santa Monica Boulevard, Los Angeles, SG100009646
Ridgewood Place Historic District, both sides North Ridgewood Place, from Beverly Boulevard to 1st Street, Los Angeles, SG100009647
St. Andrews Square Historic District, Parts of both sides of St. Andrews Place, Gramercy Place, and Manhattan Place from Beverly Boulevard to 3rd Street, Los Angeles, SG100009648

San Francisco County

St. Luke's Episcopal Church, 1760 Van Ness Avenue, San Francisco, SG100009644

FLORIDA

Hillman-Pratt Funeral Home, (African American Architects in Segregated Jacksonville, 1865–1965 MPS), 525 West Beaver Street, Jacksonville, MP100009793

Flagler County

St. Mary Catholic Church, 89 Saint Mary Place, Bunnell vicinity, SG100009785

Gilchrist County

Gilchrist County Jail, 313 NW Second Street, Trenton, SG100009786

ILLINOIS

Cook County

Church of the Epiphany (Illinois Chapter of the Black Panther Party MPS), 201 S Ashland Ave., Chicago, MP98000067

Warren County

Brewer, May (Carns) and John E., House, 320 South First Street, Monmouth, SG100009641

Will County

Downtown Joliet Historic District, Roughly bounded by the western terminus of the Jefferson Street and Jackson Street bridges over the Des Plaines River and Ottawa and Joliet Streets on the west, Jefferson Street on the south, Scott and Chicago Streets on the east, and Cass and Irving St., Joliet, SG100009642

KANSAS

Douglas County

Trinity Lutheran Historic District, 1245 New Hampshire Street, Lawrence, SG100009777

MARYLAND

Baltimore Independent City

Upland (The Women's Suffrage Movement in Maryland MPS), 1022 St. George's Road, Baltimore, MP100009813
The Maryland Club, 1 East Eager St., Baltimore, SG100009814

MICHIGAN

Berrien County

Eden Springs Park, 789 M–139, Benton Harbor, SG100009649

Kent County

Clipper Belt Lacer Company Complex, 974–1010 Front Avenue NW, Grand Rapids, SG100009650

Washtenaw County

Groves Farm, 6015 Sutton Road, Northfield Township, SG100009651

NEW HAMPSHIRE

Carroll County

Bald Peak Colony Club, 180 Bald Peak Drive, Moultonborough, SG100009636

NEW YORK

Columbia County

Copake Railroad Depot, 32 County Route 7A, Colpake, SG100009779

Erie County

Building at 1389 Delaware Avenue, 1389 Delaware Avenue, Buffalo, SG100009780

Rensselaer County

Catholic Central High School, 625 7th Avenue, Troy, SG100009781
Thomas S. Fagan & Mary Kate Fagan House, 2 Whitman Court, Troy, SG100009782

Suffolk County

Old Field Point Light Station (Light Stations of the United States MPS), 207 Old Field Road, Setauket, MP100009784

NORTH CAROLINA

Gaston County

Woodlawn Mill, 300 Woodlawn Avenue, Mount Holly, SG100009626

Granville County

Saint Catherine of Siena Catholic Church, 305 Williamsboro Street, Oxford, SG100009627

Guilford County

Minneola Manufacturing Company Mill, 106 Railroad Avenue, Gibsonville, SG100009628

Johnston County

Wood-Rains Cotton Gin, 206 W, Railroad Avenue, Princeton, SG100009629

Moore County

West Southern Pines School, 1250 West New York Avenue, Southern Pines, SG100009630

SOUTH DAKOTA

Custer County

Buffalo Gap Historic District (Boundary Decrease), (Rural Resources of Eastern Custer County MPS), Portions of Main, Second, and Walnut Streets, Buffalo Gap, BC100009859

Potter County

DeRouchey-Hageman Barn and Farmyard, 31276 155th Street, Gettysburg, SG100009810

Spink County

Conde Municipal Building, 160 2nd Street NE, Conde, SG100009811

Turton Jail, 350 feet west/northwest of the intersection of Ash and Front Streets, Turton, SG100009862

TEXAS

Bastrop County

Mary Christian Burleson House, 117 Louise Street, Elgin, SG100009778

WASHINGTON

King County

F/V Tordenskjold (West Coast Halibut Schooner), 860 Terry Avenue North, Seattle, SG100009631
Seattle Naval Hospital Chapel, 1902 NE 150th Street, Shoreline, SG100009645

Yakima County

Yakima Valley Filipino Community Hall, 211 W 2nd Street, Wapato, SG100009632

WISCONSIN

Outagamie County

Thern Farmstead, 425 East Fairview Drive, New London, SG100009774

An owner objection was received for the following resource(s):

NEW YORK

Rensselaer County

Papscanee Island Historic District, Papscanee Island, Castleton-on-Hudson vicinity, SG100009783

Additional documentation has been received for the following resource(s):

LOUISIANA

Lafayette Parish

St. John's Cathedral (Additional Documentation), St. John St. Lafayette, AD79001067

SOUTH DAKOTA

Custer County

Galena Creek Schoolhouse (Additional Documentation), (Schools in South Dakota MPS), 25151 Badger Clark Rd., Custer vicinity, AD100008618

TENNESSEE

Cheatham County

Cheatham County Courthouse (Additional Documentation), 100 Public Square, Ashland City, AD76001769

Grundy County

DuBose Memorial Church Training School (Additional Documentation), (Grundy County MRA (AD)), Fairmont and College Sts., Monteagle, AD80003802

Knox County

Westmoreland Water Wheel and Gatepost (Additional Documentation), (Knoxville and Knox County MPS), Jct. of Sherwood Dr. & Westland Ave., Knoxville, AD13000949

Montgomery County

Madison Street Historic District (Additional Documentation), (Clarksville MPS), Along Madison Street, Clarksville, AD99001393

A request for removal has been made for the following resource(s):

NEW YORK

Rensselaer County

Haskell School, 150 Sixth Ave., Troy, OT03000244

Authority: Section 60.13 of 36 CFR part 60.

Sherry A. Frear,

Chief, National Register of Historic Places/
National Historic Landmarks Program.

[FR Doc. 2023-28396 Filed 12-22-23; 8:45 am]

BILLING CODE 4312-52-P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint regarding *Certain Computing Devices Utilizing Indexed Search Systems and Components Thereof*, DN 3714; the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov.

General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of XI

Discovery, Inc. on December 19, 2023. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain computing devices utilizing indexed search systems and components thereof. The complaint names as respondents: ASUSTeK Computer Inc. of Taiwan; ASUS Computer International of Fremont, CA; Acer Inc. of Taiwan; Acer America Corporation of San Jose, CA; Dell Technologies Inc. of Round Rock, TX; Dell (Chengdu) Company Limited of China; and Dell Products L.P. of Round Rock, TX. The complainant requests that the Commission issue a limited exclusion order, cease and desist orders, and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this

notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due, notwithstanding § 201.14(a) of the Commission's Rules of Practice and Procedure. No other submissions will be accepted, unless requested by the Commission. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer to the docket number ("Docket No. 3714") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, Electronic Filing Procedures¹). Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, <https://edis.usitc.gov>.) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding filing should contact the Secretary at EDIS3Help@usitc.gov.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews,

and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,² solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.³

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: December 19, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023-28333 Filed 12-22-23; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint regarding *Certain Cellular Base Station Communication Equipment, Components Thereof, and Products Containing Same*, DN 3713; the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov.

General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at <https://www.usitc.gov>. The public record for this investigation may

be viewed on the Commission's Electronic Document Information System (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Motorola Mobility LLC on December 15, 2023. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain cellular base station communication equipment, components thereof, and products containing same. The complaint names as respondents: Ericsson AB of Sweden; Telefonaktiebolaget LM Ericsson of Sweden; and Ericsson Inc. of Plano, TX. The complainant requests that the Commission issue a limited exclusion order, cease and desist orders, and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles

¹ Handbook for Electronic Filing Procedures: https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.

² All contract personnel will sign appropriate nondisclosure agreements.

³ Electronic Document Information System (EDIS): <https://edis.usitc.gov>.

potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due, notwithstanding § 201.14(a) of the Commission's Rules of Practice and Procedure. No other submissions will be accepted, unless requested by the Commission. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer to the docket number ("Docket No. 3713") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, Electronic Filing Procedures¹). Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, <https://edis.usitc.gov>.) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding filing should contact the Secretary at EDIS3Help@usitc.gov.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information,

including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. appendix 3; or (ii) by U.S. government employees and contract personnel,² solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.³

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: December 19, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023-28307 Filed 12-22-23; 8:45 am]

BILLING CODE 7020-02-P

JUDICIAL CONFERENCE OF THE UNITED STATES

Advisory Committee on Bankruptcy Rules; Hearing of the Judicial Conference

AGENCY: Judicial Conference of the United States.

ACTION: Advisory Committee on Bankruptcy Rules; notice of cancellation of open hearing.

SUMMARY: The following public hearing on proposed amendments to the Federal Rules of Bankruptcy Procedure has been canceled: Bankruptcy Rules Hearing on January 19, 2024.

DATES: January 19, 2024.

FOR FURTHER INFORMATION CONTACT: H. Thomas Byron III, Esq., Chief Counsel, Rules Committee Staff, Administrative Office of the U.S. Courts, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Suite 7-300, Washington, DC 20544, Phone (202) 502-1820, RulesCommittee_Secretary@ao.uscourts.gov.

² All contract personnel will sign appropriate nondisclosure agreements.

³ Electronic Document Information System (EDIS): <https://edis.usitc.gov>.

SUPPLEMENTARY INFORMATION: The announcement for this hearing was previously published in the **Federal Register** on August 9, 2023 at 88 FR 53917.

(Authority: 28 U.S.C. 2073.)

Dated: December 20, 2023.

Shelly L. Cox,

Management Analyst, Rules Committee Staff.

[FR Doc. 2023-28386 Filed 12-22-23; 8:45 am]

BILLING CODE 2210-55-P

DEPARTMENT OF JUSTICE

[CPCLO Order No. 006-2023]

Privacy Act of 1974; Systems of Records

AGENCY: Office of Justice Programs, United States Department of Justice.

ACTION: Notice of a modified system of records.

SUMMARY: Pursuant to the Privacy Act of 1974 and Office of Management and Budget (OMB) Circular No. A-108, notice is hereby given that the Office of Justice Programs (OJP), a component within the United States Department of Justice (DOJ or Department), proposes to modify a system of records notice titled Public Safety Officers' Benefits System, JUSTICE/OJP-012. The component proposes to revise Routine Uses B, G, and L.

DATES: In accordance with 5 U.S.C. 552a(e)(4) and (11), this notice is applicable upon publication, subject to a 30-day period in which to comment on the routine uses, described below. Therefore, please submit any comments by January 25, 2024.

ADDRESSES: The public, OMB, and Congress are invited to submit any comments: by mail to the United States Department of Justice, Office of Privacy and Civil Liberties, ATTN: Privacy Analyst, National Place Building, 1331 Pennsylvania Avenue NW, Suite 1000, Washington, DC 20530; by facsimile at 202-307-0693; or by email at privacy.compliance@usdoj.gov. To ensure proper handling, please reference the above CPCLO Order No. on your correspondence.

FOR FURTHER INFORMATION CONTACT: Hope Janke, Bureau of Justice Assistance, Office of Justice Programs, 810 7th Street NW, Washington, DC 20531; AskPSOB@usdoj.gov; (888) 744-6513.

SUPPLEMENTARY INFORMATION: The Department is updating the system of records notice for JUSTICE/OJP-012, last published in its entirety in the **Federal Register** at 64 FR 25070 (May

¹ Handbook for Electronic Filing Procedures: https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.

10, 1999), and amended at 66 FR 8425 (Jan. 31, 2001), 82 FR 24147 (May 25, 2017) and 84 FR 53749 (Oct. 8, 2019). This update will modify Routine Uses B, G, and L to clarify that these routine uses apply to all determination by the Public Safety Officer's Benefits Program, including denial of such claims.

In accordance with 5 U.S.C. 552a(r), the Department has provided a report to OMB and Congress on this notice of a modified system of records.

Dated: December 18, 2023.

Peter A. Winn,

*Chief Privacy and Civil Liberties Officer
(Acting), United States Department of Justice.*

JUSTICE/OJP-012

SYSTEM NAME AND NUMBER:

Public Safety Officers' Benefits System, JUSTICE/OJP-012.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Bureau of Justice Assistance (BJA), Office of Justice Programs, (OJP), U.S. Department of Justice (DOJ), 810 Seventh Street NW, Washington, DC 20531.

SYSTEM MANAGER(S):

Director of the Public Safety Officers' Benefits (PSOB) Office, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, 810 Seventh Street NW, Washington, DC 20531.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

[Delete existing paragraphs B, G, and L and replace with the following:]

B. To Federal, State, local, Territorial, or Tribal governments, to agencies, departments, or instrumentalities of such governments, and to non-profit entities engaged in rescue activity or the provision of emergency medical services, as necessary to obtain information relevant to the adjudication of a claim for program benefits, including whether such claims determinations have been or are being made improperly.

G. To an employer or school having information that is or may be relevant to a claim, in order to obtain information from the same to the extent necessary to adjudicate a claim for program benefits (including whether such claims determinations have been or are being made improperly).

L. To any person or entity that OJP has reason to believe does or may possess information regarding a matter relevant to the administration of the

PSOB Program, to the extent deemed to be necessary by OJP in order to obtain information relevant to the adjudication of a claim for program benefits, including whether such claims determinations have been or are being made improperly.

HISTORY:

64 FR 25070 (May 10, 1999): Last published in full;

66 FR 8425 (January 31, 2001): Added one routine use;

72 FR 3410 (January 25, 2007): Added one routine use;

82 FR 24147 (May 25, 2017): Rescinded 72 FR 3410 and added two routine uses;

84 FR 53749 (Oct. 8, 2019): Numerous substantive revisions; republished in full.

[FR Doc. 2023-28410 Filed 12-22-23; 8:45 am]

BILLING CODE 4410-18-P

DEPARTMENT OF JUSTICE

[OMB Number 1140-0100]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision of a Previously Approved Collection; Report of Multiple Sale or Other Disposition of Certain Rifles

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until February 26, 2024.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, contact: Matthew Grim, EPS/NTCD/TORM, either by mail at 244 Needy Rd., Martinsburg, WV 25405, by email at matthew.grim@atf.gov, or telephone at 304-260-3683.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information

are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Abstract: Licensed dealers and pawnbrokers in Arizona, California, New Mexico and Texas must submit to ATF reports of multiple sales or other dispositions of certain rifles whenever, at one time or during any five consecutive business days, you sell to an unlicensed person or otherwise dispose of two or more semi-automatic rifles capable of accepting a detachable magazine and with a caliber greater than .22 (including .223/5.56 caliber). The required information must be submitted on ATF F3310.12. The information collection (IC) OMB #1140-0100 is being revised to expand the FFL population required to complete the form. ATF is now requiring Type 07 FFLs and Type 08 FFLs in these States to also report multiple sales of certain rifles on ATF Form 3310.12.

Overview of This Information Collection

1. *Type of Information Collection:* Revision of a previously approved collection.

2. *The Title of the Form/Collection:* Report of Multiple Sale or Other Disposition of Certain Rifles.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form number: ATF Form 3310.12. Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as the obligation to respond:* Affected Public: Private Sector-for or not for profit

institutions. The obligation to respond is mandatory. The statutory requirements are implemented in title 18 U.S.C. 923(g)(5)(A).

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated number of eligible respondents is 15,000 but the estimated number of responses is

approximately 12,000, and it will take each respondent 12 minutes to complete their responses.

6. *An estimate of the total annual burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 2,400 hours, which is equal to 12,000 (total responses) * .2 (12 minutes).

7. *An estimate of the total annual cost burden associated with the collection, if applicable:* The average wage for a firearms sales clerk is \$16.70 per hour and postage at \$0.51. Accordingly, the total burden on respondents is \$46,200.00 annually (2,400 total hourly burden × \$16.70 hourly wage rate for a sales clerk) + (postage: \$0.51 × 12,000 responses).

TOTAL BURDEN HOURS

Activity	Number of respondents	Frequency	Total annual responses	Time per response (min)	Total annual burden (hours)
DL3 Cost Burden	15,000	As needed	12,000	12	2,400

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 4W-218, Washington, DC.

Dated: December 19, 2023.

Darwin Arceo,
Department Clearance Officer for PRA, U.S.
Department of Justice.

[FR Doc. 2023-28305 Filed 12-22-23; 8:45 am]

BILLING CODE 4410-FY-P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Prohibited Transaction Class Exemption 1998-54 Relating to Certain Employee Benefit Plan Foreign Exchange Transactions Executed Pursuant to Standing Instructions

ACTION: Notice of availability.

SUMMARY: The Department of Labor (DOL) is submitting this Employee Benefits Security Administration (EBSA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before January 25, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting

“Currently under 30-day Review—Open for Public Comments” or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency’s estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Michael Howell by telephone at 202-693-6782, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: Prohibited Transaction Exemption 98-54 permits certain foreign exchange transactions between employee benefit plans and certain banks and broker-dealers which are parties in interest with respect to such plans, pursuant to standing instructions. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 25, 2023 (88 FR 58312).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not

display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

Agency: DOL-EBSA.

Title of Collection: Prohibited Transaction Class Exemption 1998-54 Relating to Certain Employee Benefit Plan Foreign Exchange Transactions Executed Pursuant to Standing Instructions.

OMB Control Number: 1210-0111.

Affected Public: Businesses or other for-profits.

Total Estimated Number of Respondents: 35.

Total Estimated Number of Responses: 420,000.

Total Estimated Annual Time Burden: 4,200 hours.

Total Estimated Annual Other Costs Burden: \$0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2023-28357 Filed 12-22-23; 8:45 am]

BILLING CODE 4510-29-P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Job Corps Hall of Fame/Successful Graduate Nomination

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Employment and Training Administration (ETA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before January 25, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Michael Howell by telephone at 202–693–6782, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: DOL is seeking approval for the Job Corps Hall of Fame Candidate and Successful Graduate Nomination forms, which gather information about program graduates' post-enrollment outcomes. The information submitted through the Hall of Fame Candidate and Successful Graduate forms will be reviewed by the National Office of Job Corps, for selection of one graduate annually to the Job Corps Hall of Fame and two recent graduates recognizing their career success after leaving the program. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on March 20, 2023 (88 FR 16667).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

Agency: DOL–ETA.

Title of Collection: Job Corps Hall of Fame/Successful Graduate Nomination.

OMB Control Number: 1205–0546.

Affected Public: Businesses or other for-profits; Not-for-profit institutions; State, Local and Tribal Governments.

Number of Respondents: 800.

Frequency: Varies.

Number of Responses: 800.

Estimated Average Time per

Response: Varies.

Annual Burden Hours: 1,000 hours.

Total Estimated Annual Other Costs Burden: \$0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2023–28351 Filed 12–22–23; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Hazard Communication

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Mine Safety and Health Administration (MSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before January 25, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who

are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Michael Howell by telephone at 202–693–6782, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: 30 U.S.C. 811(a)(7) requires, in part, that mandatory standards prescribe the use of labels or other appropriate forms of warning as are necessary to ensure that miners are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions for safe use or exposure.

MSHA's hazardous communications (HazCom) standards in 30 CFR part 47 require mine operators to evaluate the hazards of chemicals they produce or use and to provide information to miners concerning chemical hazards by means of a written HazCom program including a list of all hazardous chemicals known at the mine, labeling containers of hazardous chemicals, providing access to Material Safety Data Sheets (MSDS) and administering initial miner training. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on July 24, 2023 (88 FR 47522).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

Agency: DOL–MSHA.

Title of Collection: Hazard Communication—30 CFR part 47.

OMB Control Number: 1219–0133.

Affected Public: Businesses or other for-profits.

Number of Respondents: 15,021.

Frequency: On occasion.

Number of Responses: 621,433.

Annual Burden Hours: 146,902 hours.

Total Estimated Annual Other Costs Burden: \$55,254.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2023–28352 Filed 12–22–23; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR**Agency Information Collection Activities; Submission for OMB Review; Comment Request; Escape and Evacuation Plans**

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Mine Safety and Health Administration (MSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before January 25, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency’s estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Michael Howell by telephone at 202–693–6782, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: 30 CFR 57.11053 requires the development of specific escape and evacuation plans by the operator that address the unique conditions and mining system of each underground metal and nonmetal mine (MNM). The plan must show assigned responsibilities of all key personnel in the event of an emergency and set out in written form. 30 CFR 57.11053 also requires that mine operators make modifications to the escape and evacuation plan for an underground metal and nonmetal mine as mining

progresses and conditions at the mine change. The plan must be available to the Secretary or their authorized representatives from MSHA, and conspicuously posted at the mine at locations convenient to all persons on the surface and underground. The mine operator and MSHA are required to jointly review the plan at least once every 6 months. The information is prepared by the mine operator for use by miners, MSHA, and persons involved in rescue operations. A miner must be aware, at all times, of the emergency escape route for his/her particular working place. Rescue personnel must be aware of the miners’ escape routes. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 1, 2023 (88 FRN 50179).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

Agency: DOL–MSHA.

Title of Collection: Escape and Evacuation Plans.

OMB Control Number: 1219–0046.

Affected Public: Businesses or other for-profits.

Number of Respondents: 190.

Frequency: On occasion.

Number of Responses: 380.

Annual Burden Hours: 3,230 hours.

Total Estimated Annual Other Costs Burden: \$1,900.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2023–28366 Filed 12–22–23; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR**Agency Information Collection Activities; Submission for OMB Review; Comment Request; Suspension of Pension Benefits Pursuant to Regulations**

ACTION: Notice of availability.

SUMMARY: The Department of Labor (DOL) is submitting this Employee Benefits Security Administration (EBSA)-sponsored information

collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before January 25, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency’s estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Michael Howell by telephone at 202–693–6782, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: Section 203(a)(3)(B) of the Employee Retirement Income Security Act (ERISA) and regulations thereunder govern the circumstances under which pension plans may suspend pension benefit payments to retirees that return to work, or of participants who continue to work beyond normal retirement age. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 25, 2023 (88 FR 58312).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

Agency: DOL–EBSA.

Title of Collection: Suspension of Pension Benefits Pursuant to Regulations.

OMB Control Number: 1210–0048.

Affected Public: Businesses or other for-profits.

Total Estimated Number of

Respondents: 46,207.

Total Estimated Number of

Responses: 209,287.

Total Estimated Annual Time Burden: 156,082 hours.

Total Estimated Annual Other Costs Burden: \$ 9,225.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2023–28355 Filed 12–22–23; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Process for Expedited Approval of an Exemption for Prohibited Transaction, Prohibited Transaction Class Exemption 1996–62

ACTION: Notice of availability.

SUMMARY: The Department of Labor (DOL) is submitting this Employee Benefits Security Administration (EBSA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before January 25, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency’s estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and

(4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT:

Michael Howell by telephone at 202–693–6782, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: This class exemption permits a plan to seek approval on an accelerated basis of otherwise prohibited transactions by providing the Department and interested persons with information demonstrating the transaction is substantially similar to at least two individual exemptions previously granted and presents little, if any, opportunity for abuse or risk of loss to a plans’ participants and beneficiaries. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 25, 2023 (88 FR 58312).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

Agency: DOL–EBSA.

Title of Collection: Process for Expedited Approval of an Exemption for Prohibited Transaction, Prohibited Transaction Class Exemption 1996–62.

OMB Control Number: 1210–0098.

Affected Public: Businesses or other for-profits.

Total Estimated Number of Respondents: 3.

Total Estimated Number of Responses: 711.

Total Estimated Annual Time Burden: 55 hours.

Total Estimated Annual Other Costs Burden: \$ 29.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2023–28356 Filed 12–22–23; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Sealing of Abandoned Areas

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Mine Safety and Health Administration (MSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before January 25, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency’s estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT:

Michael Howell by telephone at 202–693–6782, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: MSHA’s standards for sealing abandoned areas in underground coal mines includes requirements covering the design and construction of new seals and the maintenance and repair of all seals. Miners rely on seals to protect them from the hazardous, and sometimes explosive, environments within the sealed area. MSHA inspectors use the records to determine that tests and examinations, required by the standards, are being done correctly. Records collected under these standards

will help ensure that the construction and maintenance of seals are done correctly, certified persons conducting sampling in sealed areas are adequately trained, and results from sampling in sealed areas are recorded, so that problems can be identified and corrected. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 4, 2023 (88 FRN 51859).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

Agency: DOL–MSHA.

Title of Collection: Sealing of Abandoned Areas.

OMB Control Number: 1219–0142.

Affected Public: Businesses or other for-profits.

Number of Respondents: 166.

Frequency: On occasion.

Number of Responses: 44,626.

Annual Burden Hours: 4,570 hours.

Total Estimated Annual Other Costs Burden: \$799,282.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2023–28354 Filed 12–22–23; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Employee Retirement Income Security Act Prohibited Transaction Class Exemption 1981–8, Investment of Plan Assets in Certain Types of Short-Term Investments

ACTION: Notice of availability.

SUMMARY: The Department of Labor (DOL) is submitting this Employee Benefits Security Administration (EBSA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before January 25, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency’s estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT:

Michael Howell by telephone at 202–693–6782, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: Class Exemption 81–8 permits the investment of plan assets that involve the purchase or other acquisition, holding, sale, exchange or redemption by or on behalf of an employee benefit plan of certain types of short-term investments. Without the exemption, certain aspects of these transactions might be prohibited by section 406 of the Employee Retirement Income Security Act (ERISA). For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 25, 2023 (88 FR 58312).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

Agency: DOL–EBSA.

Title of Collection: Employee Retirement Income Security Act Prohibited Transaction Class Exemption

1981–8, Investment of Plan Assets in Certain Types of Short-Term Investments.

OMB Control Number: 1210–0061.

Affected Public: Businesses or other for-profits.

Total Estimated Number of Respondents: 123,698.

Total Estimated Number of Responses: 618,490.

Total Estimated Annual Time Burden: 154,623 hours.

Total Estimated Annual Other Costs Burden: \$23,676.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2023–28358 Filed 12–22–23; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Rock Burst Control Plan (Pertains to Underground Metal/Nonmetal Mines)

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Mine Safety and Health Administration (MSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before January 25, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency’s estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the

collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT:

Michael Howell by telephone at 202–693–6782, or by email at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: Section 103(h) of the Federal Mine Safety and Health Act of 1977 (Mine Act), as amended 30 U.S.C. 813(h), authorizes the Mine Safety and Health Administration (MSHA) to collect information necessary to carry out its duty in protecting the safety and health of miners. Further, section 101(a) of the Mine Act, 30 U.S.C. 811, authorizes the Secretary of Labor to develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal and metal and nonmetal mines.

30 CFR 57.3461 requires operators of underground metal and nonmetal mines which have experienced a rock burst to report to the nearest MSHA office of each rock burst within 24 hours. These mine operators are also required to develop and implement a rock burst control plan within 90 days after a rock burst has been experienced. Plans are required to include: (1) mining and operating procedures designed to reduce the occurrence of rock bursts; (2) monitoring procedures where detection methods are used; and (3) other measures to minimize exposure of persons to areas prone to rock bursts. Plans are also required to be updated as conditions warrant and are to be made available to MSHA inspectors and to miners or their representatives. The standard does not require that all underground metal and nonmetal mines develop these preventative measures, but it does require that all mines with a rock burst history develop and implement a rock burst control plan.

Rock bursts pose a serious threat to the safety of miners in the area affected by the burst. These bursts may reasonably be expected to result in the entrapment of miners, serious physical harm, and death. Recent mining technology utilizes scientific methods of monitoring rock stresses which allows for the prediction of an oncoming burst. These predictions can be used by the mine operator to move miners to safer locations and to identify areas which need relief drilling. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on July 24, 2023 (88 FR 47524).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

Agency: DOL–MSHA.

Title of Collection: Rock Burst Control Plan (Pertains to Underground Metal/Nonmetal Mines).

OMB Control Number: 1219–0097.

Affected Public: Businesses or other for-profits.

Number of Respondents: 1.

Frequency: On occasion.

Number of Responses: 1.

Annual Burden Hours: 12 hours.

Total Estimated Annual Other Costs Burden: \$0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2023–28353 Filed 12–22–23; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2007–0041]

FM Approvals LLC: Grant of Expansion of Recognition and Modification to the NRTL Program's List of Appropriate Test Standards

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the final decision to expand the scope of recognition for FM Approvals LLC, as a Nationally Recognized Testing Laboratory (NRTL). Additionally, OSHA announces the final decision to add fourteen test standards to the NRTL Program's list of appropriate test standards.

DATES: The expansion of the scope of recognition becomes effective on December 26, 2023.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone: (202) 693–1999; email: meilinger.francis2@dol.gov.

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor; telephone: (202) 693–1911; email: robinson.kevin@dol.gov. OSHA's web page includes information about the NRTL Program (see <http://www.osha.gov/dts/otpc/nrtl/index.html>).

SUPPLEMENTARY INFORMATION:

I. Notice of the Applications for Expansion

OSHA hereby gives notice of the expansion of the scope of recognition for FM Approvals LLC (FM). FM's expansion covers the addition of fourteen test standards to the NRTL scope of recognition.

OSHA recognition of a NRTL signifies that the organization meets the requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within the scope of recognition. Each NRTL's scope of recognition includes (1) the type of products the NRTL may test, with each type specified by the applicable test standard and (2) the recognized site(s) that has/have the technical capability to perform the product-testing and product-certification activities for test standards within the NRTL's scope. Recognition is not a delegation or grant of government authority; however, recognition enables employers to use products approved by the NRTL to meet OSHA standards that require product testing and certification.

The agency processes applications by a NRTL for initial recognition, as well as for an expansion or renewal of recognition, following requirements in appendix A to 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides the preliminary finding. In the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL, including FM, which details that NRTL's scope of recognition. These pages are available from the OSHA website at <https://www.osha.gov/dts/otpc/nrtl/index.html>.

FM submitted two applications to OSHA to expand recognition as a NRTL. The first application was submitted on September 20, 2019 (OSHA–2007–0041–0021), to include ten test standards. The second application requesting the addition of six standards was submitted on May 3, 2021 (OSHA–2007–0041–0022). The first application was amended on September 21, 2022 (OSHA–2007–0041–0023), to remove two standards from the original submission. The expansion covered in this notice includes the remaining fourteen standards across both applications. OSHA staff performed a detailed analysis of the application packets and reviewed other pertinent information. OSHA did not perform any on-site reviews in relation to these applications.

OSHA published the preliminary notice announcing FM's expansion applications in the **Federal Register** on November 21, 2023 (88 FR 81105). The agency requested comments by December 6, 2023, but it received no comments in response to this notice. OSHA is now proceeding with this final notice to grant expansion of FM's NRTL scope of recognition.

To review copies of all public documents pertaining to FM's expansion applications, go to <https://www.regulations.gov> or contact the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor at (202) 693–2350. Docket No. OSHA–20007–0041 contains all materials in the record concerning FM's recognition. All submissions, including copyrighted material, are available for inspection through the OSHA Docket

Office. Contact the OSHA Docket Office at (202) 693–2350 for assistance in locating docket submissions.

II. Final Decision and Order

OSHA staff examined FM's expansion applications, their capability to meet the requirements of the test standards, and other pertinent information. Based on its review of this evidence, OSHA finds that FM meets the requirements of 29 CFR 1910.7 for expansion of its recognition, subject to the limitations and conditions listed below. OSHA, therefore, is proceeding with this final notice to grant FM's scope of recognition. OSHA limits the expansion of FM's recognition to testing and certification of products for demonstration of conformance to the test standards shown below in table 1.

TABLE 1—LIST OF APPROPRIATE TEST STANDARDS FOR INCLUSION IN FM'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
* FM 1311	Centrifugal Fire Pumps Split-Case Type (Axial or Radial).
* FM 1312	Centrifugal Fire Pumps (Vertical Shaft, Turbine Type).
* FM 1313	Positive Displacement Fire Pumps (Rotary Gear Type).
* FM 1319	Centrifugal Fire Pumps (Horizontal, End Suction Type).
* FM 1370	Centrifugal Fire Pumps (Vertical Shaft, Turbine Type, Barrel).
* FM 1371	Centrifugal Fire Pumps (In-Line Type).
* FM 3132	Pressure Actuated Waterflow Switches.
* FM 3150	Audible Notification Appliances for Automatic Fire Alarm Signaling.
* FM 3155	Public Mode Visible Signaling Appliances for Automatic Fire Alarm Signaling.
* FM 3230	Smoke Actuated Detectors for Automatic Fire Alarm Signaling.
* FM 3232	Video Image Fire Detectors for Automatic Fire Alarm Signaling.
* FM 5320	Dry Chemical Extinguishing Systems.
* FM 5420	Carbon Dioxide Extinguishing Systems.
* FM 5600	Clean Agent Extinguishing Systems.

* Represents the standards that OSHA proposes to add to the NRTL Program's List of Appropriate Test Standards

In this notice, OSHA also announces the final decision to add fourteen new test standards to the NRTL Program's List of Appropriate Test Standards.

Table 2 below lists the standards that are new to the NRTL Program. OSHA has determined that these test standards are appropriate test standards and will

add them to the NRTL Program's List of Appropriate Test Standards.

TABLE 2—STANDARDS OSHA IS ADDING TO THE NRTL PROGRAM'S LIST OF APPROPRIATE TEST STANDARDS

Test standard	Test standard title
FM 1311	Centrifugal Fire Pumps Split-Case Type (Axial or Radial).
FM 1312	Centrifugal Fire Pumps (Vertical Shaft, Turbine Type).
FM 1313	Positive Displacement Fire Pumps (Rotary Gear Type).
FM 1319	Centrifugal Fire Pumps (Horizontal, End Suction Type).
FM1370	Centrifugal Fire Pumps (Vertical Shaft, Turbine Type, Barrel).
FM 1371	Centrifugal Fire Pumps (In-Line Type).
FM 3132	Pressure Actuated Waterflow Switches.
FM 3150	Audible Notification Appliances for Automatic Fire Alarm Signaling.
FM 3155	Public Mode Visible Signaling Appliances for Automatic Fire Alarm Signaling.
FM 3230	Smoke Actuated Detectors for Automatic Fire Alarm Signaling.
FM 3232	Video Image Fire Detectors for Automatic Fire Alarm Signaling.
FM 5320	Dry Chemical Extinguishing Systems.
FM 5420	Carbon Dioxide Extinguishing Systems.
FM 5600	Clean Agent Extinguishing Systems.

OSHA's recognition of any NRTL for a particular test standard is limited to

equipment or materials for which OSHA standards require third-party testing and

certification before using them in the workplace. Consequently, if a test

standard also covers any products for which OSHA does not require such testing and certification, a NRTL's scope of recognition does not include these products.

The American National Standards Institute (ANSI) may approve the test standards listed above as American National Standards. However, for convenience, the use of the designation of the standards-developing organization for the standard as opposed to the ANSI designation may occur. Under the NRTL Program's policy (see OSHA Instruction CPL 01-00-004, Chapter 2, Section VIII), only standards determined to be appropriate test standards may be approved for NRTL recognition. Any NRTL recognized for a particular test standard may use either the proprietary version of the test standard or the ANSI version of that standard. Contact ANSI to determine whether a test standard is currently ANSI-approved.

A. Conditions

In addition to those conditions already required by 29 CFR 1910.7, FM must abide by the following conditions of the recognition:

1. FM must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major change in its operations as a NRTL, and provide details of the change(s);

2. FM must meet all the terms of its recognition and comply with all OSHA policies pertaining to this recognition; and

3. FM must continue to meet the requirements for recognition, including all previously published conditions on FM's scope of recognition, in all areas for which it has recognition.

Pursuant to the authority in 29 CFR 1910.7, OSHA hereby expands the scope of recognition of FM, subject to the limitations and conditions specified above. OSHA also adds fourteen standards to the NRTL Program's List of Appropriate Test Standards.

III. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW, Washington, DC 20210, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to Section 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 8-2020 (85 FR 58393; Sept. 18, 2020), and 29 CFR 1910.7.

Signed at Washington, DC.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023-28338 Filed 12-22-23; 8:45 am]

BILLING CODE 4510-26-P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA-2010-0013]

SolarPTL, LLC: Grant of Expansion of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the final decision to expand the scope of recognition for SolarPTL, LLC as a Nationally Recognized Testing Laboratory (NRTL).

DATES: The expansion of the scope of recognition becomes effective on December 26, 2023.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone: (202) 693-1999; email: meilinger.francis2@dol.gov.

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor; telephone: (202) 693-1911; email: robinson.kevin@dol.gov. OSHA's web page includes information about the NRTL Program (see <http://www.osha.gov/dts/otpc/nrtl/index.html>).

SUPPLEMENTARY INFORMATION:

I. Notice of Final Decision

OSHA hereby gives notice of the expansion of the scope of recognition for SolarPTL LLC (PTL). PTL's expansion covers the addition of two test standards to the NRTL scope of recognition.

OSHA recognition of a NRTL signifies that the organization meets the requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within the scope of recognition. Each NRTL's scope of recognition

includes (1) the type of products the NRTL may test, with each type specified by the applicable test standard and (2) the recognized site(s) that has/have the technical capability to perform the product-testing and product-certification activities for test standards within the NRTL's scope. Recognition is not a delegation or grant of government authority; however, recognition enables employers to use products approved by the NRTL to meet OSHA standards that require product testing and certification.

The agency processes applications by a NRTL for initial recognition, as well as for an expansion or renewal of recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides the preliminary finding. In the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL, including PTL, which details that NRTL's scope of recognition. These pages are available from the OSHA website at <https://www.osha.gov/dts/otpc/nrtl/index.html>.

PTL submitted an application, dated December 21, 2018 (OSHA-2010-0013-0007), to expand recognition as a NRTL to include one additional test standard. The standard requested, UL 61730, was referenced in application as a single standard; however this standard has two parts. PTL amended the application on October 30, 2023 (OSHA-2010-0013-0008), to clarify that the expansion request was for both parts of the standard. OSHA staff performed a detailed analysis of the application packet and reviewed other pertinent information. OSHA performed an on-site assessment related to this application on August 16-17, 2022, where OSHA found nonconformances with the requirements of 29 CFR part 1910. PTL addressed the nonconformances adequately and OSHA has no objection to the addition of both parts of this standard to the NRTL scope of recognition.

OSHA published the preliminary notice announcing PTL's expansion application in the **Federal Register** on November 21, 2023 (88 FR 81107). The agency requested comments by December 6, 2023, but it received no comments in response to this notice. OSHA now is proceeding with this final notice to grant expansion of PTL's NRTL scope of recognition.

To review copies of all public documents pertaining to PTL's application, go to <https://www.regulations.gov> or contact the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor at (202) 693–2350. Docket No. OSHA–2010–0013 contains all materials in the record concerning PTL's recognition. All submissions, including copyrighted material, are available for

inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 for assistance in locating docket submissions.

II. Final Decision and Order

OSHA staff examined PTL's expansion application, their capability to meet the requirements of the test standards, and other pertinent information. Based on its review of this

evidence, OSHA finds that PTL meets the requirements of 29 CFR 1910.7 for expansion of its recognition, subject to the limitations and conditions listed below. OSHA, therefore, is proceeding with this final notice to grant PTL's scope of recognition. OSHA limits the expansion of PTL's recognition to testing and certification of products for demonstration of conformance to the test standards shown below in table 1.

TABLE 1—APPROPRIATE TEST STANDARDS FOR INCLUSION IN PTL'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
UL 61730—Part 1	Photovoltaic (PV) Module Safety Qualification—Part 1: Requirements for Construction; and
UL 61730—Part 2	Photovoltaic (PV) Module Safety Qualification—Part 2: Requirements for Testing.

OSHA's recognition of any NRTL for a particular test standard is limited to equipment or materials for which OSHA standards require third-party testing and certification before using them in the workplace. Consequently, if a test standard also covers any products for which OSHA does not require such testing and certification, a NRTL's scope of recognition does not include these products.

A. Conditions

Recognition is contingent on continued compliance with 29 CFR 1910.7, including but not limited to, abiding by the following conditions of recognition:

1. PTL must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major change in its operations as a NRTL, and provide details of the change(s);
2. PTL must meet all the terms of its recognition and comply with all OSHA policies pertaining to this recognition; and
3. PTL must continue to meet the requirements for recognition, including all previously published conditions on PTL's scope of recognition, in all areas for which it has recognition.

Pursuant to the authority in 29 CFR 1910.7, OSHA hereby expands the scope of recognition of PTL as a NRTL, subject to the limitations and conditions specified above.

III. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW, Washington, DC 20210, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No.

8–2020 (85 FR 58393; Sept. 18, 2020), and 29 CFR 1910.7.

Signed at Washington, DC.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2023–28337 Filed 12–22–23; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL CREDIT UNION ADMINISTRATION

National Credit Union Administration Operating Fee Schedule Methodology

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice.

SUMMARY: The NCUA Board (Board) is amending its methodology for computing the annual operating fees it charges to federal credit unions (FCUs). First, for purposes of calculating the annual operating fee, the Board will increase the current asset exemption threshold from \$1 million to \$2 million. Second, the Board will adjust the asset exemption threshold annually in future years by the computed rate of aggregate asset growth at FCUs. Third, in response to comments from the public, as part of future reviews of the Operating Fee Schedule methodology the Board plans to analyze options to adjust the distribution of operating fee costs.

DATES: This methodology is effective on January 25, 2024.

FOR FURTHER INFORMATION CONTACT: James Holm, Supervisory Budget Analyst, Office of the Chief Financial Officer, at (703) 518–6570.

SUPPLEMENTARY INFORMATION:

I. Introduction

II. Summary of the Proposed Changes to the Operating Fee Schedule Methodology and Public Comments

III. Summary of the Operating Fee Schedule Methodology

I. Introduction

At its June 2023 meeting, the Board issued a notice requesting public comment about amendments to its methodology for computing the annual operating fee charged to FCUs.¹ For purposes of calculating the annual operating fee, the Board requested views from the public about: (1) increasing the asset threshold used to determine which FCUs are exempt from paying an operating fee from \$1 million to \$2 million; (2) updating the exemption threshold in future years based on annual asset growth at FCUs; and (3) whether and how the Board should modify the current three-tier Operating Fee Schedule to distribute the operating fee cost burden more equitably across FCUs subject to paying it.

Currently, FCUs reporting average assets of \$1,000,000 or less during the preceding four calendar quarters are exempt from paying an operating fee because the Board determined that such credit unions do not have the ability to pay the fee. The \$1,000,000 average asset exemption level has been in place since 2012 and has not been adjusted since that time. In the intervening 11 years, average assets across FCUs have approximately doubled. To account for this growth in the size of the credit union system, the Board proposed raising the average asset exemption level for FCUs to \$2,000,000 and to adjust the exemption threshold annually in future years by the computed rate of asset growth among FCUs.

A. Background on the NCUA Annual Budget and Fees Paid by FCUs

The NCUA charters, regulates, and insures deposits in FCUs and insures

¹ 88 FR 43149 (July 6, 2023).

deposits in federally insured, state-chartered credit unions (FISCUs) that have their shares insured through the National Credit Union Share Insurance Fund (Share Insurance Fund). To cover expenses related to the NCUA's tasks, the Board adopts an annual budget for each year. The Federal Credit Union Act (FCU Act) provides two primary sources to fund the budget: (1) requisitions from the Share Insurance Fund, referred to as the overhead transfer rate (OTR);² and (2) operating fees charged against FCUs.³ The Board uses an allocation formula to calculate the OTR and determine the amount of the budget that it will requisition from the Share Insurance Fund. Remaining amounts needed to fund the annual budget are charged to FCUs in the form of operating fees, based on each FCU's total assets.⁴

With regard to the operating fee, the FCU Act requires each FCU to, "in accordance with rules prescribed by the Board, . . . pay to the [NCUA] an annual operating fee which may be composed of one or more charges identified as to the function or functions for which assessed."⁵ The fee must "be determined according to a schedule, or schedules, or other method determined by the Board to be appropriate, which gives due consideration to the expenses of the [NCUA] in carrying out its responsibilities under the [FCU Act] and to the ability of [FCUs] to pay the fee."⁶ The statute requires the Board to, among other things, "determine the periods for which the fee shall be assessed and the date or dates for the payment of the fee or increments thereof."⁷

Accordingly, the FCU Act imposes three requirements on the Board related to assessing an operating fee on FCUs: (1) the fee must be assessed according to a schedule or schedules, or other method that the Board determines to be appropriate, which gives due consideration to NCUA's responsibilities in carrying out the FCU Act and the ability of FCUs to pay the fee; (2) the Board must determine the

period for which the fee will be assessed and the due date for payment; and (3) the Board must deposit collected fees into the Treasury to defray the Board's expenses in carrying out the FCU Act. Once collected, operating fees "may be expended by the Board to defray the expenses incurred in carrying out the provisions of [the FCU Act], including the examination and supervision of [FCUs]."⁸ The NCUA's regulations govern certain aspects of the operating fee processes.⁹ The regulation establishes: (i) the basis for charging operating fees; (ii) a notice process; (iii) rules for new charters, conversions, mergers, and liquidations; and (iv) administrative fees and interest for late payment, among other principles and processes.¹⁰

The Board first proposed its Operating Fee Schedule methodology in 1979, after Congress passed the Financial Institutions Regulatory and Interest Rate Control Act of 1978.¹¹ This legislation permitted the Board to consolidate previously separate chartering, supervision, and examination fees into a single operating fee, charged "in accordance with schedules, and for time periods, as determined by the Board, in an amount necessary to offset the expenses of the Administration at a rate consistent with a credit union's ability to pay."¹² In combination with a proposed change to § 701.6 of the NCUA's regulations in 1979, the Board proposed an initial fee schedule in the **Federal Register**, including rates for 12 asset tiers.¹³ It later published a final rule in the **Federal Register**, which included a finalized fee schedule for 1979.¹⁴

Other aspects of and adjustments to the operating fee process, such as changes to which FCUs are exempt from operating fees or the multipliers used to determine fees applicable to FCUs that fall within designated asset tiers, have not always been published in the **Federal Register** and are not included in the Code of Federal Regulations. Instead, in November 2015, the Board delegated authority to the NCUA's Chief Financial Officer to administer the Board-approved Operating Fee Schedule methodology and to set the operating fees as calculated per the approved methodology during each annual budget cycle beginning with 2016.¹⁵

Although it is not required to do so under the Administrative Procedure Act,¹⁶ in January 2016, the Board published an updated methodology in detail in the **Federal Register** and solicited comment.¹⁷ The Board made no changes in response to comments on the methodology published in 2016.

The Board provided notice of several revisions to the Operating Fee Schedule methodology in July 2020 and revised the methodology concurrently with approving a final operating fee rule in December 2020. The Board adopted three revisions to the methodology: (1) including the budget for capital projects within the total annual budget subject to the OTR; (2) including projected miscellaneous revenues within the total annual budget subject to the OTR; and (3) for purposes of determining the annual adjustment to the rate tier thresholds, comparing the average of total FCU assets reported in Call Reports for the four quarters available at the time the Board approves the budget to the average of total FCU assets in Call Reports for the four quarters of the respective previous years.

Since 2020, the Chief Financial Officer has applied the published Operating Fee Schedule methodology and explained its application in the NCUA's annual budget documents.

Historically, the Board has not used **Federal Register** notices in connection with annual adjustments to the asset tiers and rates of the Operating Fee Schedule. Instead, the Board has opted to adopt such changes at its open meetings. As recently as 2012, for example, the Board increased the asset threshold used to exempt FCUs from operating fees from \$500,000 to \$1 million at an open meeting, without requesting advance comment in the **Federal Register**.¹⁸ While the Board has varied its practice with respect to Operating Fee Schedule changes, it has done so within the FCU Act's broad directive that the Operating Fee Schedule should be as "determined by the Board to be appropriate," subject to its consideration of its expenses and the ability of FCUs to pay.¹⁹ In addition, the NCUA's regulation on operating fee processes includes a standing invitation for written comments from FCUs on existing Operating Fee Schedules.²⁰

www.ncua.gov/About/Documents/Agenda%20Items/AG20151119Item6a.pdf. Since that time, the operating fee schedule has been published in the NCUA's annual budget.

¹⁶ 5 U.S.C. 551 *et seq.*

¹⁷ 81 FR 4674 (Jan. 27, 2016).

¹⁸ Board Action Memorandum on 2013 operating fee (Nov. 15, 2012).

¹⁹ 12 U.S.C. 1755(b).

²⁰ 12 CFR 701.6(c).

² See, e.g., 12 U.S.C. 1783(a) (making the Share Insurance Fund available "for such administrative and other expenses incurred in carrying out the purpose of [Title II of the FCU Act] as [the Board] may determine to be proper.").

³ 12 U.S.C. 1755(a) ("In accordance with rules prescribed by the Board, each [FCU] shall pay to the [NCUA] an annual operating fee which may be composed of one or more charges identified as to the function or functions for which assessed.") and 12 U.S.C. 1766(j)(3). Other sources of income for the operating budget include interest income, funds from publication sales, parking fee income, and rental income.

⁴ 12 CFR 701.6(a).

⁵ 12 U.S.C. 1755(a).

⁶ 12 U.S.C. 1755(b).

⁷ *Id.*

⁸ 12 U.S.C. 1755(d).

⁹ 12 CFR 701.6.

¹⁰ *Id.*

¹¹ 44 FR 11785 (Mar. 2, 1979).

¹² *Id.* at 11786.

¹³ *Id.* at 11787.

¹⁴ 44 FR 27379 (May 10, 1979).

¹⁵ See Board Action Memorandum on 2016 operating fee (Nov. 19, 2015), <https://>

Each year the Board also invites comments on the draft NCUA budget, which includes a detailed explanation of how the operating fee is calculated and how changes to the operating fee rates are determined based on application of the published methodology.

II. Summary of the Proposed Changes to the Operating Fee Schedule Methodology and Public Comments

At its June 2023 meeting, the NCUA Board approved the issuance of a notice and request for comment about adjustments to the methodology the NCUA uses to determine how it apportions operating fees charged to FCUs. The proposal provided for a 60-day comment period, which ended on September 5, 2023. The NCUA received five comment letters in response to the notice and request for comments. In general, all letters received from commenters expressed broad support for the Board's proposals. A few of the commenters, however, did raise concerns for the NCUA's consideration, which are discussed in more detail in the following portion of the preamble.

Issue: The Board proposed to raise the asset exemption threshold level below which FCUs are not charged an operating fee. Currently, FCUs reporting average assets of \$1 million or less during the preceding four calendar quarters are exempt from paying an operating fee because the Board determined that such credit unions do not have the ability to pay the fee. The \$1 million average asset exemption level has been in place since 2012 and has not been adjusted since that time. In the intervening 11 years, average assets across FCUs have approximately doubled. To account for this growth in the size of the credit union system, the Board proposed to raise the asset exemption level for FCUs to \$2 million.

Comments Received: None of the commenters objected to this change. One of the five commenters supported the increase, and one other commenter did not take a specific position about the exemption level but noted that any change to the exemption should not be offset by changes in the amounts transferred from the Share Insurance Fund through the OTR. The three remaining commenters supported increasing the exemption threshold and urged the Board to consider raising it further to \$5 million. In addition, two of the remaining three commenters recommended the Board reduce the NCUA budget by the amount of any revenue that would not be collected from FCUs newly exempt from paying the operating fee.

NCUA Response: In response to the one comment about any increase to the exemption threshold level not being offset by an adjustment to the OTR, the OTR methodology would not change in response to adjusting the exemption threshold. Because the Operating Fee Schedule methodology allocates the non-OTR portion of the NCUA budget to all FCUs subject to it, changes to the Operating Fee Schedule methodology do not lower total operating fee collections.

With respect to the three comments that urged the Board to raise the exemption threshold to \$5,000,000, the Board determined not to make that change. Such a change is beyond the scope of the proposal. The NCUA, however, does plan to evaluate the feasibility and impact of such alternate exemption levels in its next cyclical review of the Operating Fee Schedule methodology.

In response to the two comments suggesting that the NCUA Board reduce the agency budget by the amount of the operating fee not collected from FCUs newly exempt from paying the operating fee, the agency does not plan to change its budget formulation processes. The NCUA determines the resources it requires to carry out its responsibilities for a given year and then, as explained earlier in this notice, computes how those costs should be distributed based on the Board-approved OTR and Operating Fee Schedule methodologies. Changing the operating fee exemption threshold reallocates the share of the budget paid by FCUs between those required to pay it and has no direct impact on the resources the NCUA Board determines are necessary for the NCUA to fulfill its statutory responsibilities.

Issue: To maintain consistency with the growth of FCU assets throughout the credit union system, the Board proposed adjusting the exemption threshold annually in future years by the computed rate of FCU asset growth. This inflationary adjustment would be included in the operating fee calculation presented in the annual draft NCUA budget published by the Chief Financial Officer pursuant to 12 U.S.C. 1789(b). The NCUA would adjust the exemption threshold by the percentage by which average quarterly assets reported for FCUs for the most-current four quarters have increased compared to the previous four quarters, using the Call Report data available at the time the NCUA budget is published. For example, when the Board approved the 2023–2024 operating budget in December 2022, the average FCU assets for the four most-current quarters (*i.e.*,

the third and fourth quarters of 2021 and the first two quarters of 2022) were 8.5 percent higher than the previous four quarters (*i.e.*, the third and fourth quarters of 2020 and the first two quarters of 2021). This increase in assets can be expressed as an inflation multiplier (1.085 in the example given) and applied to the exemption threshold to determine the adjusted level.

Comments Received: None of the commenters objected to this change. Three of the five commenters specifically expressed support for this change while two of the five did not comment on the issue. One commenter questioned whether the exemption threshold would decrease if the annual asset levels in the credit union system fell.

NCUA Response: In response to the question about the average asset exemption threshold decreasing if annual asset levels in the credit union system fell, the Board will take this comment under advisement and may, in the future, consider whether it is necessary to amend the methodology to address this contingency.

Issue: The Board has not substantially modified the current three-tier Operating Fee Schedule since 1993. The current Operating Fee Schedule is regressive; that is, credit unions with a larger amount of total assets pay a lower marginal rate on those assets above the threshold levels for the lower tiers. Given growth and consolidation in the credit union system, the Board requested views from the public about whether such an approach is an equitable method for allocating the operating fee.

Comments Received: None of the commenters offered any specific recommendations or views regarding proposed adjustments to the operating fee tiers. Three of the five commenters requested that the NCUA provide additional information about any proposed fee tier adjustments before they would comment on any proposals.

NCUA Response: The Board will review the current fee structure as part of its next cyclical review of the Operating Fee Schedule methodology. No changes to the current fee structure will be made as part of this final notice.

III. Summary of the Revised Operating Fee Schedule Methodology

For the reasons discussed, the Board will revise the Operating Fee Schedule methodology by raising the threshold at and below which FCUs do not pay an operating fee to \$2 million and will adjust this threshold annually by the aggregate rate of asset growth at FCUs.

By the National Credit Union
Administration Board.

Melane Conyers-Ausbrooks,
Secretary of the Board.

[FR Doc. 2023-28303 Filed 12-22-23; 8:45 am]

BILLING CODE 7535-01-P

NATIONAL CREDIT UNION ADMINISTRATION

Revisions of Agency Information Collection of a Previously Approved Collection; Request for Comments

AGENCY: National Credit Union
Administration (NCUA).

ACTION: Notice of submission to the
Office of Management and Budget.

SUMMARY: As required by the Paperwork
Reduction Act of 1995, The National
Credit Union Administration (NCUA) is
submitting the following extensions and
revisions of currently approved
collections to the Office of Management
and Budget (OMB) for renewal.

DATES: Written comments should be
received on or before January 25, 2024
to be assured consideration.

ADDRESSES: Written comments and
recommendations for the proposed
information collection should be sent
within 30 days of publication of this
notice to [www.reginfo.gov/public/do/](http://www.reginfo.gov/public/do/PRAMain)
[PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular
information collection by selecting
“Currently under 30-day Review—Open
for Public Comments” or by using the
search function.

FOR FURTHER INFORMATION CONTACT:

Copies of the submission may be
obtained by contacting Mahala Vixamar
at (703) 718-1155, emailing
PRAComments@ncua.gov, or viewing
the entire information collection request
at www.reginfo.gov.

SUPPLEMENTARY INFORMATION:

OMB Number: 3133-NEW.
Title: Supervisory Stress Test Annual
Data Collection, 12 CFR part 702,
subpart C.

Type of Review: New Collection.
Abstract: The NCUA Board (Board)
has determined, to protect the National
Credit Union Share Insurance Fund
(NCUSIF) and the credit union system,
that the largest Federally Insured Credit
Unions (FICUs) should have systems
and processes in place to monitor and
maintain their capital adequacy. Subpart C of part 702 of NCUA’s
regulations codifies capital planning
and stress testing requirements for
federally insured credit unions with \$10
billion or more in assets (covered credit
unions). Covered credit unions are
further delineated by asset tiers. Tier I
are credit union with \$10 billion or

more in total assets, but less than \$15
billion in total assets; tier II are credit
union with \$15 billion or more in total
assets, but less than \$20 billion in total
assets; and tier III are credit union with
\$20 billion or more in total assets. Tier
II and III credit unions are required to
conduct supervisory stress tests and
section 702.306 (b) codifies that NCUA
reserves the right to conduct stress tests
of covered credit unions at any time and
where both NCUA and a covered credit
union have conducted the tests, the
results of NCUA’s tests will determine
whether the covered credit union has
met the requirements of this subpart. To
facilitate NCUA’s ability to conduct
supervisory stress test on covered credit
unions, section 702.306(d) requires that
covered credit unions must provide
NCUA with any relevant qualitative or
quantitative information requested by
NCUA pertinent to capital plans or
stress test under this part.

Affected Public: Private Sector: Not-
for-profit institutions.

Estimated Number of Respondents:
12.

**Estimated Number of Responses per
Respondent:** 1.

Estimated Total Annual Responses:
12.

Estimated Hours per Response: 20.

**Estimated Total Annual Burden
Hours:** 240.

OMB Number: 3133-0061.

Title: Central Liquidity Facility, 12
CFR part 725.

Type of Review: Extension of a
previously approved collection.

Abstract: Part 725 contains the
regulations implementing the National
Credit Union Central Liquidity Facility
Act, subchapter III of the Federal Credit
Union Act. The NCUA Central Liquidity
Facility is a mixed-ownership
Government corporation within NCUA.
It is managed by the NCUA Board and
is owned by its member credit unions.
The purpose of the Facility is to
improve the general financial stability of
credit unions by meeting their liquidity
needs and thereby encourage savings,
support consumer and mortgage lending
and provide basic financial resources to
all segments of the economy. The
Central Liquidity Facility achieves this
purpose through operation of a Central
Liquidity Fund (CLF). The collection of
information under this part is necessary
for the CLF to determine credit
worthiness, as required by 12 U.S.C.
1795e(2).

Affected Public: Private Sector: Not-
for-profit institutions.

Estimated Number of Respondents:
269.

**Estimated Number of Responses per
Respondent:** 4.260.

Estimated Total Annual Responses:
1,146.

Estimated Hours per Response: 0.603.

**Estimated Total Annual Burden
Hours:** 691.

OMB Number: 3133-0067.

Title: Corporate Credit Union Monthly
Call Report and Annual Report of
Officers.

Type of Review: Revision of a
currently approved collection.

Abstract: Section 202(a)(1) of the
Federal Credit Union Act (Act) requires
federally insured credit unions to make
reports of condition to the NCUA Board
upon dates selected by it. Corporate
credit unions report this information
monthly on NCUA Form 5310, also
known as the Corporate Credit Union
Call Report. The financial and statistical
information is essential to NCUA in
carrying out its responsibility for
supervising corporate credit unions. The
Federal Credit Union Act, 12 U.S.C.
1762, specifically requires Federal
credit unions to report the identity of
credit union officials. Section 741.6(a)
requires federally-insured credit unions
to submit a Report of Officials annually
to NCUA containing the annual
certification of compliance with security
requirements. The branch information is
requested under the authority of § 741.6
of the NCUA Rules and Regulations.
NCUA utilizes the information to
monitor financial conditions in
corporate credit unions, and to allocate
supervision and examination resources.

Affected Public: Private Sector: Not-
for-profit institutions.

Estimated Number of Respondents:
11.

**Estimated Number of Responses per
Respondent:** 13.

Estimated Total Annual Responses:
143.

Estimated Hours per Response: 3.77.

**Estimated Total Annual Burden
Hours:** 539.

Reason for Change: The 5310
Corporate Call Report, Profile, and
Corporate Financial Performance
Reports (CFPR) for calendar year 2024
have several changes that entail removal
of references to Current Expected Credit
Loss (CECL) early adoption language;
removal of the Available for Sale Book
Value references; additional
supplemental information for charitable
donation accounts, subordinated debt
purchased from member credit unions,
and additional information about CUSO
investments; additional liquidity,
weighted average life (WAL), and WAL
with 50 percent prepayment
information reporting, and Federal
Reserve Bank Excess Balance Account
reporting; clarification of Information

System and Technology questions on the Profile form; and corresponding updates to the Corporate Financial Performance Report (CFPR), including a new template for aggregate CFPRs that shows weighted average ratios. These changes have not adjusted the current burden.

OMB Number: 3133–0199.

Title: Capital Planning and Stress Testing, 12 CFR 702–E.

Type of Review: Revision of a currently approved collection.

Abstract: To protect the National Credit Union Share Insurance Fund (NCUSIF) and the credit union system, the largest Federally Insured Credit Unions (FICUs) need to have systems and processes in place to monitor and maintain their capital adequacy. Subpart C of part 702 of NCUA's regulations codifies the capital planning and stress testing requirements for federally insured credit unions with \$10 billion or more in assets (covered credit unions). NCUA issues these regulations under the authority of section 120(a) requiring their supervised institutions to conduct annual stress tests. Stress testing is needed to assess the potential impact of expected and stressed economic conditions on the consolidated earnings, losses, and capital of a covered credit union over the planning horizon, taking into account the current state of the covered credit union and the covered credit union's risks, exposures, strategies, and activities.

NCUA received one comment from the 60-Day Notice published at 88 FR 62604. The commenter requested that NCUA provide additional clarification regarding the use of the standard form results reporting templates for purposes of reporting results of internal capital planning and analysis. The commenter noted that multiple items requested in the SST schedules were not applicable to internal capital analysis conducted by the credit union. As an example, the commenter cited Stress Test Capital and the Stress Test Capital Ratio currently required to be reported in the standard form templates were not applicable to their internal capital planning and analysis. The commenter also stated they felt use of the standard form reporting templates was redundant and ineffective whereas their capital plan includes commentary, analysis and supporting schedules that bring important context to the results of that analysis.

NCUA agrees that some revision and clarification in the reporting instructions may be necessary to use the standard form results reporting

templates for purposes of reporting results of both annual Supervisory Stress Testing results as well as results of internal capital adequacy assessment analysis and planning. We disagree, however, with the example provided by the commenter, because Section 702.304(b)(1) of the Rules and Regulations requires covered credit unions to include, as a mandatory element in their annual capital planning, "a quarterly assessment of the expected sources and levels of stress test capital over the planning horizon that reflects the covered credit union's financial state, size, complexity, risk profile, scope of operations, and existing level of capital, assuming both expected and unfavorable conditions". The requirement to measure stress test capital as defined in section 702.302 of the Regulations aside, NCUA acknowledges that credit unions, as part of their internal capital adequacy assessment analysis and planning, may target different measures. NCUA has made revisions to the standard form templates to accommodate reporting of different capital measures in the balance sheet tab of the templates. Instructions and definitions were adjusted accordingly as well. Furthermore, NCUA disagrees with the commenter's statement that reporting results of internal capital analysis using the standard form templates would be inefficient and redundant as compared to the detailed analysis, commentary and supporting schedules contained in their annual capital plan. As stated in the initial PRA notification, reporting of internal capital analysis results in a standard form manner will allow NCUA to more efficiently and fairly review benchmarks and opine on the strength and reasonableness of credit unions analyses serving as the foundation of the capital adequacy assessment and planning. NCUA acknowledges there would be some initial burden placed on credit unions to revise and update systems and applications used to generate results of internal capital analysis in a form exportable to the reporting templates; however, NCUA believes that the benefits obtained in efficiency and fairness of review and assessment of capital analysis results outweigh these initial burdens.

The commenter also stated that NCUA's inclusion of investment data as part of the revised annual data request is duplicative because ONES credit unions submit other investment data on a quarterly basis. NCUA agrees with the commenter that ONES credit unions are required to submit some instrument-level investment data to the ONES

supervisory team on a quarterly basis. However, this only covers a portion of credit union investment activities. The annual collection of investment data covered by the PRA notice also captures instrument-level investment information in credit union employee benefit and charitable donation accounts. These additional instrument-level investment data are needed to model the credit union's balance sheet and income statement under stress scenarios. This information has historically been collected by NCUA on an annual basis. While NCUA agrees that future efforts should work to combine both investment data collections, continuing to collect this data as part of the current annual collection is still needed.

Affected Public: Private Sector: Not-for-profit institutions.

Estimated Number of Respondents: 12.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Responses: 12.

Estimated Hours per Response: 781.67.

Estimated Total Annual Burden Hours: 9,380.

Reason for Change: Burden increased due to the increase in the number of credit unions meeting the asset size threshold for capital planning and self-run stress testing and because of the updated self-run SST results reporting template, as well as reporting of internal capital analysis results on the updated template.

Request for Comments: Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will become a matter of public record. The public is invited to submit comments concerning: (a) whether the collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of the information on the respondents, including the use of automated collection techniques or other forms of information technology.

By the National Credit Union
Administration Board.

Melane Conyers-Ausbrooks,
Secretary of the Board.

[FR Doc. 2023-28302 Filed 12-22-23; 8:45 am]

BILLING CODE 7535-01-P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Notice of Proposed Information Collection Requests: Collection of Information To Assess the Current State of Library and Museum Infrastructure To Identify Infrastructure Needs

AGENCY: Institute of Museum and
Library Services, National Foundation
on the Arts and the Humanities.

ACTION: Notice, request for comments,
and collection of information.

SUMMARY: The Institute of Museum and
Library Services (IMLS), as part of its
continuing effort to reduce paperwork
and respondent burden, conducts a pre-
clearance consultation program to
provide the public and federal agencies
with an opportunity to comment on
proposed and/or continuing collections
of information in accordance with the
Paperwork Reduction Act. This pre-
clearance consultation program helps to
ensure that requested data will be
provided in the appropriate format; that
respondents' reporting burden (time and
financial resources) is minimized; that
collection instruments are clearly
understood and cover material to which
respondents can be responsive; and, that
the impact of collection requirements on
respondents can be properly assessed.

DATES: Written comments must be
submitted to the office listed in the
ADDRESSES section below on or before
February 24, 2024.

ADDRESSES: Send comments to: Sandra
Narva, Acting Director of Grants Policy
and Management, Institute of Museum
and Library Services, 955 L'Enfant Plaza
North SW, Suite 4000, Washington, DC
20024-2135. Ms. Narva can be reached
by telephone at 202-653-4634, or by
email at snarva@imls.gov. Office hours
are from 8:30 a.m. to 5 p.m., E.T.,
Monday through Friday, except Federal
holidays. Persons who are deaf or hard
of hearing (TTY users) can contact IMLS
at 202-207-7858 via 711 for TTY-Based
Telecommunications Relay Service.

FOR FURTHER INFORMATION CONTACT: For
a copy of the documents, contact:
Matthew Birnbaum, Ph.D., Director of

Research and Evaluation, Institute of
Museum and Library Services, 955
L'Enfant Plaza North SW, Suite 4000,
Washington, DC 20024-2135. Dr.
Birnbaum can be reached by telephone:
202-653-4760, or by email at
mbirnbaum@imls.gov. Persons who are
deaf or hard of hearing (TTY users) can
contact IMLS at 202-207-7858 via 711
for TTY-Based Telecommunications
Relay Service.

SUPPLEMENTARY INFORMATION: The
purpose of this notice is to solicit
comments about a proposed IMLS study
of library and museum infrastructure.
This study will follow the requirements
of the House Appropriations Labor,
Health and Human Services
Subcommittee's 2023 Appropriations
Bill for the Department of Labor (Report
117-403), and the Senate
Appropriations Subcommittee's
Departments of Labor, Health and
Human Services, and Education, and
Related Agencies Appropriations Act
(2023) (S.4659). IMLS intends to assess
the physical conditions of libraries and
museums to inform potential
grantmaking initiatives focused on
improving library and museum
facilities, including those in
underserved communities and those
impacted by national disasters.

A copy of the proposed information
collection request can be obtained by
contacting the individual listed below
in the **FOR FURTHER INFORMATION
CONTACT** section of this notice.

IMLS is the primary source of federal
support for the nation's libraries and
museums. We advance, support, and
empower America's museums, libraries,
and related organizations through grant
making, research, and policy
development. To learn more, visit
www.imls.gov.

IMLS is particularly interested in
public comments that help the agency to:

- Evaluate whether the proposed
collection of information appropriately
responds to Congressional direction
authorizing this study.
- Evaluate the accuracy of the
agency's estimate of the burden of the
proposed collection of information
including the validity of the
methodology and assumptions used.
- Enhance the quality, utility, and
clarity of the information to be
collected.
- Minimize the burden of the
collection of information on those who
are to respond, including using
appropriate automated electronic,
mechanical, or other technological
collection techniques, or other forms of
information technology, e.g., permitting
electronic submissions of response.

I. Background

IMLS is the primary source of federal
support for the Nation's libraries and
museums. We advance, support, and
empower America's museums, libraries,
and related organizations through grant
making, research, and policy
development. To learn more, visit
www.imls.gov.

II. Current Actions

This notice proposes the Collection of
Information to Assess the Current State
of Library and Museum Infrastructure to
Identify Infrastructure Needs
recommended by the U.S. Congress in
Reports 117-403 and S.4659. This
evaluation will enable IMLS to make
well-informed decisions about potential
future investments and funding
allocations to strategically address areas
with the greatest need. The proposed
collection of primary data from key
stakeholders will lead to an
understanding of the diversity of library
and museum facilities. This study will
inform IMLS as to the most critical
needs of library and museum
infrastructures and where to allocate
funding for the most significant impact.

Agency: Institute of Museum and
Library Services.

Title: Collection of Information to
Assess the Current State of Library and
Museum Infrastructure to Identify
Infrastructure Needs.

OMB Control Number: 3137-NEW.

Agency Number: 3137.

Respondents/Affected Public:
Museum and library management;
museum and library associations, state,
municipal, and city level stakeholders.

**Total Number of Annual
Respondents:** Approximately 500.

Frequency of Response: Expected to
be once per request.

Average Minutes per Response:
Estimated at 30 minutes per response.

**Total Estimated Number of Annual
Burden Hours:** Approximately 250
hours.

Cost Burden (dollars): Estimated at
\$8,844.

Public Comments Invited: Comments
submitted in response to this Notice
will be summarized and/or included in
the request for OMB's clearance of this
information collection.

Dated: December 20, 2023.

Suzanne Mbollo,
*Grants Management Specialist, Institute of
Museum and Library Services.*

[FR Doc. 2023-28405 Filed 12-22-23; 8:45 am]

BILLING CODE 7036-01-P

NUCLEAR REGULATORY COMMISSION**[NRC–2023–0215]****Monthly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations****AGENCY:** Nuclear Regulatory Commission.**ACTION:** Monthly notice.

SUMMARY: Pursuant to section 189.a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (NRC) is publishing this regular monthly notice. The Act requires the Commission to publish notice of any amendments issued, or proposed to be issued, and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration (NSHC), notwithstanding the pendency before the Commission of a request for a hearing from any person.

DATES: Comments must be filed by January 25, 2024. A request for a hearing or petitions for leave to intervene must be filed by February 26, 2024. This monthly notice includes all amendments issued, or proposed to be issued, from November 9, 2023, to December 7, 2023. The last monthly notice was published on November 28, 2023.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website:

- *Federal rulemaking website:* Go to <https://www.regulations.gov> and search for Docket ID NRC–2023–0215. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: Stacy.Schumann@nrc.gov. For technical questions, contact the individual listed in the “For Further Information Contact” section of this document.

- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see “Obtaining Information and Submitting Comments” in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT:

Susan Lent, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–1365; email: Susan.Lent@nrc.gov.

SUPPLEMENTARY INFORMATION:**I. Obtaining Information and Submitting Comments***A. Obtaining Information*

Please refer to Docket ID NRC–2023–0215, facility name, unit number(s), docket number(s), application date, and subject when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to <https://www.regulations.gov> and search for Docket ID NRC–2023–0215.
- *NRC’s Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select “Begin Web-based ADAMS Search.” For problems with ADAMS, please contact the NRC’s Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to PDR.Resource@nrc.gov. The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.

- *NRC’s PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to PDR.Resource@nrc.gov or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (<https://www.regulations.gov>). Please include Docket ID NRC–2023–0215, facility name, unit number(s), docket number(s), application date, and subject, in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at <https://www.regulations.gov> as well as enter the comment submissions into ADAMS. The NRC does not routinely edit

comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses and Proposed No Significant Hazards Consideration Determination

For the facility-specific amendment requests shown in this notice, the Commission finds that the licensees’ analyses provided, consistent with section 50.91 of title 10 of the *Code of Federal Regulations* (10 CFR) “Notice for public comment; State consultation,” are sufficient to support the proposed determinations that these amendment requests involve NSHC. Under the Commission’s regulations in 10 CFR 50.92, operation of the facilities in accordance with the proposed amendments would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The Commission is seeking public comments on these proposed determinations. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determinations.

Normally, the Commission will not issue the amendments until the expiration of 60 days after the date of publication of this notice. The Commission may issue any of these license amendments before expiration of the 60-day period provided that its final determination is that the amendment involves NSHC. In addition, the Commission may issue any of these amendments prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. If the Commission takes action on any of these amendments prior to the expiration of either the comment period or the notice period, it will publish in

the **Federal Register** a notice of issuance. If the Commission makes a final NSHC determination for any of these amendments, any hearing will take place after issuance. The Commission expects that the need to take action on any amendment before 60 days have elapsed will occur very infrequently.

A. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any person (petitioner) whose interest may be affected by any of these actions may file a request for a hearing and petition for leave to intervene (petition) with respect to that action. Petitions shall be filed in accordance with the Commission's "Agency Rules of Practice and Procedure" in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

Petitions must be filed no later than 60 days from the date of publication of this notice in accordance with the filing instructions in the "Electronic Submissions (E-Filing)" section of this document. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii).

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration, which will serve to establish when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

A State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof, may submit

a petition to the Commission to participate as a party under 10 CFR 2.309(h) no later than 60 days from the date of publication of this notice. Alternatively, a State, local governmental body, Federally recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

For information about filing a petition and about participation by a person not a party under 10 CFR 2.315, see ADAMS Accession No. ML20340A053 (<https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML20340A053>) and on the NRC's public website at <https://www.nrc.gov/about-nrc/regulatory/adjudicatory/hearing.html#participate>.

B. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including documents filed by an interested State, local governmental body, Federally recognized Indian Tribe, or designated agency thereof that requests to participate under 10 CFR 2.315(c), must be filed in accordance with 10 CFR 2.302. The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases, to mail copies on electronic storage media, unless an exemption permitting an alternative filing method, as further discussed, is granted. Detailed guidance on electronic submissions is located in the "Guidance for Electronic Submissions to the NRC" (ADAMS Accession No. ML13031A056) and on the NRC's public website at <https://www.nrc.gov/site-help/e-submittals.html>.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at Hearing.Docket@nrc.gov, or by telephone at 301-415-1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the

NRC's public website at <https://www.nrc.gov/site-help/e-submittals/getting-started.html>. After a digital ID certificate is obtained and a docket created, the participant must submit adjudicatory documents in Portable Document Format. Guidance on submissions is available on the NRC's public website at <https://www.nrc.gov/site-help/electronic-sub-ref-mat.html>. A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. ET on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email confirming receipt of the document. The E-Filing system also distributes an email that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed to obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the "Contact Us" link located on the NRC's public website at <https://www.nrc.gov/site-help/e-submittals.html>, by email to MSHD.Resource@nrc.gov, or by a toll-free call at 1-866-672-7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., ET, Monday through Friday, except Federal holidays.

Participants who believe that they have good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted in accordance with 10 CFR 2.302(b)-(d). Participants filing adjudicatory documents in this manner are responsible for serving their documents on all other participants. Participants granted an exemption under 10 CFR 2.302(g)(2) must still meet the electronic formatting requirement in 10 CFR 2.302(g)(1), unless the participant also seeks and is granted an exemption from 10 CFR 2.302(g)(1).

Documents submitted in adjudicatory proceedings will appear in the NRC's

electronic hearing docket, which is publicly available at <https://adams.nrc.gov/ehd>, unless excluded pursuant to an order of the presiding officer. If you do not have an NRC-issued digital ID certificate as previously described, click “cancel” when the link requests certificates and you will be automatically directed to the NRC’s electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information such as social

security numbers, home addresses, or personal phone numbers in their filings unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants should not include copyrighted materials in their submission.

The following table provides the plant name, docket number, date of application, ADAMS accession number,

and location in the application of the licensees’ proposed NSHC determinations. For further details with respect to these license amendment applications, see the applications for amendment, which are available for public inspection in ADAMS. For additional direction on accessing information related to this document, see the “Obtaining Information and Submitting Comments” section of this document.

LICENSE AMENDMENT REQUEST(S)

Entergy Operations, Inc.; Waterford Steam Electric Station, Unit 3; St. Charles Parish, LA

Docket No(s)	50–382.
Application date	July 26, 2023.
ADAMS Accession No	ML23207A049.
Location in Application of NSHC	Pages 10–11 of the Enclosure.
Brief Description of Amendment(s)	The proposed amendment would modify Surveillance Requirement (SR) 4.3.1.3, listed in Technical Specification (TS) 3.3.1, “Reactor Protective Instrumentation,” and SR 4.3.2.3, listed in TS 3.3.2, “Engineered Safety Features Actuation System Instrumentation,” to remove conflicting language that should have been removed as part of the Waterford Steam Electric Station, Unit 3 license amendment request to adopt Technical Specifications Task Force (TSTF) Traveler TSTF–425 (ADAMS Package Accession No. ML15170A121), which relocated specific surveillance frequencies to the Surveillance Frequency Control Program (a licensee controlled program).
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Anna Vinson Jones, Assistant General Counsel/Legal Department, Entergy Operations, Inc., 101 Constitution Avenue NW, Washington, DC 20001.
NRC Project Manager, Telephone Number	Jason Drake, 301–415–8378.

Nebraska Public Power District; Cooper Nuclear Station; Nemaha County, NE

Docket No(s)	50–298.
Application date	November 15, 2023.
ADAMS Accession No	ML23319A419.
Location in Application of NSHC	Page 3 of Attachment 1 incorporates by reference the NSHC published in the Federal Register on February 22, 2006 (71 FR 9179) and a notice of availability was published on April 21, 2006 (71 FR 20735).
Brief Description of Amendment(s)	The proposed amendment would modify technical specifications (TSs) by relocating reference to specific American Society for Testing Materials (ASTM) standards for fuel oil testing to licensee-controlled documents. The change is consistent with NRC-approved Technical Specification Task Force (TSTF) TSTF–374, Revision 0, “Revision to TS 5.5.13 and Associated TS Bases for Diesel Fuel Oil,” and is part of the Consolidated Line Item Improvement Process.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	John C. McClure, Vice President, Governmental Affairs & General Counsel Nebraska Public Power District, P.O. Box 499, Columbus, NE 68601.
NRC Project Manager, Telephone Number	Thomas Byrd, 301–415–3719.

Nine Mile Point Nuclear Station, LLC and Constellation Energy Generation, LLC; Nine Mile Point Nuclear Station, Unit 1; Oswego County, NY

Docket No(s)	50–220.
Application date	October 18, 2023.
ADAMS Accession No	ML23291A246.
Location in Application of NSHC	Pages 2–4 of Attachment 1.
Brief Description of Amendment(s)	The proposed amendment would modify the Nine Mile Point, Unit 1 (NMP1), technical specifications by relocating Surveillance Requirement 4.3.6.a to the licensee-controlled Surveillance Frequency Control Program (SFCP). The SFCP was previously implemented at NMP1 by License Amendment No. 222 (ADAMS Accession No. ML16081A256) dated May 31, 2016. Surveillance Requirement 4.3.6.a was within the scope of License Amendment No. 222; however, it was not fully revised in the adoption of Technical Specification Task Force Traveler 425, Revision 3, to meet the SFCP in accordance with Nuclear Energy Institute 04–10, “Risk-Informed Technical Specifications Initiative 5b, and Risk-Informed Method for Control of Surveillance Frequencies” (ADAMS Accession No. ML071360456).
Proposed Determination	NSHC.

LICENSE AMENDMENT REQUEST(S)—Continued

Name of Attorney for Licensee, Mailing Address	Jason Zorn, Associate General Counsel, Constellation Energy Generation, 101 Constitution Ave. NW, Suite 400 East, Washington, DC 20001.
NRC Project Manager, Telephone Number	Richard Guzman, 301-415-1030.

III. Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses

During the period since publication of the last monthly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating

license or combined license, as applicable, proposed NSHC determination, and opportunity for a hearing in connection with these actions, were published in the **Federal Register** as indicated in the safety evaluation for each amendment.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has

made a determination based on that assessment, it is so indicated in the safety evaluation for the amendment.

For further details with respect to each action, see the amendment and associated documents such as the Commission's letter and safety evaluation, which may be obtained using the ADAMS accession numbers indicated in the following table. The safety evaluation will provide the ADAMS accession numbers for the application for amendment and the **Federal Register** citation for any environmental assessment. All of these items can be accessed as described in the "Obtaining Information and Submitting Comments" section of this document.

LICENSE AMENDMENT ISSUANCE(S)

Constellation Energy Generation, LLC; Clinton Power Station, Unit No. 1; DeWitt County, IL

Docket No(s)	50-461.
Amendment Date	November 22, 2023.
ADAMS Accession No	ML23284A251.
Amendment No(s)	250.
Brief Description of Amendment(s)	The amendment adopts Technical Specifications Task Force (TSTF) Traveler TSTF-332-A, Revision 1, "ECCS [emergency core cooling system] Response Time Testing." TSTF-332 revises technical specification definitions for ECCS response time, isolation system response time, and reactor protection system response time that are referenced in surveillance requirements.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Constellation Energy Generation, LLC; LaSalle County Station, Units 1 and 2; LaSalle County, IL

Docket No(s)	50-373, 50-374.
Amendment Date	November 8, 2023.
ADAMS Accession No	ML23286A260.
Amendment No(s)	260 (Unit 1), 245 (Unit 2).
Brief Description of Amendment(s)	The amendments replaced the existing reactor vessel heatup and cooldown rate limits and the pressure and temperature limit curves with references to the Pressure and Temperature Limits Report.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Constellation Energy Generation, LLC; Zion Nuclear Power Station, Units 1 and 2; Lake County, IL

Docket No(s)	50-295, 50-304, 72-1037.
Amendment Date	November 16, 2023.
ADAMS Accession No	ML23291A080.
Amendment No(s)	192 (Unit 1), 179 (Unit 2).
Brief Description of Amendment(s)	These conforming amendments reflect the two previously approved indirect transfers of the Zion Nuclear Power Station, Units 1 and 2 (Zion) licenses from Exelon Generation Company (EGC) to Constellation Energy Generation, LLC (CEG), as well as the direct transfer of the Zion licenses and conforming amendments, from ZionSolutions, LLC (ZS) to CEG. The approved conforming amendments were changed by replacing EGC with CEG, as the licensee, now that ZS has completed its decommissioning of the Zion site outside the boundaries of the on-site Independent Spent Fuel Storage Installation (ISFSI) and the actions described in the Zion License Termination Plan have been completed. The completion of the Zion decommissioning outside the boundary of the on-site ISFSI and the name change of the licensee from EGC to CEG was evaluated in the NRC safety evaluations (ML19228A131, ML21277A248, ML22076A012, and ML23286A306) supporting termination of the Zion licenses outside the boundary of the on-site ISFSI.

LICENSE AMENDMENT ISSUANCE(S)—Continued

Public Comments Received as to Proposed NSHC (Yes/No).	No.
Energy Harbor Nuclear Corp. and Energy Harbor Nuclear Generation LLC; Perry Nuclear Power Plant, Unit 1; Lake County, OH	
Docket No(s)	50–440.
Amendment Date	November 17, 2023.
ADAMS Accession No	ML23292A297.
Amendment No(s)	201.
Brief Description of Amendment(s)	The amendment removed the Table of Contents from the Perry Nuclear Power Plant, Unit 1, technical specifications and placed it under licensee control.
Public Comments Received as to Proposed NSHC (Yes/No).	No.
Entergy Operations, Inc.; Arkansas Nuclear One, Unit 1; Pope County, AR	
Docket No(s)	50–313.
Amendment Date	November 28, 2023.
ADAMS Accession No	ML23275A207.
Amendment No(s)	280.
Brief Description of Amendment(s)	The amendment removed Condition A, “One RCP [reactor coolant pump] not in operation in each loop”; Required Action A.1 to “Restore one non-operating RCP to operation”; and its Completion Time of “18 hours” from Arkansas Nuclear One, Unit 1 Technical Specification 3.4.4 “RCS [Reactor Coolant System] Loops—MODES 1 and 2.”
Public Comments Received as to Proposed NSHC (Yes/No).	No.
Nine Mile Point Nuclear Station, LLC and Constellation Energy Generation, LLC; Nine Mile Point Nuclear Station, Unit 1; Oswego County, NY	
Docket No(s)	50–220.
Amendment Date	December 6, 2023.
ADAMS Accession No	ML23289A012.
Amendment No(s)	250.
Brief Description of Amendment(s)	The amendment revised the technical specification requirements to permit the use of risk informed completion times for actions to be taken when limiting conditions for operation are not met. The changes are based on Technical Specifications Task Force (TSTF) Traveler TSTF–505, Revision 2, “Provide Risk-Informed Extended Completion Times—RITSTF [Risk-Informed TSTF] Initiative 4b.”
Public Comments Received as to Proposed NSHC (Yes/No).	No.
Southern Nuclear Operating Company, Inc.; Joseph M. Farley Nuclear Plant, Units 1 and 2; Houston County, AL	
Docket No(s)	50–348, 50–364.
Amendment Date	November 22, 2023.
ADAMS Accession No	ML23228A143.
Amendment No(s)	249 (Unit 1), 246 (Unit 2).
Brief Description of Amendment(s)	The amendments revised the Technical Specifications 3.6.3, “Containment Isolation Valves,” Surveillance Requirement (SR) 3.6.3.5 to eliminate event-based testing of containment purge valves with resilient seals. The amendments eliminated “AND Within 92 days of opening the valve” from SR 3.6.3.5.
Public Comments Received as to Proposed NSHC (Yes/No).	No.
Southern Nuclear Operating Company, Inc.; Vogtle Electric Generating Plant, Unit 3; Burke County, GA	
Docket No(s)	52–025.
Amendment Date	December 7, 2023.
ADAMS Accession No	ML23310A292.
Amendment No(s)	196.
Brief Description of Amendment(s)	The amendment permitted an exception to Regulatory Guide 1.163 that would allow the specified frequency for the first periodic Type A integrated leak rate test to be performed prior to the earlier of initial Mode 4 entry for Unit 3 Cycle 2 and midnight on May 31, 2025.
Public Comments Received as to Proposed NSHC (Yes/No).	No.
Southern Nuclear Operating Company, Inc.; Vogtle Electric Generating Plant, Units 3 and 4; Burke County, GA	
Docket No(s)	52–025, 52–026.
Amendment Date	October 23, 2023.
ADAMS Accession No	ML23138A085 (Package).
Amendment No(s)	193 (Unit 3) and 190 (Unit 4).

LICENSE AMENDMENT ISSUANCE(S)—Continued

Brief Description of Amendment(s)	The amendments revised Technical Specification (TS) 3.2.1, "Heat Flux Hot Channel Factor ($F_Q(Z)$)," to adopt (with certain exceptions) the TS changes described in Appendix D of the NRC-approved licensing Topical Report WCAP-17661-P-A, Revision 1, "Improved RAOC and CAOC F_Q Surveillance Technical Specifications," dated February 2019. WCAP-17661-P-A, Revision 1, is applicable to plants using either relaxed axial offset control (RAOC) or constant axial offset control (CAOC) surveillance formulations—the revised Vogtle, Units 3 and 4, TS 3.2.1 uses the CAOC formulation. A reference to WCAP 17661 P A, Revision 1 was also added to TS 5.6.3, "Core Operating Limits Report (COLR)."
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Tennessee Valley Authority; Watts Bar Nuclear Plant, Units 1 and 2; Rhea County, TN

Docket No(s)	50-390, 50-391.
Amendment Date	December 6, 2023.
ADAMS Accession No	ML23293A057.
Amendment No(s)	163 (Unit 1), 70 (Unit 2).
Brief Description of Amendment(s)	The amendments revised Watts Bar Nuclear Plant, Units 1 and 2, Technical Specification (TS) 3.8.3, "Diesel Fuel Oil, Lube Oil, and Starting Air," Surveillance Requirement (SR) 3.8.3.1 (verification of fuel oil storage tank volume), and SR 3.8.3.2 (verification of lubricating oil inventory volume), by removing the current stored diesel fuel oil and lube oil numerical volume requirements and replacing them with duration-based diesel operating time requirements, consistent with TS Task Force (TSTF) Standard TS Traveler TSTF-501, Revision 1, "Relocate Stored Fuel Oil and Lube Oil Volume Values to Licensee Control." The amendments also revised TS 3.8.1, "AC Sources—Operating," SR 3.8.1.4 to replace the specific day tank numerical volume requirements with a duration-based diesel operating time requirement.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Vistra Operations Company LLC; Comanche Peak Nuclear Power Plant, Unit Nos. 1 and 2; Somervell County, TX

Docket No(s)	50-445, 50-446.
Amendment Date	December 6, 2023.
ADAMS Accession No	ML23313A073.
Amendment No(s)	184 (Unit 1) and 184 (Unit 2).
Brief Description of Amendment(s)	The amendments revised Technical Specification (TS) 3.2.1, "Heat Flux Hot Channel Factor ($F_Q(Z)$)," and associated references in TS 5.6.5, "Core Operating Limits Report (COLR)," to implement the new $F_Q(Z)$ surveillance methodology of WCAP-17661-P-A, Revision 1. The amendments also re-formulated the $F_QW(Z)$ approximation for $F_Q(Z)$, revised the surveillance requirements, and revised the required actions when $F_Q(Z)$ is not within limits.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

Wolf Creek Nuclear Operating Corporation; Wolf Creek Generating Station, Unit 1; Coffey County, KS

Docket No(s)	50-482.
Amendment Date	November 29, 2023.
ADAMS Accession No	ML23299A266.
Amendment No(s)	238.
Brief Description of Amendment(s)	The amendment modified the implementation date of License Amendment No. 237 for Wolf Creek Generating Station, Unit 1, which revised License Condition 2.C.(5) regarding fire protection and the Updated Safety Analysis Report to allow the use of hard hat mounted portable lights.
Public Comments Received as to Proposed NSHC (Yes/No).	No.

IV. Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses and Final Determination of No Significant Hazards Consideration and Opportunity for a Hearing (Exigent Circumstances or Emergency Situation)

Since publication of the last monthly notice, the Commission has issued the following amendment. The Commission has determined for this amendment that the application for the amendment complies with the standards and requirements of the Atomic Energy Act

of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

Because of exigent circumstances or emergency situation associated with the date the amendment was needed, there was not time for the Commission to publish, for public comment before issuance, its usual notice of consideration of issuance of amendment, proposed NSHC

determination, and opportunity for a hearing.

For exigent circumstances, the Commission has either issued a **Federal Register** notice providing opportunity for public comment or has used local media to provide notice to the public in the area surrounding a licensee's facility of the licensee's application and of the Commission's proposed determination of NSHC. The Commission has provided a reasonable opportunity for the public to comment, using its best efforts to make available to the public means of communication for the public to

respond quickly, and in the case of telephone comments, the comments have been recorded or transcribed as appropriate and the licensee has been informed of the public comments.

In circumstances where failure to act in a timely way would have resulted, for example, in derating or shutdown of a nuclear power plant or in prevention of either resumption of operation or of increase in power output up to the plant's licensed power level, the Commission may not have had an opportunity to provide for public comment on its NSHC determination. In such case, the license amendment has been issued without opportunity for comment prior to issuance. If there has been some time for public comment but less than 30 days, the Commission may provide an opportunity for public comment. If comments have been requested, it is so stated. In either event, the State has been consulted by telephone whenever possible.

Under its regulations, the Commission may issue and make an amendment immediately effective, notwithstanding the pendency before it of a request for

a hearing from any person, in advance of the holding and completion of any required hearing, where it has determined that NSHC is involved.

The Commission has applied the standards of 10 CFR 50.92 and has made a final determination that the amendments involve NSHC. The basis for this determination is contained in the documents related to each action. Accordingly, the amendment has been issued and made effective as indicated. For those amendments that have not been previously noticed in the **Federal Register**, within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the guidance concerning the Commission's "Agency Rules of Practice and Procedure" in 10 CFR part 2 as discussed in section II.A of this document.

Unless otherwise indicated, the Commission has determined that the amendment satisfies the criteria for

categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for this amendment. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated in the safety evaluation for the amendment.

For further details with respect to these actions, see the amendment and associated documents such as the Commission's letter and safety evaluation, which may be obtained using the ADAMS accession numbers indicated in the following table. The safety evaluation will provide the ADAMS accession number(s) for the application for amendment and the **Federal Register** citation for any environmental assessment. All of these items can be accessed as described in the "Obtaining Information and Submitting Comments" section of this document.

LICENSE AMENDMENT ISSUANCE(S)—EXIGENT/EMERGENCY CIRCUMSTANCES

Pacific Gas and Electric Company; Diablo Canyon Power Plant, Unit 2; San Luis Obispo County, CA

Docket No(s)	50–323.
Amendment Date	December 7, 2023.
ADAMS Accession No	ML23324A153.
Amendment No(s)	246.
Brief Description of Amendment(s)	The amendment revised Technical Specification 3.7.8, "Auxiliary Saltwater (ASW) System," Condition A note to allow a one-time Completion Time of 144 hours to replace the ASW Pump 2–2 motor during Cycle 24. The amendment was requested under exigent circumstances pursuant to NRC regulations.
Local Media Notice (Yes/No)	No.
Public Comments Requested as to Proposed NSHC (Yes/No).	No.

V. Previously Published Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The following notice was previously published as separate individual notice.

It was published as an individual notice either because time did not allow the Commission to wait for this monthly notice or because the action involved exigent circumstances. It is repeated here because the monthly notice lists all amendments issued or proposed to be issued involving NSHC.

For details, including the applicable notice period, see the individual notice in the **Federal Register** on the day and page cited.

LICENSE AMENDMENT REQUEST(S)—REPEAT OF INDIVIDUAL FEDERAL REGISTER NOTICE

Pacific Gas and Electric Company; Diablo Canyon Power Plant, Unit 2; San Luis Obispo County, CA

Docket No(s)	50–323.
Application Date	November 14, 2023, as supplemented by letter dated November 16, 2023.
ADAMS Accession No(s)	ML23319A204, ML23320A312.
Brief Description of Amendment(s)	The proposed amendment would revise Technical Specification 3.7.8, "Auxiliary Saltwater (ASW) System," Condition A note to allow a one-time Completion Time of 144 hours to replace the ASW Pump 2–2 motor during Cycle 24. The proposed amendment is being requested under exigent circumstances pursuant to NRC regulations.
Date & Cite of Federal Register Individual Notice.	November 22, 2023 (88 FR 81443).

LICENSE AMENDMENT REQUEST(S)—REPEAT OF INDIVIDUAL FEDERAL REGISTER NOTICE—Continued

Expiration Dates for Public Comments & Hearing Requests.	December 6, 2023 (Public Comments); January 22, 2024 (Hearing Requests).
Union Electric Company; Callaway Plant, Unit No. 1; Callaway County, MO	
Docket No(s)	50–483.
Application Date	December 1, 2022, as supplemented by letter dated October 16, 2023.
ADAMS Accession No(s)	ML22335A507 (Package), ML23289A214 (Package).
Brief Description of Amendment(s)	The proposed amendment would revise the Callaway Plant, Unit No. 1 technical specifications (TSs), licensing basis (<i>i.e.</i> , the TS Bases and Final Safety Analysis Report), to allow use of one train of the normal, non-safety-related service water system to solely provide cooling water support (in lieu of support from the associated safety-related essential service water train) for one of two redundant trains of TS-required equipment when both equipment trains are required to be operable during cold shutdown/refueling conditions. The proposed amendment was previously noticed on February 21, 2023 (88 FR 10559) and was renoticed because it was supplemented by letter dated October 16, 2023 (ADAMS Package Accession No. ML23289A214), which changed the scope due to additional TS changes.
Date & Cite of Federal Register Individual Notice.	November 13, 2023; 88 FR 77616.
Expiration Dates for Public Comments & Hearing Requests.	December 13, 2023 (Public Comments); January 12, 2024 (Hearing Requests).

Dated: December 13, 2023.

For the Nuclear Regulatory Commission.

Victor G. Cusumano,*Acting Deputy Director, Division of Operating
Reactor Licensing, Office of Nuclear Reactor
Regulation.*

[FR Doc. 2023–27832 Filed 12–22–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–8943–MLA; ASLBP No. 07–859–03–MLA–BD01]

Atomic Safety and Licensing Board Panel; Before the Licensing Board: G. Paul Bollwerk, III, Chair, Nicholas G. Trikouros, Dr. Craig M. White; In the Matter of: Crow Butte Resources, Inc. (North Trend Expansion Project); Memorandum and Order (Notice of Hearing)

December 20, 2023.

In 2007, Crow Butte Resources, Inc., (CBR) submitted a request to amend its existing 10 CFR part 40 source materials license to authorize CBR to conduct in situ uranium recovery operations within the so-called North Trend Expansion Area (NTEA).¹ In a May 2008 ruling,² the Licensing Board granted the hearing requests of Consolidated Intervenor.³ Additionally, the Board granted 10 CFR 2.315(c) interested governmental entity status to the Oglala Sioux Tribe and the Oglala Delegation of the Great Sioux Nation Treaty Council, allowing them to participate in this proceeding as well.⁴

In light of the foregoing, please take notice that a hearing is being conducted in this license amendment proceeding. The hearing is governed by the simplified hearing procedures set forth in 10 CFR part 2, subparts C and L, 10 CFR 2.300–2.390, 2.1200–2.1213.

The public is invited to attend any prehearing conference, oral argument, or evidentiary hearing that may be conducted in this adjudication pursuant to 10 CFR 2.329, 2.331, 2.327–2.328, 2.1206–2.1208. Notices of those sessions will be published in the **Federal Register** and/or made available to the public at the NRC Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, and through the NR website, www.nrc.gov.

Documents relating to this license amendment proceeding are available for public inspection at the Commission's PDR or electronically from the publicly

available records component of NRC's ADAMS document repository. ADAMS, including its adjudicatory proceeding-related Electronic Hearing Docket, is accessible from the NRC website at www.nrc.gov/reading-rm/adams.html. Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR reference staff by telephone at 1–800–397–4209/301–415–4737, or by email to pdr.resource@nrc.gov.

It is so ordered.

For the Atomic Safety and Licensing Board, Rockville, Maryland.

Dated: December 20, 2023.

George P. Bollwerk, III,
Administrative Judge.

[FR Doc. 2023–28385 Filed 12–22–23; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024–128 and CP2024–134]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 28, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Introduction
- II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the

modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (<http://www.prc.gov>). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.¹

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s):* MC2024–128 and CP2024–134; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 150 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 19, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Alireza Motameni; *Comments Due:* December 28, 2023.

This Notice will be published in the **Federal Register**.

Jennie L. Jbara,
Alternate Certifying Officer.

[FR Doc. 2023–28431 Filed 12–22–23; 8:45 am]

BILLING CODE 7710–FW–P

¹ See Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

¹ See Letter from Stephen P. Collins, President, CBR, to Charles L. Miller, Director, Office of Federal and State Materials and Environmental Management Programs, Nuclear Regulatory Commission (NRC) at 1 (May 30, 2007) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML0711550057).

² See LBP–08–06, 67 NRC 241, 344 (2008), *aff'd in part and rev'd in part*, CLI–09–12, 69 NRC 535, 573 (2009).

³ The Consolidated Intervenor consists of the Western Nebraska Resources Council, Debra White Plume, and Owe Aku/Bring Back the Way.

⁴ See LBP–09–12, 69 NRC 11, 52 (2009), *rev'd on other grounds*, CLI–09–12, 69 NRC at 573; LBP–08–06, 67 NRC at 344.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99206; File No. SR–NYSE–2023–50]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Price List

December 19, 2023.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b–4 thereunder,³ notice is hereby given that on December 18, 2023, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Price List to (1) modify fee rates and requirements for transactions that remove liquidity from the Exchange; (2) offer a monthly rebate for Designated Market Maker (“DMM”) units with 150 or fewer assigned securities along with incentives for affiliated Supplemental Liquidity Providers (“SLPs”); and (3) eliminate an underutilized fee for transactions that remove liquidity from the Exchange in Tape B and C securities. The Exchange proposes to implement the fee changes effective December 18, 2023. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries,

set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Price List to (1) modify fee rates and requirements for transactions that remove liquidity from the Exchange; (2) offer a monthly rebate for DMM units with 150 or fewer assigned securities along with incentives for affiliated SLPs; and (3) eliminate an underutilized fee for transactions that remove liquidity from the Exchange in Tape B and C securities.

The proposed changes respond to the current competitive environment by incentivizing submission of additional liquidity in Tape A, B and Tape C securities to a public exchange and offering an additional incentive to smaller DMM units and affiliated SLPs to quote on the Exchange. The proposed incentive also seeks to attract potential new DMM units and affiliated SLPs in order to expand and diversify the pool of Exchange market makers.

The Exchange proposes to implement the fee changes effective December 18, 2023.⁴

Background

Current Market and Competitive Environment

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁵

While Regulation NMS has enhanced competition, it has also fostered a “fragmented” market structure where trading in a single stock can occur across multiple trading centers. When multiple trading centers compete for order flow in the same stock, the Commission has recognized that “such competition can lead to the fragmentation of order flow in that stock.”⁶ Indeed, cash equity trading is currently dispersed across 16 exchanges,⁷ numerous alternative trading systems,⁸ and broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange currently has more than 17% market share.⁹ Therefore, no exchange possesses significant pricing power in the execution of cash equity order flow. More specifically, the Exchange’s share of executed volume of equity trades in Tapes A, B and C securities is less than 12%.¹⁰

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can move order flow, or discontinue or reduce use of certain categories of products. While it is not possible to know a firm’s reason for shifting order flow, the Exchange believes that one such reason is because of fee changes at any of the registered exchanges or non-exchange venues to which the firm routes order flow. Accordingly, competitive forces compel the Exchange to use exchange transaction fees and credits because market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

In response to the competitive environment described above, the Exchange has established incentives for its member organizations who submit orders that remove liquidity on the Exchange. The Exchange believes that the proposed changes, taken together, will incentivize submission of additional liquidity in Tape A, B and

⁶ See Securities Exchange Act Release No. 61358, 75 FR 3594, 3597 (January 21, 2010) (File No. S7–02–10) (Concept Release on Equity Market Structure).

⁷ See Cboe U.S. Equities Market Volume Summary, available at https://markets.cboe.com/us/equities/market_share. See generally <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml.html>.

⁸ See FINRA ATS Transparency Data, available at <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is available at <https://www.sec.gov/foia/docs/atlist.htm>.

⁹ See Cboe Global Markets U.S. Equities Market Volume Summary, available at https://markets.cboe.com/us/equities/market_share/.

¹⁰ See *id.*

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b–4.

⁴ The Exchange originally filed to amend the Price List on September 1, 2023 (SR–NYSE–2023–31). SR–NYSE–2023–31 was withdrawn on September 13, 2023 and replaced by SR–NYSE–2023–32. SR–NYSE–2023–32 was withdrawn on September 22, 2023 and replaced by SR–NYSE–2023–33. SR–NYSE–2023–33 was withdrawn on September 28, 2023 and replaced by SR–NYSE–2023–35. SR–NYSE–2023–35 was withdrawn on November 1, 2023 and replaced by SR–NYSE–2023–41. SR–NYSE–2023–41 was withdrawn on December 18, 2023 and replaced by this filing.

⁵ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (File No. S7–10–04) (Final Rule) (“Regulation NMS”).

Tape C securities to a public exchange, thereby promoting price discovery and transparency and enhancing order execution opportunities for member organizations. The Exchange has also established incentives for DMM units to quote at specified levels. The proposed fee change is designed to encourage market maker quoting by offering an additional incentive to smaller DMM units and affiliated SLPs to quote on the Exchange. The proposed change could also have the added benefit of potentially attracting new DMM units and affiliated SLPs to the Exchange.

Proposed Rule Change

The Exchange proposes to revise the rates and requirements for fees for transactions that remove liquidity from the Exchange and pay DMM units with 150 or fewer assigned securities a new, monthly rebate based on the number of assigned securities and time at the National Best Bid ("NBB") and National Best Offer ("NBO," together the "NBBO") in the applicable security in the applicable month, along with a minimum SLP credit for adding displayed liquidity. The Exchange also proposes to eliminate an underutilized fee for transactions that remove liquidity from the Exchange in Tape B and C securities.

Charges for Removing Liquidity

Currently, the Exchange sets forth the fees for removing liquidity from the Exchange in Tape A securities in a different section of the Price List from fees for removing liquidity in Tape B and C securities, which are grouped with credits for adding liquidity in Tape B and C securities under their own heading in the Price List.

The Exchange proposes to modify the rates and requirements for certain fees for removing liquidity in Tapes B and C securities.

First, for non-Floor broker transactions that remove liquidity from the Exchange (*i.e.*, when taking liquidity from the NYSE), the Exchange currently offers a fee of \$0.00290 in Tape A securities and a fee of \$0.00295 for Tape B and C securities where the member organization has an Adding ADV,¹¹ excluding liquidity added by a DMM, that is at least 2,000,000 ADV on the NYSE in Tape A securities.

The Exchange proposes to change the fee for Tape A securities and revise the requirements to qualify for the fees, as follows. As proposed, for non-Floor broker transactions that remove liquidity from the Exchange, the

Exchange would offer a fee of \$0.00300 in Tape A securities and the current fee of \$0.00295 for Tape B and C securities where the member organization has 0.05% Adding ADV of Tape A CADV.

Second, the Exchange currently offers a fee of \$0.00285 in Tape A securities and a fee of \$0.00290 in Tape B and C securities for non-Floor broker transactions if the member organization has Adding ADV, excluding liquidity added by a DMM, that is at least 7,000,000 in Tape A and 500,000 ADV in Tape B and Tape C combined during the billing month.

The Exchange proposes to change the fee for Tape A securities and revise the requirements to qualify for the fees, as follows. As proposed, for non-Floor broker transactions that remove liquidity from the Exchange, the Exchange would offer a fee of \$0.00295 in Tape A securities and the current fee of \$0.00290 for Tape B and C securities where the member organization has 0.10% Adding ADV of Tape A CADV and 0.007% Adding ADV in Tape B and Tape C CADV combined during the billing month.

Third, the Exchange currently offers a fee of \$0.0028 in Tape A securities and a fee of \$0.00285 Tape B and C securities for non-Floor broker transactions if the member organization has Adding ADV, excluding liquidity added by a DMM, that is at least 14,000,000 ADV in Tape A securities and 750,000 ADV in Tape B and Tape C securities combined during the billing month.

The Exchange proposes to change the fee for Tape A securities and revise the requirements to qualify for the fees, as follows. As proposed, for non-Floor broker transactions that remove liquidity from the Exchange, the Exchange would offer a fee of \$0.00290 in Tape A securities and the current fee of \$0.00285 for Tape B and C securities where the member organization has 0.30% Adding ADV in Tape A CADV and 0.01% Adding ADV in Tape B and Tape C CADV combined during the billing month.

Finally, the Exchange proposes a new tier for non-Floor broker transactions that remove liquidity from the Exchange. As proposed, member organizations would be eligible for a fee of \$0.00285 in Tape A, Tape B and Tape C securities for non-Floor broker transactions if the member organization (1) has 1.05% Adding ADV in Tape A CADV and 0.01% Adding ADV in Tape B and Tape C CADV combined during the billing month, or (2) operates a DMM unit that is registered in at least 25 securities and has 0.05% Adding ADV in Tape A CADV.

The purpose of this proposed change is to encourage member organizations to send liquidity to the Exchange. Specifically, the first proposed qualification method seeks to encourage member organizations to send adding liquidity in all Tapes to the Exchange as way to achieve eligibility for a lower remove fee, which could in turn incentivize those member organizations to send removing liquidity to the Exchange in response to the lower remove fee. The second proposed qualification method seeks to encourage member organizations that operate a DMM unit that is registered in at least 25 securities to send adding liquidity in Tape A securities as way to achieve eligibility for a lower remove fee, which could in turn incentivize those member organizations to send removing liquidity to the Exchange to capture that lower remove fee.¹² The Exchange believes that it is reasonable to offer a lower remove fee based on a combination of adding liquidity and operation of a DMM unit of a certain size. The Exchange notes that other marketplaces offer incremental credits to members that are lead market makers ("LMM") registered in a minimum number of securities and that add a specified percentage of displayed liquidity.¹³ The Exchange further believes that eligibility for the proposed fee for member organizations that operate a DMM unit with a certain number of registrations plus an adding volume requirement is not unfairly discriminatory because member organizations that do not operate a DMM unit can still qualify for the lower remove fee by sending adding liquidity to the Exchange and meeting the ADV requirements for all Tapes set out in the first qualification method.

Because the tier would be new, the Exchange does not know how many member organizations could qualify based on the proposed Adding ADV criteria set out in the first prong. The Exchange does not know, however, whether any of these member organizations would send sufficient adding ADV volume to the Exchange in Tape A, B and C securities to be eligible for the proposed fee based on the first qualification method. Similarly, there are 3 member organizations that operate a DMM unit registered in at least 25

¹² For purposes of this alternative qualification method, the member organization that would be eligible for the proposed lower remove fee would be the same legal entity as the member organization that operates a DMM unit.

¹³ For instance, Cboe BZX offers a higher tiered rebate based on a lower adding requirement if the member is enrolled in a minimum number of LMM securities. See Cboe BZX Equities Fee Schedule, available at https://www.cboe.com/us/equities/membership/fee_schedule/bzx/.

¹¹ The terms "ADV" and "CADV" are defined in footnote * of the Price List.

securities that could be eligible for the lower remove if they send the proposed amount of adding ADV in Tape A securities. The Exchange does not know, however, whether any of these member organizations would send sufficient Adding ADV volume in Tape A securities to the Exchange in order to be eligible for the proposed fee based on the second qualification method.

The Exchange proposes an approach for the removing tiers that will compare the liquidity added by member organizations from one based on ADV to a percentage threshold based on Tape A CADV and combined Tape B and C CADV. As proposed, the percentage threshold will adjust each calendar month based on the US average daily consolidated share volume in Tape A securities and Tape B and Tape C securities CADV for that month. By allowing tiers to move in sync with consolidated volume, the proposed change will provide a more consistent floor against which to measure member organizations' adding volume on the Exchange. In addition, the proposed change will provide a more straightforward way to communicate floating volume tiers while maintaining a minimum threshold, an approach similar to that adopted by other exchanges.¹⁴ Although the percentage thresholds will result in lower minimum share volume requirements for the removing tiers when consolidated volumes are lower, they will also result in higher minimum share volume requirements when consolidated volumes are higher.

The Exchange notes the proposed percentages of CADV are comparable to the current ADV levels. For example, Tape A CADV in May 2023 was 4 billion shares. The current Tape A Add ADV requirements of 14 million shares ADV, 7 million shares ADV, and 2 million shares ADV would equate to 12 million shares ADV (using 0.30% of Tape A CADV), 4.0 million shares ADV (using 0.10% of Tape A CADV), and 2 million shares ADV (using 0.05% of Tape A CADV), respectively. The Exchange further notes that changing the 7 million share requirement to 0.10% of Tape A CADV represents a significant reduction in the requirement, which the Exchange believes should

encourage more member organizations to participate in that tiered pricing.

The Exchange believes that the proposed changes, taken together, will incentivize submission of liquidity in Tape A, B and Tape C securities to a public exchange, thereby promoting price discovery and transparency and enhancing order execution opportunities for member organizations. As noted above, the Exchange operates in a competitive environment, particularly as it relates to attracting non-marketable orders, which add liquidity to the Exchange. The Exchange does not know how much order flow member organizations choose to route to other exchanges or to off-exchange venues. Because the proposed reconfiguration involves the introduction of new fees, incentives, and/or new requirements, the Exchange does not know how many member organizations could qualify for the new remove fees based on their current trading profile on the Exchange and if they choose to direct order flow to the NYSE. In short, without having a view of member organization's activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any member organization directing orders to the Exchange. The proposed changes are not otherwise intended to address other issues, and the Exchange is not aware of any significant problems that market participants would have in complying with the proposed changes.

Small DMM Incentive

The Exchange proposes to pay DMM units with 150 or fewer assigned securities a new, monthly rebate based on the number of assigned securities and time at the NBBO in the applicable security in the applicable month. The proposed rebate would be payable for each security assigned to such a DMM in the previous month (regardless of whether the stock price exceeds \$1.00) for which that DMM provides quotes at the NBBO at least 15% of the time in the applicable month, which the Exchange proposes to define in the Price List as the "Incentive Quoting Requirement".¹⁵ The proposed monthly rebate would be in addition to the current rate on transactions and

would be prorated to the number of trading days in a month that an eligible security is assigned to a DMM.

As proposed, a DMM unit that has at least 1 and not more than 24 assigned securities that meets the Incentive Quoting Requirement would be eligible for a monthly rebate of \$250 per qualifying symbol.

A DMM unit that has a least 25 and no more than 74 assigned securities that meets the Incentive Quoting Requirement would be eligible for a monthly rebate of \$500 per qualifying symbol. SLPs affiliated with a DMM unit that has between 25 and 74 assigned securities that meet the Incentive Quoting Requirement are eligible for a minimum display credit for SLP Adding of \$0.0023 in SLP symbols that meet the 10% average quoting requirement in an assigned security pursuant to Rule 107B.¹⁶

Finally, a DMM unit that has at least 75 but no more than 150 assigned securities that meets the Incentive Quoting Requirement would be eligible for a monthly rebate of \$1,000 per qualifying symbol. SLPs affiliated with a DMM unit that has between 75 and 150 assigned securities that meet the Incentive Quoting Requirement are eligible for a minimum display credit for SLP Adding of \$0.0026 in SLP symbols that meet the 10% average quoting requirement in an assigned security pursuant to Rule 107B.

For example, assume a DMM has 35 assigned securities. Further assume the DMM quotes at the NBBO at least 15% of the time in 30 of those assigned securities and quotes under the NBBO 15% of the time in the remaining 5 assigned securities. For a billable month in those 30 assigned securities that meet the Incentive Quoting Requirement, the DMM would receive a per qualified symbol credit of \$500, with a total combined credit of \$15,000 (30 securities × \$500). In addition, a SLP affiliated with that DMM would receive a minimum credit of \$0.0023 for displayed adding, and would receive a

¹⁴ For example, NYSE Arca, Inc. ("NYSE Arca") charges fees for removing liquidity of \$0.0030, or \$0.0029 in Tape B securities for ETP Holders meeting the requirements of Adding Tiers 1–4, or \$0.0029 in Tape C securities for ETP Holders meeting the requirements of Tape C Tier 1. See NYSE Arca Equities Fees and Charges, available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf.

¹⁵ For purposes of the Price List, DMM NBBO Quoting means DMM quoting at the NBBO. See NYSE Price List, General, third bullet, available at https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf. Time at the NBBO or "inside" is calculated as the average of the percentage of time the DMM unit has a bid or offer at the inside. Reserve or other non-displayed orders entered by the DMM are not included in the inside quote calculations.

¹⁶ Under Rule 107B, a SLP can be either a proprietary trading unit of a member organization ("SLP-Prop") or a registered market maker at the Exchange ("SLMM"). For purposes of the 10% average or more quoting requirement in assigned securities pursuant to Rule 107B, quotes of an SLP-Prop and an SLMM of the same member organization are not aggregated. However, for purposes of adding liquidity for assigned SLP securities in the aggregate, shares of both an SLP-Prop and an SLMM of the same member organization are included. SLPs affiliated with a DMM unit that has between 1 and 24 assigned securities would not be eligible for a minimum display credit for SLP Adding. It should be noted that eligible SLPs would receive the better of the proposed minimum display credit or the applicable current SLP tiered credit.

higher credit if that SLP qualified for higher credits under the SLP Tiers.

The proposed rule change is designed to provide smaller market makers (*i.e.*, DMM units with 150 or fewer assigned securities) with an added incentive to quote in their assigned securities at the NBBO at least 15% of the time in a given month and increase SLP displayed adding volume. As described above, member organizations have a choice of where to send order flow. The Exchange believes that incentivizing DMM units on the Exchange to quote at the NBBO more frequently could attract additional orders to the Exchange and contribute to price discovery which benefits all market participants. In addition, additional liquidity-providing quotes benefit all market participants because they provide greater execution opportunities on the Exchange and improve the public quotation. Moreover, the Exchange believes the proposed change could have the added benefit of attracting additional DMM units to the Exchange. Currently, the Exchange has three DMM units, only one of which has fewer than 150 assigned securities and therefore could qualify for the rebate.¹⁷ The Exchange cannot predict with certainty whether and how many member organizations would avail themselves of the opportunity to become an Exchange DMM unit. However, the Exchange believes that the proposed rebate could incentivize additional firms to become DMM units on the Exchange by increasing incentives for new and smaller entrants. Finally, the Exchange believes that the proposed minimum display credits for SLPs affiliated with a DMM unit is reasonable because it would incentivize greater adding liquidity by SLPs affiliated with a DMM unit, thereby contributing to depth and market quality on the Exchange.

Deletion of Underutilized Remove Tier Fee

In August 2019, the Exchange adopted a new, lower fee of \$0.0026 per share for removing liquidity from the Exchange in both Tapes B and C securities as an alternative way for member organizations to qualify for the Remove Tier for Tape B and C Securities. The purpose of the change was to incentivize member organizations to remove additional liquidity from the Exchange, thereby increasing the number of orders adding liquidity that are executed on the Exchange and improving overall liquidity on a public

exchange, resulting in lower costs for member organizations that qualify for the rate.

The Exchange proposes to eliminate and remove the fee of \$0.0026 per share for removing liquidity from the Exchange in both Tapes B and C and the associated requirements. The fee has been underutilized by member organizations insofar as only three have achieved the fee since it was adopted. The Exchange does not anticipate that any additional member organization in the near future would qualify for the tiered fee that is the subject of this proposed rule change.

The proposed change is not otherwise intended to address other issues, and the Exchange is not aware of any significant problems that market participants would have in complying with the proposed changes.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹⁸ in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,¹⁹ in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Change Is Reasonable

As discussed above, the Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”²⁰ While Regulation NMS has enhanced competition, it has also fostered a “fragmented” market structure where trading in a single stock can occur across multiple trading centers. When multiple trading centers compete for order flow in the same stock, the Commission has recognized that “such competition can lead to the

fragmentation of order flow in that stock.”²¹

Charges for Removing Liquidity

The Exchange believes that the proposal to revise the rates and requirements for fees for transactions that remove liquidity from the Exchange are reasonable. The purpose of these changes is to encourage additional liquidity on the Exchange because market participants benefit from the greater amounts of displayed liquidity present on a public exchange. The Exchange believes that the proposed modifications to the qualification requirements, including replacing a fixed volume number with a percentage of Adding ADV, and the new fees will incentivize additional liquidity in Tape A, Tape B and Tape C securities to a public exchange to qualify for lower fees for removing liquidity on those tapes, thereby promoting price discovery and transparency and enhancing order execution opportunities for member organizations. The proposal is thus reasonable because all member organizations would benefit from such increased levels of liquidity. As noted, the Exchange believes that replacing a fixed volume number with a percentage of Adding ADV is reasonable because the proposed percentages of Adding ADV are comparable to the current levels with one exception that represents a significant reduction in the requirement, which the Exchange believes is reasonable because it should encourage more member organizations to participate in that tiered pricing.

With respect to the addition of percentage ADV thresholds to the existing share thresholds for the remove pricing tiers, the Exchange believes that the change is reasonable because the levels of liquidity provision required to receive the applicable credits will move month to month with respect to the levels of market volumes. The Exchange believes the levels of activity required to achieve higher tiers will be generally consistent with existing requirements for these tiers.

For the same reasons, the Exchange believes that it is reasonable to offer a lower fee of \$0.00285 fee in Tape A, B and C securities for non-Floor broker transactions if the member organization has 1.05% Adding ADV in Tape A CADV and 0.01% Adding ADV in Tape B and Tape C CADV combined during the billing month, or operates a DMM unit registered in at least 25 securities

¹⁸ 15 U.S.C. 78f(b).

¹⁹ 15 U.S.C. 78f(b)(4) & (5).

¹⁷ In contrast, there are 14 competing Lead Marker Makers on NYSE Arca. See <https://www.nyse.com/markets/nyse-arca/membership>.

²⁰ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495, 37499 (June 29, 2005) (S7–10–04) (Final Rule) (“Regulation NMS”).

²¹ See Securities Exchange Act Release No. 61358, 75 FR 3594, 3597 (January 21, 2010) (File No. S7–02–10) (Concept Release on Equity Market Structure).

and sends a minimum of 0.05% Adding ADV in Tape A CADV. As noted above, the proposed fee is designed to encourage member organizations to send liquidity to the Exchange, which would be accomplished by member organizations sending adding liquidity to the Exchange to meet the proposed tier requirements. Under either proposed qualification method, by qualifying for the lower remove fee, the Exchange believes the member organization would have an incentive to send removing liquidity to the Exchange. The Exchange thus believes both methods are a reasonable way to increase liquidity on a public exchange.

As noted, because the proposed fee is new, the Exchange does not know how many member organizations would qualify for the proposed fee based on their current Exchange trading profile. The Exchange believes that offering the proposed tiered remove fee to member organizations that operate a DMM unit registered in at least 25 securities could incentivize other member organizations to operate a DMM unit or increase their number of DMM registrations in order for the member organization to become eligible for the fee. The proposal is reasonable because all member organizations would benefit from such increased levels of liquidity. As noted, the Exchange believes the proposed alternative qualification method is reasonable and fair because member organizations that do not qualify for the proposed lower fee based on the revised alternative qualification criteria can still qualify by meeting the proposed adding ADV requirements for all Tapes. As also noted, other marketplaces offer incremental credits to members that add a specified percentage of displayed liquidity or meet a minimum number of registrations in ETPs as LMM.²²

Small DMM Incentive

The Exchange believes that the proposal to offer an additional rebate to a DMM with 150 or fewer assigned securities if it increases its quoting at the NBBO, and associated incentives for affiliated SLPs, is a reasonable means to improve market quality, attract additional order flow to a public market, and enhance execution opportunities for member organizations on the Exchange, to the benefit of all market participants. The Exchange notes that the proposal would also foster liquidity provision and stability in the marketplace and reduce smaller DMM's reliance on transaction fees. The proposal would also reward DMM units, who have greater risks and heightened quoting

and other obligations than other market participants. The proposed change is also a reasonable attempt to potentially attract additional DMM units to the Exchange by providing financial incentives for smaller firms to become DMM units. Moreover, offering minimum display credits for SLPs affiliated with a DMM unit is a reasonable method to incentivize greater adding liquidity by SLPs that are affiliated with a DMM unit, thereby contributing to depth and market quality on the Exchange. The Exchange further believes that it is reasonable to offer the proposed minimum display credits to SLPs affiliated with an DMM unit because the proposed credits are in line with the current adding credits for all SLPs.²³

Deletion of Underutilized Remove Tier Fee

The Exchange believes that the proposed elimination of the underutilized remove tier fee is reasonable because member organizations have underutilized this fee. As noted, only three member organizations have achieved the fee since it was adopted. The Exchange does not anticipate that any additional member organization in the near future would qualify for the tiered fee that is the subject of this proposed rule change. The Exchange believes it is reasonable to eliminate fee when such incentives become underutilized. The Exchange also believes eliminating underutilized incentives would add clarity and transparency to the Price List.

The Proposal Is an Equitable Allocation of Fees

Charges for Removing Liquidity

The Exchange believes that, for the reasons discussed above, the proposed changes taken together, will incentivize member organizations to send additional adding liquidity to achieve lower fees when removing liquidity in Tape A, Tape B and Tape C securities from the Exchange, thereby increasing the number of orders that are executed on the Exchange, promoting price discovery and transparency and enhancing order execution opportunities and improving overall liquidity on a public exchange. The Exchange believes that providing a new lower fee when removing liquidity from the Exchange based on Adding ADV in all Tapes or Adding ADV in Tape A securities where the member

organization operates a DMM unit registered in at least 25 securities is equitable because if the proposed lower fee would apply equally to all similarly situated member organizations. Further, the proposed alternative qualification criteria is equitable because a member organization that would not qualify for the lower fee based on adding volume and operation of a DMM unit with a minimum number of assigned securities would have the ability to qualify for the lower fee based on adding volume in Tapes A, B and C under the first qualification criteria.

The proposed change also is equitable because it would be in line with the applicable rates on other marketplaces.²⁴ As previously noted, the Exchange operates in a competitive environment, particularly as it relates to attracting orders, which add or remove liquidity to the Exchange. The Exchange does not know how much order flow member organizations choose to route to other exchanges or to off-exchange venues. Because the proposed reconfiguration of the fees involves the introduction of new requirements and/or new fees, the Exchange does not know how many member organizations could qualify for the new remove fees based on their current trading profile on the Exchange and if they choose to direct order flow to the NYSE. As noted, although there are currently 3 member organizations that operate a DMM unit registered in at least 25 securities that could qualify for the proposed new \$0.00285 fee in all Tapes if they send the proposed amount of adding ADV in Tape A securities, the Exchange does not know whether any of these member organizations or how many additional member organizations could qualify for the proposed rate based on the member organization's trading profile on the Exchange. Hence, without having a view of member organization's activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any member organization directing orders to the Exchange.

Small DMM Incentive

The Exchange believes the proposal equitably allocates its fees among its market participants by fostering

²⁴ For example, NYSE Arca, Inc. ("NYSE Arca") charges fees for removing liquidity of \$0.0030, or \$0.0029 in Tape B securities for ETP Holders meeting the requirements of Adding Tiers 1–4, or \$0.0029 in Tape C securities for ETP Holders meeting the requirements of Tape C Tier 1. See NYSE Arca Equities Fees and Charges, available at https://www.nyse.com/publicdocs/nyse/markets/nysearca/NYSE_Arca_Marketplace_Fees.pdf.

²² See note 13, *supra*.

²³ See NYSE Price List, SLP Provide Tiers, available at https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf. See note 16, *infra*.

liquidity provision and stability in the marketplace and reducing smaller DMM's reliance on transaction fees. Moreover, the proposal is an equitable allocation of fees because it would reward DMM units for their increased risks and heightened quoting and other obligations. As such, it is equitable to offer smaller DMM units an additional flat, per security credit for orders that add liquidity. Moreover, the proposal is an equitable allocation of fees because it would reward DMM units for their increased risks and heightened quoting requirements and other obligations. As such, it is equitable to offer smaller DMM units an additional flat, per qualified security credit for orders that add liquidity. The proposed rebate is also equitable because it would apply equally to any DMM unit of a certain size. The Exchange notes that at this time there is currently only one DMM unit that could qualify for the proposed rebate based on its number of assigned securities. The Exchange believes that the proposal would provide an equal incentive to any member organization to maintain a DMM unit, and that the proposal constitutes an equitable allocation of fees because all similarly situated member organizations would be eligible for the same rebate. Similarly, the Exchange believes that it is equitable to offer minimum display credits to SLPs affiliated with a DMM because the proposed credits would apply to all similarly situated member organizations that are affiliated with a DMM unit on a full and equal basis. Further, the Exchange believes the proposed minimum display credits are equitable because, as noted, the proposed rates are in line with the current adding tiered rates for all SLPs and thus an SLP that is not affiliated with a DMM unit could qualify for comparable rates by satisfying the current SLP adding requirements.

Deletion of Underutilized Remove Tier Fee

The Exchange believes the proposal equitably allocates fees among its market participants because the underutilized fee the Exchange proposes to eliminate would be eliminated in its entirety, and would no longer be available to any member organization in any form. Similarly, the Exchange believes the proposal equitably allocates fees among its market participants because elimination of the underutilized fee would apply to all similarly-situated member organizations that remove liquidity from the Exchange on an equal basis. All such member organizations would continue to be subject to the same fee structure, and access to the

Exchange's market would continue to be offered on fair and nondiscriminatory terms.

The Proposal Is Not Unfairly Discriminatory

Charges for Removing Liquidity

The Exchange believes that that reconfiguring the fee for member organizations that remove liquidity from the Exchange will incentivize submission of additional liquidity in Tape A, Tape B and Tape C securities to a public exchange to qualify for the lower fees for removing liquidity, thereby promoting price discovery and transparency and enhancing order execution opportunities for member organizations. The proposal does not permit unfair discrimination because the new rates for removing liquidity in Tape A, Tape B and Tape C securities would be applied to all similarly situated member organizations and other market participants, who would all be eligible for the same credits on an equal basis. Moreover, the new lower fee when removing liquidity also neither targets nor will it have a disparate impact on any particular category of market participant. The proposal does not permit unfair discrimination because the proposed alternative criteria would be applied to all similarly situated member organizations, who would all be eligible for the same credit on an equal basis. Member organizations could qualify the new lower rate either by meeting the proposed Adding ADV requirements in all Tapes or meeting the proposed Adding ADV requirement in Tape A securities and operating a DMM unit registered in at least 25 securities. In both cases, the proposal does not permit unfair discrimination because the proposed criteria apply equally to all similarly situated member organizations, and all member organizations eligible for the new fee under either criteria would be eligible for the same credit on an equal and non-discriminatory basis. Moreover, the Exchange does not believe that offering a lower remove fee to member organizations that operate a DMM unit and meet Adding ADV requirements would be unfairly discriminatory given that member organizations operating a DMM unit have greater risks and heightened quoting and other obligations than other market participants. As such, it is equitable and not unfairly discriminatory to offer member organizations operating a DMM unit that also meet a lower Adding ADV requirement the ability to receive the same lower remove fee as other member

organizations that do not operate a DMM unit and thus do not have the same quoting and trading obligations as DMM units. Accordingly, no member organization already operating on the Exchange would be disadvantaged by the proposed allocation of fees.

The Exchange believes it is not unfairly discriminatory to provide higher fees for removing liquidity in Tape A securities insofar as the proposed fees would be provided on an equal basis to all member organizations that remove liquidity by meeting the tiered requirements. Further, the Exchange believes the proposed fee would provide an incentive for member organizations to remove additional liquidity from the Exchange in Tape B and C securities. The Exchange also believes that the proposed change is not unfairly discriminatory because it is reasonably related to the value to the Exchange's market quality associated with higher volume. As noted, the proposed change also is not unfairly discriminatory because it would be in line with the applicable rates on other marketplaces.²⁵ It should be noted that the submission of orders to the Exchange is optional for member organizations in that they could choose whether to submit orders to the Exchange and, if they do, the extent of its activity in this regard. Lastly, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

Small DMM Incentive

The Exchange believes that the proposal is not unfairly discriminatory. In the prevailing competitive environment, member organizations are free to disfavor the Exchange's pricing if they believe that alternatives offer them better value. For example, member organizations could display quotes on competing exchanges rather than quoting sufficiently on the Exchange to meet the 15% NBBO quoting requirement. The Exchange believes that offering a rebate for DMM units with 150 or fewer assigned securities in the previous month would provide a further incentive for smaller DMM units to quote and trade their assigned securities on the Exchange, and will generally allow the Exchange and DMM units to better compete for order flow, thus enhancing competition. The Exchange also believes that the requirement of 150 or fewer assigned securities to qualify for the credit is not unfairly discriminatory because it would apply

²⁵ See note 13, *supra*.

equally to all existing and prospective member organizations with 150 or fewer assigned securities that choose to maintain a DMM unit on the Exchange. The Exchange does not believe that it is unfairly discriminatory to offer incentives based on a maximum threshold. The Exchange notes that it currently offers incentives that apply equally to all member organizations that cannot or choose not to exceed a certain volume threshold.²⁶ The Exchange believes that the proposal would provide an equal incentive to any member organization to maintain a DMM unit, and that the proposal would not be unfairly discriminatory because the threshold-based incentive would be offered on equal terms to all similarly situated member organizations. Finally, the proposed minimum display credits for SLPs affiliated with a DMM unit neither targets nor will it have a disparate impact on any particular category of market participant. The proposal does not permit unfair discrimination because the proposed minimum display credits would be applied to all similarly situated SLPs that are affiliated with a DMM unit, who would all be eligible for the same credit on an equal and non-discriminatory basis. Moreover, the proposal does not permit unfair discrimination because SLPs that are not affiliated with a DMM unit can qualify for comparable rates by satisfying the current SLP adding requirements. Accordingly, no member organization already operating on the Exchange would be disadvantaged by the proposed allocation of fees.

Deletion of Underutilized Remove Tier Fee

The Exchange believes that the proposal is not unfairly discriminatory because it neither targets nor will it have a disparate impact on any particular category of market participant. The Exchange believes that the proposal is not unfairly discriminatory because the proposed elimination of the underutilized fee would affect all similarly-situated market participants on an equal and non-discriminatory basis. The Exchange believes that eliminating a fee that is underutilized and ineffective would no longer be available to any member organization on an equal basis. The Exchange also believes that the proposed change would protect investors and the public interest because the deletion of an underutilized

fee would make the Price List more accessible and transparent.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,²⁷ the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for member organizations. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."²⁸

Intramarket Competition. The proposed change is designed to attract additional order flow and new potential DMM units to the Exchange. The Exchange believes that the proposed changes, including the DMM rebate that would continue to incentivize smaller DMM units to quote at the NBBO more frequently, would continue to incentivize market participants to direct order flow to the Exchange. Greater liquidity benefits all market participants on the Exchange by providing more execution opportunities on the Exchange and encourages member organizations to send orders, thereby contributing to robust levels of liquidity, which benefits all market participants on the Exchange. The proposed fees and rebate would be available to all similarly-situated market participants, and, as such, the proposed changes would not impose a disparate burden on competition among market participants on the Exchange.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and with off-

exchange venues. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange does not believe its proposed fee change can impose any burden on intermarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)²⁹ of the Act and paragraph (f) thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSE-2023-50 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to file number SR-NYSE-2023-50. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements

²⁶ For instance, the first 750,000 ADV of the aggregate of executions at the close by a member organization are not charged. See NYSE Price List, available at https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf.

²⁷ 15 U.S.C. 78f(b)(8).

²⁸ Regulation NMS, 70 FR at 37498-99.

²⁹ 15 U.S.C. 78s(b)(3)(A).

with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSE-2023-50 and should be submitted on or before January 16, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁰

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-28327 Filed 12-22-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-99204; File No. SR-FINRA-2023-015]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Designation of Longer Period for Commission Action on Proposed Rule Change Relating to Dissemination of Information on Individual Transactions in U.S. Treasury Securities and Related Fees

December 19, 2023.

On November 2, 2023, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to (1) amend FINRA Rules 6710 and 6750 to provide that FINRA will disseminate information on individual transactions in U.S. Treasury Securities that are On-

the-Run Nominal Coupons reported to FINRA's Trade Reporting and Compliance Engine ("TRACE") on an end-of-day basis with specified dissemination caps for large trades, and (2) amend FINRA Rule 7730 to include U.S. Treasury Securities within the existing fee structure for end-of-day and historic TRACE data. The proposed rule change was published for comment in the **Federal Register** on November 9, 2023.³ Section 19(b)(2) of the Act⁴ provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is December 24, 2023. The Commission is extending this 45-day time period for Commission action. The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change and the comments received. Accordingly, pursuant to Section 19(b)(2) of the Act, the Commission designates February 7, 2024, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR-FINRA-2023-015).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-28325 Filed 12-22-23; 8:45 am]

BILLING CODE 8011-01-P

³ See Securities Exchange Act Release No. 98859 (November 3, 2023), 88 FR 77388. Comments received on the proposed rule change are available at: <https://www.sec.gov/comments/sr-finra-2023-015/srfinra2023015.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ 17 CFR 200.30-3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-99207; File No. SR-CboeBZX-2023-106]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule by Modifying Certain Tiers and Discontinuing the NBBO Setter Program

December 19, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 12, 2023, Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule applicable to its equities trading platform ("BZX Equities") by (1) modifying certain Add/Remove Volume Tiers; (2) modifying the Lead Market Maker ("LMM") Pricing Tiers; and (3) discontinuing the NBBO Setter Program. The Exchange proposes to implement these changes effective December 1, 2023.³

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Securities Exchange Act of 1934 (the "Act"), to which market participants may direct their order flow. Based on publicly available information,⁴ no single registered equities exchange has more than 14% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange in particular operates a "Maker-Taker" model whereby it pays rebates to members that add liquidity and assesses fees to those that remove liquidity. The Exchange's Fee Schedule sets forth the standard rebates and rates applied per share for orders that provide and remove liquidity, respectively. Currently, for orders in securities priced at or above \$1.00, the Exchange provides a standard rebate of \$0.00160 per share for orders that add liquidity and assesses a fee of \$0.0030 per share for orders that remove liquidity.⁵ For orders in securities priced below \$1.00, the Exchange provides a standard rebate of \$0.00009 per share for orders that add liquidity and assesses a fee of 0.30% of the total dollar value for orders that remove liquidity.⁶ Additionally, in

response to the competitive environment, the Exchange also offers tiered pricing which provides Members opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

Add/Remove Volume Tiers

Under footnote 1 of the Fee Schedule, the Exchange currently offers various Add/Remove Volume Tiers that provide enhanced rebates for orders yielding fee codes B,⁷ V⁸ and Y⁹ where a Member reaches certain add volume-based criteria. The Exchange also offers various Add/Remove Volume Tiers that provide enhanced rebates for orders yielding fee codes HB,¹⁰ HV¹¹ or HY¹² where a Member reaches certain non-displayed add volume-based criteria. The Exchange first proposes to modify the enhanced rebate associated with Non-Displayed Add Volume Tier 4. Currently, Members who satisfy the criteria of Non-Displayed Add Volume Tier 4 receive an enhanced rebate of \$0.00275 per share for securities priced at or above \$1.00. As proposed, Members who satisfy the criteria of Non-Displayed Add Volume Tier 4 will receive an enhanced rebate of \$0.0027 per share for securities priced at or above \$1.00. The purpose of reducing the enhanced rebate associated with Non-Displayed Add Volume Tier 4 is for business and competitive reasons, as the Exchange believes that reducing such rebate as proposed would decrease the Exchange's expenditures with respect to transaction pricing in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added liquidity. The Exchange notes that despite the modest decrease in the enhanced rebate associated with Non-Displayed Add Volume Tier 4, the enhanced rebate remains competitive and continues to be in-line with the enhanced rebates

provided under Non-Displayed Add Volume Tiers 1–3.¹³

Next, the Exchange proposes to discontinue Non-Displayed Add Volume Tier 5, as no Members have satisfied the criteria within the past six months and the Exchange no longer wishes to, nor is required to, maintain such tier. More specifically, the proposed change removes this tier as the Exchange would rather redirect future resources and funding into other programs and tiers intended to incentivize increased order flow.

Lead Market Maker Pricing Tiers

Under footnote 14 of the Fee Schedule, the Exchange offers a comprehensive liquidity provision program to incentivize Lead Market Makers ("LMMs") to provide enhanced market quality across all BZX-listed securities. Under the Exchange's LMM Program,¹⁴ the Exchange offers daily incentives for LMMs in securities listed on the Exchange for which the LMM meets certain Minimum Performance Standards.¹⁵ Such daily incentives are determined based on the number of Choe-listed securities for which the LMM meets the Minimum Performance Standards and the average auction volume across such securities. Generally, the more LMM Securities¹⁶ for which the LMM meets the Minimum Performance Standards and the higher the auction volume across those securities, the greater the total daily payment to the LMM. Currently, pursuant to paragraph (D) of footnote 14 the Exchange offers LMM Add Volume Tiers, which provide an enhanced rebate to LMMs who reach certain add-

¹³ The Exchange notes that Non-Displayed Add Volume Tier 1 pays an enhanced rebate of \$0.0018 per share for securities priced at or above \$1.00, Non-Displayed Add Volume Tier 2 pays an enhanced rebate of \$0.0020 per share for securities priced at or above \$1.00, and Non-Displayed Add Volume Tier 3 pays an enhanced rebate of \$0.0025 per share for securities priced at or above \$1.00. See BZX Equities Fee Schedule, Footnote 1.

¹⁴ See Securities Exchange Act Release No. 72020 (April 25, 2014), 79 FR 24807 (May 1, 2014), SR-BATS-2014-015 ("Original LMM Filing").

¹⁵ As defined in Rule 11.8(e)(1)(E), the term "Minimum Performance Standards" means a set of standards applicable to an LMM that may be determined from time to time by the Exchange. Such standards will vary between LMM Securities depending on the price, liquidity, and volatility of the LMM Security in which the LMM is registered. The performance measurements will include (A) Percent of time at the NBBO; (B) percent of executions better than the NBBO; (C) average displayed size; and (D) average quoted spread. For additional detail, see Original LMM Filing.

¹⁶ See Rule 11.8(e)(1)(D). The term "LMM Security" means a Listed Security that has an LMM. See also Rule 11.8(e)(1)(B). The term "Listed Security" means any ETP or any Primary Equity Security or Closed-End Fund listed on the Exchange pursuant to Rule 14.8 or 14.9.

³ The Exchange initially filed the proposed fee change on December 1, 2023 (SR-CboeBZX-2023-098). On December 12, 2023, the Exchange withdrew that filing and submitted this proposal.

⁴ See Choe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (November 27, 2023), available at <https://www.cboe.com/us/equities/statistics/>.

⁵ See BZX Equities Fee Schedule, Standard Rates.

⁶ *Id.*

⁷ Fee code B is appended to orders that add liquidity to BZX in Tape B securities.

⁸ Fee code V is appended to orders that add liquidity to BZX in Tape A securities.

⁹ Fee code Y is appended to orders that add liquidity to BZX in Tape C securities.

¹⁰ Fee code HB is appended to orders that add non-displayed liquidity to BZX in Tape B securities.

¹¹ Fee code HV is appended to orders that add non-displayed liquidity to BZX in Tape A securities.

¹² Fee code HY is appended to orders that add non-displayed liquidity to BZX in Tape C securities.

volume based criteria. Now, the Exchange proposes to update the applicable fee codes for LMM Add Volume Tiers 2, 3, and 4 to remove fee codes ZV,¹⁷ ZB,¹⁸ and ZY.¹⁹

Specifically, the Exchange proposes to: (i) amend LMM Add Volume Tier 2 to apply to orders yielding fee codes V and HV (removing fee code ZV); (ii) amend LMM Add Volume Tier 3 to apply to orders yielding fee codes B and HB (removing fee code ZB); and (iii) amend LMM Add Volume Tier 4 to apply to orders yielding fee codes Y and HY (removing fee code ZY). The purpose of eliminating certain fee codes from LMM Add Volume Tiers 2–4 is for business and competitive reasons, as the Exchange believes that eliminating such fee codes as proposed would decrease the Exchange's expenditures with respect to transaction pricing in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added liquidity. The Exchange notes that despite eliminating fee codes associated with retail orders from LMM Add Volume Tiers 2–4, LMM Add Volume Tiers 2–4 will continue to provide enhanced rebates for liquidity-adding orders in displayed and non-displayed orders, which does not represent a significant departure from the enhanced rebate offered under LMM Add Volume Tier 1.

NBBO Setter Program

Under footnote 20 of the Fee Schedule the Exchange offers its NBBO Setter Program, which offers an enhanced rebate to Members which reach certain add volume criteria in NBBO Setter Securities.²⁰ The Exchange now proposes to discontinue the NBBO Setter Program as the Exchange no longer wishes to, nor is required to, maintain such tier. More specifically, the proposed change removes this tier as the Exchange would rather redirect future resources and funding into other programs and tiers intended to incentivize increased order flow. In addition, the Exchange proposes to eliminate the terms Setter NBBO,²¹ NBBO Setter Securities, Baseline Setter

ADAV,²² and Current Setter ADAV²³ from the Definitions section of the Fee Schedule as these terms apply only to the NBBO Setter Program.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.²⁴ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)²⁵ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)²⁶ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers as well as Section 6(b)(4)²⁷ as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

As described above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The Exchange believes that its proposal to lower the enhanced rebate paid to Members that satisfy the criteria of Non-Displayed Add Volume Tier 4 is reasonable, equitable, and consistent with the Act because such change is designed to decrease the Exchange's expenditures with respect to transaction pricing in order to offset some of the costs associated with the Exchange's

current pricing structure, which provides various rebates for liquidity-adding orders, and the Exchange's operations generally, in a manner that is consistent with the Exchange's overall pricing philosophy of encouraging added liquidity. The proposed lower enhanced rebate (\$0.0027 per share) is reasonable and appropriate because it represents only a modest decrease from the current enhanced rebate (\$0.00275 per share) and remains competitive with the enhanced rebates offered under Non-Displayed Add Volume Tiers 1–3. The Exchange further believes that the proposed decrease to the enhanced rebate associated with Non-Displayed Add Volume Tier 4 is not unfairly discriminatory because it applies to all Members equally, in that all Members will receive the reduced enhanced rebate upon satisfying the criteria of Non-Displayed Add Volume Tier 4.

Similarly, the Exchange believes that its proposal to eliminate fee codes ZV, ZB, and ZY from LMM Add Volume Tiers 2–4 is reasonable, equitable, and consistent with the Act because such change is designed to decrease the Exchange's expenditures with respect to transaction pricing in order to offset some of the costs associated with the Exchange's current pricing structure, which provides various rebates for liquidity-adding orders, and the Exchange's operations generally, in a manner that is consistent with the Exchange's overall pricing philosophy of encouraging added liquidity. The Exchange further believes that the proposal to eliminate fee codes ZV, ZB, and ZY from LMM Add Volume Tiers 2–4 is not unfairly discriminatory because it applies to all LMMs equally, in that no LMMs will be permitted to use fee codes ZV, ZB, or ZY to receive an enhanced rebate under LMM Add Volume Tiers 2–4 and all LMMs are still eligible to receive an enhanced rebate by satisfying the criteria of LMM Add Volume Tiers 2–4 pursuant to the remaining fee codes. The remaining fee codes applicable to LMM Add Volume Tiers 2–4 do not represent a significant departure from LMM Add Volume Tier 1, which all LMMs continue to be eligible to receive an enhanced rebate from.

Finally, The Exchange believes that its proposal to eliminate Non-Displayed Add Volume Tier 5 and the NBBO Setter Tier is reasonable because the Exchange is not required to maintain these tiers or provide Members an opportunity to receive enhanced rebates. The Exchange believes its proposal to eliminate these tiers is also equitable and not unfairly discriminatory because it applies to all

¹⁷ Fee code ZV is appended to Retail Orders that add liquidity to BZX in Tape A securities.

¹⁸ Fee code ZB is appended to Retail Orders that add liquidity to BZX in Tape B securities.

¹⁹ Fee code ZY is appended to Retail Orders that add liquidity to BZX in Tape C securities.

²⁰ NBBO Setter Securities means a list of securities included in the NBBO Setter Program, the universe of which will be determined by the Exchange and published in a Notice distributed to Members and on the Exchange's website.

²¹ Setter NBBO means a quotation of at least 100 shares that is better than the NBBO or a quotation of a notional size of at least \$10,000.00 that is better than the NBBO.

²² Baseline Setter ADAV means ADAV calculated as the number of displayed shares added per day that establish a new NBBO in NBBO Setter Securities. ADAV means average daily added volume calculated as the number of shares added per day, calculated on a monthly basis.

²³ Current Setter ADAV means ADAV calculated as the number of displayed shares added per day that establish a new Setter NBBO in NBBO Setter Securities.

²⁴ 15 U.S.C. 78f(b).

²⁵ 15 U.S.C. 78f(b)(5).

²⁶ *Id.*

²⁷ 15 U.S.C. 78f(b)(4).

Members (*i.e.*, the tiers will not be available for any Member). The Exchange also notes that the proposed rule change to remove these tiers merely results in Members not receiving an enhanced rebate, which, as noted above, the Exchange is not required to offer or maintain. Furthermore, the proposed rule change to eliminate Non-Displayed Add Volume Tier 5 and the NBBO Setter Tier enables the Exchange to redirect resources and funding into other programs and tiers intended to incentivize increased order flow.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Members. As a result, the Exchange believes that the proposed changes further the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."

The Exchange believes the proposed rule changes do not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed changes to Non-Displayed Add Volume Tier 4 and LMM Add Volume Tiers 2–4 will apply to all Members and LMMs equally in that all Members and LMMs are eligible for the tiers, have a reasonable opportunity to meet the tiers' criteria and will receive the enhanced rebate on their qualifying orders if such criteria is met. The Exchange does not believe the proposed changes burden competition, but rather, enhances competition as it is intended to increase the competitiveness of BZX by adopting pricing incentives in order to attract order flow and incentivize participants to increase their participation on the Exchange, providing for additional execution opportunities for market participants and improved price transparency. The proposed change to eliminate Non-Displayed Add Volume Tier 5 and the NBBO Setter Program will not impose any burden on intramarket competition because the changes apply to all

Members uniformly, as in, the tiers will no longer be available to any Member.

Next, the Exchange believes the proposed rule changes does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including other equities exchanges, off-exchange venues, and alternative trading systems. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single equities exchange has more than 14% of the market share.²⁸ Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."²⁹ The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . .".³⁰ Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or

appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act³¹ and paragraph (f) of Rule 19b-4³² thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBZX-2023-106 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to file number SR-CboeBZX-2023-106. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements

²⁸ *Supra* note 4.

²⁹ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

³⁰ *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR-NYSEArca-2006-21)).

³¹ 15 U.S.C. 78s(b)(3)(A).

³² 17 CFR 240.19b-4(f).

with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CboeBZX-2023-106 and should be submitted on or before January 16, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³³

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-28328 Filed 12-22-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-99205; File No. SR-NYSE-2023-41]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Withdrawal of Proposed Rule Change To Amend Its Price List

December 19, 2023.

On November 1, 2023, New York Stock Exchange LLC ("NYSE") filed with the Securities and Exchange Commission (the "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")¹ and Rule 19b-4 thereunder² a proposed rule change to amend its Price List to: (1) modify fee rates and requirements for transactions that remove liquidity from the Exchange; (2) offer a monthly rebate for Designated Market Maker units with 150 or fewer assigned securities along with incentives for affiliated Supplemental Liquidity Providers; and (3) eliminate an underutilized fee for transactions

that remove liquidity from the Exchange in Tape B and C securities. The proposed rule change was published for comment on November 21, 2023.³ On December 18, 2023, NYSE withdrew the proposed rule change (SR-NYSE-2023-41).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-28326 Filed 12-22-23; 8:45 am]

BILLING CODE 8011-01-P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 20139; NEW YORK Disaster Number NY-20005 Declaration of Economic Injury]

Administrative Declaration of an Economic Injury Disaster for the State of New York

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Economic Injury Disaster Loan (EIDL) declaration for the State of NEW YORK dated 12/19/2023.

Incident: Five-Alarm Fire.

Incident Period: 08/20/2023.

DATES: Issued on 12/19/2023.

Economic Injury (EIDL) Loan Application Deadline Date: 09/19/2024.

ADDRESSES: Visit the MySBA Loan Portal at <https://lending.sba.gov> to apply for a disaster assistance loan.

FOR FURTHER INFORMATION CONTACT: Alan Escobar, Office of Disaster Recovery & Resilience, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205-6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's EIDL declaration, applications for disaster loans may be submitted online using the MySBA Loan Portal <https://lending.sba.gov> or other locally announced locations. Please contact the SBA disaster assistance customer service center by email at disastercustomerservice@sba.gov or by phone at 1-800-659-2955 for further assistance.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Kings.

Contiguous Counties:

New York: New York, Queens, Richmond

The Interest Rates are:

	Percent
Business and Small Agricultural Cooperatives without Credit Available Elsewhere	4.000
Non-Profit Organizations without Credit Available Elsewhere	2.375

The number assigned to this disaster for economic injury is 201390.

The State which received an EIDL Declaration is New York.

(Catalog of Federal Domestic Assistance Number 59008)

Isabella Guzman,
Administrator.

[FR Doc. 2023-28418 Filed 12-22-23; 8:45 am]

BILLING CODE 8026-09-P

DEPARTMENT OF STATE

[Delegation of Authority No. 548]

Delegation of Authority; Overseas Real Property Management

By virtue of the authority of the Secretary of State pursuant to the laws of the United States, and as delegated by Department of State Delegation of Authority No. 514, I hereby delegate to the Director of Overseas Buildings Operations, to the extent authorized by law, all functions and authorities for overseas real property management as described in the Foreign Service Buildings Act, 1926, as amended (22 U.S.C. ch. 8).

The functions delegated herein may be re-delegated, to the extent authorized by law. This delegation of authority does not revoke, supersede, or affect any other delegation of authority. Any authority covered by this delegation may also be exercised by the Secretary, the Deputy Secretary, the Deputy Secretary for Management and Resources, and the Under Secretary for Management.

This document will be published in the **Federal Register**.

Dated: December 15, 2023.

John R. Bass,
Under Secretary for Management,
Department of State.

[FR Doc. 2023-28298 Filed 12-22-23; 8:45 am]

BILLING CODE 4710-10-P

³³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 98953 (November 15, 2023), 88 FR 81114.

⁴ 17 CFR 200.30-3(a)(12).

DEPARTMENT OF STATE**[Public Notice: 12287]****60-Day Notice of Proposed Information Collection: Two (2) Passport Services Information Collections: Supplemental Questionnaire To Determine Entitlement for a U.S. Passport and Supplemental Questionnaire To Determine Identity for a U.S. Passport****ACTION:** Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to February 26, 2024.

ADDRESSES: You may submit comments by any of the following methods:

- *Web:* Persons with access to the internet may comment on this notice by going to <https://www.regulations.gov>. You can search for the document by entering "Docket Number: DOS-2023-0041" in the Search field. Then click the "Comment Now" button and complete the comment form.

- *Email:* Passport-Form-Comments@State.gov. You must include the DS form number (if applicable), information collection title, and the OMB control number in the email subject line.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Supplemental Questionnaire to Determine Entitlement for a U.S. Passport.

- *OMB Control Number:* 1405-0214.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Consular Affairs, Passport Services.
- *Form Number:* DS-5513.
- *Respondents:* United States Citizens and Non-citizen Nationals.
- *Estimated Number of Respondents:* 760.
- *Estimated Number of Responses:* 760.
- *Average Time per Response:* 85 minutes.
- *Total Estimated Burden Time:* 1,080 hours per year.

- *Frequency:* On occasion.
- *Obligation to Respond:* Required to Obtain a Benefit.

- *Title of Information Collection:* Supplemental Questionnaire to Determine Identity for a U.S. Passport.
- *OMB Control Number:* 1405-0215.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Consular Affairs, Passport Services.
- *Form Number:* DS-5520.
- *Respondents:* United States Citizens and Non-citizen Nationals.
- *Estimated Number of Respondents:* 10,000.
- *Estimated Number of Responses:* 10,000.
- *Average Time per Response:* 45 minutes.
- *Total Estimated Time Burden:* 7,500 hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collections

- *1405-0214, DS-5513, Supplemental Questionnaire to Determine Entitlement for a U.S. Passport:* The primary purpose for soliciting this information is to establish entitlement for a U.S. Passport Book or Passport Card. The information may also be used in connection with issuing other travel documents or evidence of citizenship, and in furtherance of the Secretary's responsibility for the protection of U.S. nationals abroad and to administer the passport program.

- *1405-0215, DS-5520, Supplemental Questionnaire to Determine Identity for a U.S. Passport:* The primary purpose for soliciting this information is to establish identity for a U.S. Passport Book or Passport Card. The information may also be used in connection with

issuing other travel documents or evidence of citizenship, and in furtherance of the Secretary's responsibility for the protection of U.S. nationals abroad and to administer the passport program.

Methodology

The Supplemental Questionnaire to Determine Entitlement for a U.S. Passport is used to supplement an existing passport application and solicits information relating to the respondent's family and birth circumstances that is needed prior to passport issuance. If the information on form DS-5513 is needed, a passport agency will mail the form directly to the applicant for completion and return or the applicant can download and complete a fillable PDF version found at travel.state.gov.

The Supplemental Questionnaire to Determine Identity for a U.S. Passport is used to supplement an existing passport application and solicits information relating to the respondent's identity that is needed prior to passport issuance. If the information on form DS-5520 is needed, a passport agency will mail the form directly to the applicant for completion and return or the applicant can download and complete a fillable PDF version found at travel.state.gov.

Kevin E. Bryant,

Deputy Director, Office of Directives Management, Department of State.

[FR Doc. 2023-28363 Filed 12-22-23; 8:45 am]

BILLING CODE 4710-06-P

DEPARTMENT OF STATE**[Public Notice: 12292]****Notice of Public Meeting in Preparation for International Maritime Organization HTW 10 Session**

The Department of State will conduct a public meeting at 10 a.m. ET on Wednesday, January 31, 2024, both in-person at Coast Guard Headquarters in Washington, DC, and via teleconference. The primary purpose of the meeting is to prepare for the tenth session of the International Maritime Organization's (IMO) Sub-Committee on Human Element, Training and Watchkeeping (HTW) to be held in London, United Kingdom, from Monday, February 5, 2024, to Friday, February 9, 2024.

Members of the public may participate up to the capacity of the teleconference line, which will handle 500 participants, or up to the seating capacity of the room if attending in-person.

The agenda items to be considered include:

- Adoption of the agenda
- Decisions of other IMO bodies
- Validated model training courses
- Role of the human element
- Reports on unlawful practices associated with certificates of competency
- Comprehensive review of the 1978 STCW Convention and Code
- Biennial status report and provisional agenda for HTW 11
- Election of Chair and Vice-Chair for 2025
- Any other business
- Report to the Maritime Safety Committee

Please note: The Sub-committee may, on short notice, adjust the HTW 10 agenda to accommodate any constraints associated with the meeting. Although no changes to the agenda are anticipated, if any are necessary, they will be provided to those who RSVP.

Those who plan to participate should contact the meeting coordinator, Mrs. Megan Johns Henry at megan.c.johns@uscg.mil, by phone at (202) 372-1255, or in writing at 2703 Martin Luther King Jr. Ave. SE, Stop 7509, Washington, DC 20593-7509 not later than January 17, 2024, 14 days prior to the meeting. Requests made after January 17, 2024, might not be able to be accommodated. The meeting coordinator will provide the teleconference information, facilitate the building security process, and requests for reasonable accommodation. Please note that due to security considerations, two valid, government issued photo identifications must be presented to gain entrance to the Douglas A. Munro Coast Guard Headquarters Building at St. Elizabeth's. This building is accessible by taxi, public transportation, and privately owned conveyance (upon advanced request).

Additional information regarding this and other IMO public meetings may be found at: <https://www.dco.uscg.mil/IMO>.

(Authority: 22 U.S.C. 2656 and 5 U.S.C. 552)

Leslie W. Hunt,

Coast Guard Liaison Officer, Office of Ocean and Polar Affairs, Department of State.

[FR Doc. 2023-28344 Filed 12-22-23; 8:45 am]

BILLING CODE 4710-09-P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 730 (Sub-No. 1)]

Roster of Arbitrators—Annual Update

Pursuant to 49 U.S.C. 11708, the Board's regulations establish a voluntary

and binding arbitration process to resolve rail rate and practice complaints that are subject to the Board's jurisdiction. Section 11708(f) provides that, unless parties otherwise agree, an arbitrator or panel of arbitrators shall be selected from a roster maintained by the Board. Accordingly, the Board's rules establish a process for creating and maintaining a roster of arbitrators. 49 CFR 1108.6(b).

The Board most recently updated its roster of arbitrators by decision served February 17, 2023. The roster is published on the Board's website at www.stb.gov (click the "Resources" tab, select "Litigation Alternatives" from the dropdown menu, click on the "Arbitration" link, and click on the "Roster of Arbitrators" link).

As provided under 49 CFR 1108.6(b), the Board updates the roster of arbitrators annually. Accordingly, the Board is now requesting the names and qualifications of new arbitrators who wish to be placed on the roster. Current arbitrators who wish to remain on the roster must notify the Board of their continued availability and confirm that the biographical information on file with the Board remains accurate and, if not, provide any necessary updates. Arbitrators who do not confirm their continued availability will be removed from the roster. This decision will be served on all current arbitrators.

Any person who wishes to be added to the roster should file an application that describes the applicant's experience with rail transportation and economic regulation, as well as professional or business experience, including agriculture, in the private sector. The submission should also describe the applicant's training in dispute resolution and/or experience in arbitration or other forms of dispute resolution, including the number of years of experience. Lastly, the submission should provide the applicant's contact information and information on fees.

All comments—including filings from new applicants, updates to existing arbitrator information, and confirmations of continued availability—should be submitted either via e-filing on the Board's website or in writing addressed to 395 E Street, SW, Washington, DC 20423-0001 by January 25, 2024. The Board will assess each new applicant's qualifications to determine which individuals can ably serve as arbitrators based on the criteria established under 49 CFR 1108.6(b). The Board will then establish an updated roster of arbitrators. The roster will include a brief biographical sketch of each arbitrator, including information

such as background, area(s) of expertise, arbitration experience, and geographical location, as well as contact information and fees. The roster will be published on the Board's website.

It is ordered:

1. Applications from persons interested in being added to the Board's roster of arbitrators, and confirmations of continued availability (with updates, if any, to existing arbitrator information) from persons currently on the arbitration roster, are due by January 25, 2024.

2. This decision will be served on all current arbitrators and published in the **Federal Register**.

3. This decision is effective on the date of service.

Decided: December 19, 2023.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Kenyatta Clay,
Clearance Clerk.

[FR Doc. 2023-28403 Filed 12-22-23; 8:45 am]

BILLING CODE 4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 290 (Sub-No. 5) (2024-1)]

Quarterly Rail Cost Adjustment Factor

AGENCY: Surface Transportation Board.

ACTION: Approval of rail cost adjustment factor.

SUMMARY: The Surface Transportation Board has adopted the first quarter 2024 Rail Cost Adjustment Factor and cost index filed by the Association of American Railroads.

DATES: *Applicability Date:* January 1, 2024.

FOR FURTHER INFORMATION CONTACT: Pedro Ramirez, (202) 245-0333. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245-0245.

SUPPLEMENTARY INFORMATION: The rail cost adjustment factor (RCAF) is an index formulated to represent changes in railroad costs incurred by the nation's largest railroads over a specified period of time. Under 49 U.S.C. 10708, the Surface Transportation Board (Board) is required to publish the RCAF on at least a quarterly basis. Each quarter, the Association of American Railroads computes three types of RCAF figures and submits those figures to the Board for approval. The Board has reviewed the submission and adopts the RCAF figures for the first quarter of 2024. The first quarter 2024 RCAF (Unadjusted) is 0.974. The first quarter 2024 RCAF (Adjusted) is 0.383. The first quarter

2024 RCAF-5 is 0.367. Additional information is contained in the Board's decision, which is available at www.stb.gov.

Decided: December 19, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

Brendetta Jones,
Clearance Clerk.

[FR Doc. 2023-28318 Filed 12-22-23; 8:45 am]

BILLING CODE 4915-01-P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Reallocation of Unused Fiscal Year 2024 WTO Tariff-Rate Quota Volume for Raw Cane Sugar

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: The Office of the United States Trade Representative (USTR) is providing notice of a reallocation of the fiscal year (FY) 2024 in-quota quantity of the World Trade Organization (WTO) tariff-rate quota (TRQ) for imported raw cane sugar.

DATES: This notice is applicable on December 26, 2023.

FOR FURTHER INFORMATION CONTACT: Erin Nicholson, Office of Agricultural Affairs, at 202-395-9419 or erin.h.nicholson@ustr.eop.gov.

SUPPLEMENTARY INFORMATION: Pursuant to Additional U.S. Note 5 to Chapter 17 of the Harmonized Tariff Schedule of the United States (HTSUS), the United States maintains WTO TRQs for imports of raw cane and refined sugar. Section 404(d)(3) of the Uruguay Round Agreements Act (19 U.S.C. 3601(d)(3)) authorizes the President to allocate the in-quota quantity of a TRQ for any agricultural product among supplying countries or customs areas. The President delegated this authority to the U.S. Trade Representative under Presidential Proclamation 6763 (60 FR 1007).

On July 5, 2023, the U.S. Department of Agriculture established the FY2024 TRQ for imported raw cane sugar at the minimum quantity to which the United States is committed pursuant to the WTO Uruguay Round Agreements (1,117,195 metric tons raw value (MTRV) conversion factor: 1 metric ton = 1.10231125 short tons). On July 19, 2023, USTR provided notice of country-by-country allocations of the FY2024 in-quota quantity of the WTO TRQ for imported raw cane sugar. See 87 FR 43593. On November 30, 2023, based on consultation with quota holders, USTR

reallocated 223,740 MTRV of the original TRQ quantity from those countries that had stated they did not plan to fill their FY2024 allocated raw cane sugar quantities. See 88 FR 83596. Due to an inadvertent omission, Fiji was not consulted and therefore was not included as a country receiving a reallocated amount. Based on further consultation with certain quota holders, USTR has determined that an additional 3,217 MTRV is available for reallocation from those countries that have stated they do not plan to fill their FY2024 allocated raw cane sugar quantities. USTR is allocating the 3,217 MTRV to Fiji, which is the amount that Fiji would have received if included in the reallocation of November 30, 2023.

The allocations of the raw cane sugar WTO TRQ to countries that are net importers of sugar are conditioned on receipt of the appropriate verifications of origin. Certificates for quota eligibility must accompany imports from any country for which an allocation has been provided.

Douglas McKalip,

Chief Agricultural Negotiator, Office of the United States Trade Representative.

[FR Doc. 2023-28340 Filed 12-22-23; 8:45 am]

BILLING CODE 3390-F4-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Final Action of Waiver With Respect to Land; Coleman A. Young Municipal Airport, Detroit, MI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The FAA is providing notice of a release of Federal obligations for one land parcel at Coleman A. Young Municipal Airport, Detroit, Michigan.

FOR FURTHER INFORMATION CONTACT: Georgina McDonald, Program Manager, Federal Aviation Administration, Detroit Airports District Office, 11677 S Wayne Rd., Romulus, MI 48174-1412. Telephone Number: (734) 229-2900/ FAX Number: (734) 229-2950.

SUPPLEMENTARY INFORMATION: The City of Detroit, Airport Sponsor of the Coleman A. Young Municipal Airport has requested a release of all FAA obligations for 34.21 acres of property that was previously owned by the airport. The subject parcel, identified as Parcel 16, was included in a property exchange brokered by the City of Detroit and disposed of without FAA authorization in 2019.

Parcel 16 was acquired by the Airport Sponsor on September 19, 1993 and was funded in part under Federal Airport Improvement Program (AIP) Grant numbers 3-26-0027-1089 in June 1994 and 3-26-0027-0888 in June 1997. On June 26, 2001, the FAA released the obligations on 23.00 acres of the 34.21-acre Parcel 16 to be leased for industrial development. The remaining 11.21 acres of Parcel 16 is located west of French Road, outside the airport operation area fence and is not needed for aeronautical purposes. It is entirely paved and its existing and proposed future use is for commercial vehicle parking. The FAA has confirmed that the Airport Sponsor has received fair market value for the sale of Parcel 16.

The FAA has confirmed the disposition of proceeds from the sale of the airport property were in accordance with 49 U.S.C. 47107(c)(2)(B) and FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in the **Federal Register** on February 16, 1999 (64 FR 7696).

In accordance with section 125 of The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21) the FAA is providing notice that the FAA is releasing the subject airport property described below at the Coleman A. Young Municipal Airport, Detroit, Michigan, from federal obligations.

The subject property is described as: All that part of Fractional Section 5, T.1 S., R. 12E., City of Detroit, Wayne County, Michigan, described as part of Lots 2 and 7, all of lots 3, 4, 5 and 6 of Engel's Subdivision as recorded in Liber 11 of Plats, Page 73, Wayne County Records, also lots 154 through 197, both inclusive, except for the North 12' thereof of Bolton Subdivision as recorded in Liber 37 of Plats, Page 36, Wayne County Records, also Lots 237 through 249, both inclusive, except for the North 12' thereof of Bolton No. 1 Subdivision as recorded in Liber 39 of Plats, Page 29, Wayne County Records, also Lot 16 of Leander Rivard Farm Subdivision as recorded in Liber 28 of Plats, Page 4, Wayne County, Michigan, also all that part of vacated Molena Ave., 30 ft. wide, lying adjacent to and Southerly of said Lots 154 through 197, and Lots 237-249, vacated Gilbo Ave., 50 ft. wide, lying adjacent to and between said Lots 175 and 176, and the vacated Public Alley adjacent to said Lot 16, being more particularly described as: Beginning at the intersection of the Southerly line of Molena Ave., 30 ft. wide, with the Westerly Line of French Road, 36 ft. wide; thence S 35°48'23" E. 66.97 ft. along the Westerly Line of said French

Road; thence S 63°34'25" W. 1,000.00 ft.; thence S 26°04'30" E. 325.79 ft.; thence S 38°16'30" W. 114.92 ft.; thence 206.23 ft. along the arc of a curve to the right having a radius of 446.34 ft., chord bearing and distance of S 50°56'38" W. 204.55 ft.; thence S 26°21'30" E. 22.00 ft.; thence S 63°38'30" W. 1,444.27 ft. along the Northerly Line of Madola Ave., 50 ft. wide; thence N 26°10'30" W. 353.43 ft.; thence N 63°31'20" E. 410.29 ft.; thence N 27°20'38" W. 159.12 ft.; thence N 34°47'45" W. 182.05 ft.; thence N 63°43'15" E. 1,043.73 ft.; thence N 59°10'42" E. 50.00 ft.; thence N 63°43'15" E. 690.96 ft.; thence N 30°14'46" W. 418.41 ft.; thence N 63°52'55" E. 299.58 ft. along the Southerly Line of Leander Ave., 50 ft. wide; thence the following two courses and distances along the Westerly line of said French Rd.: S 33°05'35" E. 413.10 ft.; and S 35°48'23" E. 194.85 ft. to the point of beginning.

This release does not constitute a commitment by the FAA to financially assist in the disposal of the subject airport property nor a determination of eligibility for grant-in-aid funding from the FAA.

Issued in Romulus, Michigan, on December 19, 2023.

Stephanie R. Swann,

Deputy Manager, Detroit Airports District Office, FAA, Great Lakes Region.

[FR Doc. 2023–28322 Filed 12–22–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2023–0055]

Agency Information Collection Activities: Notice of Request for Renewal of Currently Approved Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of request for extension of currently approved information collection.

SUMMARY: The FHWA has forwarded the information collection request described in this notice to the Office of Management and Budget (OMB) for approval of a renewal of information collection. We published a **Federal Register** Notice with a 60-day public comment period on this information collection on October 18, 2023. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by January 25, 2024.

ADDRESSES: You may submit comments identified by DOT Docket ID Number 0055 by any of the following methods:

Website: For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Carlos B. McCloud, (225) 433–2892—carlos.mccloud@dot.gov or David Harris, (202) 366–2825—dave.harris@dot.gov, FHWA Office of Transportation Management (HOTM) USDOT HQ E84–471, 1200 New Jersey Avenue SE, Washington, DC 20590. Office hours are from 8 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Strategic Innovation for Revenue Collection (SIRC) Program Grant Application.

OMB Control #: 2125–0676.

Background: In adherence with 5 CFR 1320.13, this is a request for approval for an emergency clearance for processing of information related to a new collection of information for the SIRC Program grant application submission and quarterly reporting requirements for FY 2023–2024 program of projects awards. The collection of information will support implementation of title III—Research, Technology, and Education, sec. 13001. Strategic Innovation for Revenue Collection (a) and (b) of the Infrastructure Investment and Jobs Act (Public Law No: 117–58 or also referred to as the Bipartisan Infrastructure Law-BIL (see Exhibit A page 12). The Office of the Secretary of Transportation (OST) and the Federal Highway Administration (FHWA) has coordinated on the development of public information to solicit responses to a Notice of Funding Opportunity (NOFO) for the SIRC Program. Awarded funds to eligible applicants will test the feasibility of a road usage fee and other user-based alternative revenue mechanisms (referred to in this section as “user based alternative revenue mechanisms”) to help maintain the

long-term solvency of the Highway Trust Fund.

- The information will be received by the FHWA to fulfill the grant application submittal requirements and agreements prescribed in the NOFO.

- The collection of information will include grant application forms and narratives, grant agreements, and project management quarterly reporting.

- The purpose of the collection is to receive information relevant to evaluating applications to the SIRC grant program, per the NOFO, and reporting requirements agreed to by recipients of the Grants.

- The obligation to respond to the collection of information is voluntary and is required to obtain or retain a benefit.

The Strategic Innovation for Revenue Collection (SIRC) Program seeks to fund pilot projects that test the implementation of user-based alternative revenue mechanisms that utilize a road user fee structure for eligible entities to test the feasibility of the program objectives outlined in section 133001(b)(3), as prescribed in Exhibit A of this document. Grant awards test innovative ways to replace or supplement the Federal gas tax to maintain the long-term solvency of the Highway Trust Fund. The collection of information is necessary to receive applications for grant funds, evaluate the effectiveness of projects that have been awarded grant funds, and monitor project financial conditions and project progress pursuant to section 133001(b)(3). FY 2023–FY 2024 is the first year of implementation for the SIRC Program. FHWA implemented a similar predecessor program, the Surface Transportation System Funding Alternatives (STSFA) program authorized by section 6020 of the Fixing America's Surface Transportation (FAST) Act, Public Law 114–94, FY 2016–2021, which was repealed with the passage of BIL. Information about awards funded under the STSFA program is available at: <https://ops.fhwa.dot.gov/stsfa/index.htm>.

FHWA requests information from applicants in the form an electronic application, which will represent 100% of the submissions. The application will assist in soliciting proposals for funding from eligible applicants for the five-year grant program, to monitor the grant program recipients, project progress, assess project outcomes and permit evaluation. The reporting requirements are submitted by recipients and will be completed during the application stage, grant agreement, and the project management stages.

FHWA will continue to use the information collected in the application phase to evaluate proposals and make decisions to award grants to applicants for any future similar appropriations. FHWA will use the information to monitor the progress of projects that have been awarded SIRC Program funds, and to monitor the proper expenditure of Federal funds. The project management information will be collected by grant recipients.

Much of the information will be produced and collected through the normal process of project management, so the additional burden of Government information collection is small in comparison to the data management related to information that grant recipients already collect to manage their projects properly. The information collected from grant recipients is project specific and the information is not available other than from the grantees. The information will be used to monitor projects on a quarterly basis, and to ensure on an annual basis that the project's plan conforms to the project's real operating environment.

All information submitted as part of or in support of any application shall use publicly available data or data that can be made public. If the application includes information the applicant considers to be a trade secret or confidential commercial or financial information, the applicant should do the following: (1) Note on the front cover that the submission "Contains Confidential Business Information (CBI)"; (2) mark each affected page "CBI"; and (3) highlight or otherwise denote the CBI portions. DOT protects such information from disclosure to the extent allowed under applicable law. In the event DOT receives a Freedom of Information Act (FOIA) request for the information, DOT will follow the procedures described in its FOIA regulations at 49 CFR 7.17. Only information that is ultimately determined to be confidential under that procedure will be exempt from disclosure under FOIA. Retention of records will adhere to DOT Order 1351.28 Records Management, 28.4.5 Electronic Records.

The Department will receive application reports electronically via email and via websites from grant awardees upon approval from OMB. Certain agencies within the Department have found that delivery of reports electronically is the most reliable way to collect information and will use their existing grant administration systems to collect the information covered under this request. To minimize the burden on applicants, OMB approved standard

forms are being used to collect information where possible. Such standard forms include the Application for Federal Assistance (SF-424), available online at https://apply07.grants.gov/apply/forms/sample/SF424_2_1-V2.1.pdf, and the post-award Federal Financial Reports form (SF-425), available online at https://apply07.grants.gov/apply/forms/sample/SF425_2_0-V2.0.pdf.

If the information requested in the reports is not collected, the Department will not be able to evaluate project progress or financial conditions in accordance with the 23 U.S.C., Bipartisan Infrastructure Law and the Notice of Funding Opportunity (NOFO) for the program published in the **Federal Register**. The quarterly collection of financial data ensures that the use of Federal funds can be appropriately monitored.

Respondents: The primary respondents are the eligible applicants, which includes a State or a group of States, Metropolitan Planning Organization (MPO) or a group of Metropolitan Planning Organizations (as defined in section 134(b) of title 23, United States Code), a local government or a group of local governments.

Frequency: Every year by December 31st.

Estimated Average Burden per Response: The estimated number of hours for each of the 15 recipients (annually based on previous STSFA Program) to compile and submit the requested data is estimated to be no more than 8 employee hours annually.

Estimated Total Annual Burden Hours: Total estimated average annual burden is 1,032 hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burdens; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 49 CFR 1.48.

Issued On: December 19, 2023.

Jazmyne Lewis,

Information Collection Officer.

[FR Doc. 2023-28320 Filed 12-22-23; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA-2023-0057]

Agency Information Collection Activities: Notice of Request for Extension of Currently Approved Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of request for extension of currently approved information collection.

SUMMARY: The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for renewal of an existing information collection that is summarized below under

SUPPLEMENTARY INFORMATION. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by February 26, 2024.

ADDRESSES: You may submit comments identified by DOT Docket ID Number 0057 by any of the following methods:

Website: For access to the docket to read background documents or comments received go to the Federal eRulemaking Portal: Go to <http://www.regulations.gov>.

Follow the online instructions for submitting comments.

Fax: 1-202-493-2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590-0001.

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Miranda Sim, 202-366-0756 or Beatriz Hernandez, 202-366-3126, Office of Budget and Finance, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, between 7:30 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Fund Transfers to Other Agencies and Among Title 23 Programs.
OMB Control #: 2125–0620.

Background: The Infrastructure Investment and Jobs Act (IIJA), Public Law 117–58, continues the ability of States to transfer highway funds to other States and agencies and among programs/projects. These authorities are codified in sections 104 and 126 of title 23, United States Code, as amended by the IIJA. Transferability under the IIJA is generally similar to that allowed under previous authorization acts such as the Fixing America's Surface Transportation (FAST) Act, Moving Ahead for Progress in the 21st Century Act (MAP–21), and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU). This notice establishes requirements for initiating the transfer of apportioned funds (funds distributed among States and programs by statutory formula) to carry out these provisions of law. The types of transfers affected by this notice are:

- a. Transfer of funds from a State to the FHWA pursuant to U.S.C. title 23, sec. 104(f)(3).
- b. Transfer of funds from a State to a Federal agency other than FHWA.
- c. Transfer of funds from a State to another State.
- d. Transfer of funds from FHWA to Federal Transit Administration pursuant to U.S.C. title 23, sec. 104(f)(1).
- e. Transfer of funds between programs pursuant to U.S.C. title 23, sec. 126; and,
- f. Transfer of funds between projects.

The State initiating the fund transfer must fill out a FHWA Funds Transfer Request form. This form is either filled out manually via the currently approved paper-based transfer form (FHWA–1575C) or electronically via the FHWA Funds Control Module in the Fiscal Management Information System (FMIS). The information required in the FMIS Funds Control Module is equivalent to the information required in the paper-based transfer form and over ninety percent of the transfers are now required to be submitted electronically. These transfers are routed electronically after State DOT approval, from the State DOT to the FHWA Division Office; after Division Office concurrence, from the Division Office to the FHWA Budget Office; and finally, the FHWA Budget Office processes the request. Automating in the FMIS Funds Control Module allowed the transfer request process to be streamlined by incorporating system validations to limit errors and by automating the flow of the approval process. Information required to fill out

a transfer form includes the requester's contact information; a description of the program/project the transfer will come from and go to, the fiscal year, the program code, a demo ID or an urban area when applicable, and the amount to be transferred.

Respondents: 50 State Transportation Departments, the District of Columbia, and Puerto Rico.

Estimated Average Burden per Response: 15 minutes.

Estimated Total Annual Burden Hours: It is estimated that a total of 2,000 responses will be received annually, which would equal a total annual burden of 500 hours.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FHWA's performance; (2) the accuracy of the estimated burdens; (3) ways for the FHWA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized, including the use of electronic technology, without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 49 CFR 1.48.

Issued on: December 19, 2023.

Jazmyne Lewis,

Information Collection Officer.

[FR Doc. 2023–28321 Filed 12–22–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2008–0355; FMCSA–2019–0031; FMCSA–2020–0047]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for three individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have “no established medical history or clinical diagnosis of epilepsy or any other condition which is likely

to cause loss of consciousness or any loss of ability to control a CMV.” The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to continue to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on November 6, 2023. The exemptions expire on November 6, 2025.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, (202) 366–4001, fmcamedical@dot.gov. Office hours are from 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Comments

To view comments go to www.regulations.gov. Insert the docket numbers (FMCSA–2008–0355, FMCSA–2019–0031, or FMCSA–2020–0047) in the keyword box and click “Search.” Next, sort the results by “Posted (Newer-Older),” choose the first notice listed, and click “Browse Comments.” If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

B. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption request. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov. As described in the system of records notice DOT/ALL 14 (Federal Docket Management System), which can be reviewed at <https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices>, the comments are searchable by the name of the submitter.

II. Background

On November 1, 2023, FMCSA published a notice announcing its decision to renew exemptions for three individuals from the epilepsy and seizure disorders prohibition in 49 CFR

391.41(b)(8) to operate a CMV in interstate commerce and requested comments from the public (88 FR 75091). The public comment period ended on December 1, 2023, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(8).

The physical qualification standard for drivers regarding epilepsy found in § 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria¹ to assist medical examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Conclusion

Based on its evaluation of the three renewal exemption applications FMCSA announces its decision to exempt the following drivers from the epilepsy and seizure disorders prohibition in § 391.41(b)(8).

As of December 1, 2023, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following three individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers (88 FR 74560):

Brian Bommer (OH); David Kietzman (WI); and Jerel Sayers (ID).

The drivers were included in docket number FMCSA–2008–0355,

FMCSA–2019–0031, or FMCSA–2020–0047. Their exemptions were applicable as of November 6, 2023 and will expire on November 6, 2025.

In accordance with 49 U.S.C. 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) the person fails to comply with the terms and conditions

of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–28398 Filed 12–22–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0038]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 17 individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have “no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.” The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on December 5, 2023. The exemptions expire on December 5, 2025.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, (202) 366–4001, fmcsamedical@dot.gov. Office hours are from 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Comments

To view comments go to www.regulations.gov. Insert the docket number, (FMCSA–2023–0038) in the keyword box and click “Search.” Next, sort the results by “Posted (Older-

Newer),” choose the first notice listed, and click “Browse Comments.” If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

B. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption requests. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov. As described in the system of records notice DOT/ALL 14 (Federal Docket Management System), which can be reviewed at <https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices>, the comments are searchable by the name of the submitter.

II. Background

On October 31, 2023, FMCSA published a notice announcing receipt of applications from 17 individuals requesting an exemption from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8) and requested comments from the public (88 FR 74557). The public comment period ended on November 30, 2023, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that granting exemptions to these individuals would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(8).

The physical qualification standard for drivers regarding epilepsy found in § 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria¹ to assist medical examiners (MEs) in determining whether drivers with certain medical conditions are qualified

¹ These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. Epilepsy: § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at <https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf>.

¹ These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. Epilepsy: § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at <https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf>.

to operate a CMV in interstate commerce.

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statutes allow the Agency to renew exemptions at the end of the 5-year period. However, FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The Agency's decision regarding these exemption applications is based on the 2007 recommendations of the Agency's Medical Expert Panel. The Agency conducted an individualized assessment of each applicant's medical information, including the root cause of the respective seizure(s) and medical information about the applicant's seizure history, the length of time that has elapsed since the individual's last seizure, the stability of each individual's treatment regimen and the duration of time on or off of anti-seizure medication. In addition, the Agency reviewed the treating clinician's medical opinion related to the ability of the driver to safely operate a CMV with a history of seizure and each applicant's driving record found in the Commercial Driver's License Information System for commercial driver's license (CDL) holders, and interstate and intrastate inspections recorded in the Motor Carrier Management Information System. For non-CDL holders, the Agency reviewed the driving records from the State Driver's Licensing Agency. A summary of each applicant's seizure history was discussed in the November 30, 2023, **Federal Register** notice (88 FR 74557) and will not be repeated in this notice.

These 17 applicants have been seizure-free over a range of 29 years while taking anti-seizure medication and maintained a stable medication treatment regimen for the last 2 years. In each case, the applicant's treating physician verified his or her seizure history and supports the ability to drive commercially.

The Agency acknowledges the potential consequences of a driver experiencing a seizure while operating a CMV. However, the Agency believes the

drivers granted this exemption have demonstrated that they are unlikely to have a seizure and their medical condition does not pose a risk to public safety.

Consequently, FMCSA finds further that in each case exempting these applicants from the epilepsy and seizure disorder prohibition in § 391.41(b)(8) would likely achieve a level of safety equal to that existing without the exemption, consistent with the applicable standard in 49 U.S.C. 31315(b)(1).

V. Conditions and Requirements

The terms and conditions of the exemption are provided to the applicants in the exemption document and include the following: (1) each driver must remain seizure-free and maintain a stable treatment during the 2-year exemption period; (2) each driver must submit annual reports from their treating physicians attesting to the stability of treatment and that the driver has remained seizure-free; (3) each driver must undergo an annual medical examination by a certified ME, as defined by § 390.5T; and (4) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy of his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the 17 exemption applications, FMCSA exempts the following drivers from the epilepsy and seizure disorder prohibition in § 391.41(b)(8), subject to the requirements cited above:

James Byrd (TN)
Francis Chiacchieri (MA)
Lane Freeman (FL)
Jeffrey Gomall (MN)
Christine Green-McClure (NY)
Nicholas Hayes (VA)
Alex Hohman (PA)
Michelle Hughes (NC)
Michael Keys (PA)
Matthew Lee (GA)
Lisa Martin (NY)
Pedro Martinez (TX)
Cecil Massey (MS)
James Phillips (NC)

Joshua Pike (ME)
Alex Ramerth (MN)
Maciej Skrzyniarz (IL)

In accordance with 49 U.S.C. 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136, 49 U.S.C. chapter 313, or the FMCSRs.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–28402 Filed 12–22–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0040]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of denials.

SUMMARY: FMCSA announces its decision to deny applications from 26 individuals who requested an exemption from the Federal Motor Carrier Safety Regulations (FMCSRs) prohibiting persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to operate a commercial motor vehicle (CMV) from operating CMVs in interstate commerce.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, (202) 366–4001, fmcamedical@dot.gov. Office hours are from 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing material in the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Comments

To view comments go to www.regulations.gov. Insert the docket

number (FMCSA–2023–0040) in the keyword box, and click “Search.” Next, choose the only notice listed, and click “Browse Comments.” If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

B. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption request. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov. As described in the system of records notice DOT/ALL 14 (Federal Docket Management System), which can be reviewed at <https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices>, the comments are searchable by the name of the submitter.

II. Background

FMCSA received applications from 26 individuals who requested an exemption from the FMCSRs prohibiting persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to operate a CMV from operating CMVs in interstate commerce.

FMCSA has evaluated the eligibility of these applicants and concluded that granting these exemptions would not provide a level of safety that would be equivalent to, or greater than, the level of safety that would be obtained by complying with § 391.41(b)(8).

III. Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver’s medical certification. The Agency’s decision regarding these exemption applications is based on the eligibility criteria, the terms and conditions for Federal

exemptions, and an individualized assessment of each applicant’s medical information provided by the applicant.

IV. Conclusion

The Agency has determined that these applicants do not satisfy the eligibility criteria or meet the terms and conditions of the Federal exemption and granting these exemptions would not provide a level of safety that would be equivalent to, or greater than, the level of safety that would be obtained by complying with § 391.41(b)(8). Therefore, the 26 applicants in this notice have been denied exemptions from the physical qualification standards in § 391.41(b)(8).

Each applicant has, prior to this notice, received a letter of final disposition regarding his/her exemption request. Those decision letters fully outlined the basis for the denial and constitute final action by the Agency. This notice summarizes the Agency’s recent denials as required under 49 U.S.C. 31315(b)(4) by periodically publishing names and reasons for denial.

The following 26 applicants do not meet the minimum time requirement for being seizure-free, either on or off of anti-seizure medication:

Daniel Ashley (MD)
Joseph Bodle (CA)
Milverton Burton (FL)
Joe Celedonia (MD)
Cannon Fowler (AL)
Brian Hagen (MN)
Tomrone Harris (PA)
Andre Hartig (ME)
Dylan Hill (KS)
Jacob Johnstone (WI)
Regan Keller (NH)
Richard Kelley (IL)
Jeramie Kozlowski (PA)
Adam Martin (IN)
Dawn McGann (WA)
Jaysen Meidell (IL)
Douglas Pelton (OH)
Kevin Pustelak (PA)
Nicholas Quairola (FL)
Jesus Reyna (IL)
Jennifer Roberts (NM)
Quac’era Schaffer (NC)
Paritpal Singh (CA)
Kristina Walters (IN)
Trevor Ward (CO)
Penny Wittman (OH)

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–28397 Filed 12–22–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2018–0304; FMCSA–2019–0048; FMCSA–2019–0128]

California and Washington Meal and Rest Break Rules; Petitions for Waiver of Preemption Determinations

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of petitions for waiver of preemption determinations; request for comments.

SUMMARY: FMCSA requests comments on petitions requesting waivers of the Agency’s December 21, 2018 and January 13, 2020 decisions preempting the State of California’s Meal and Rest Break (MRB) rules for certain drivers of property- and passenger-carrying commercial motor vehicles (CMVs) and its November 17, 2020 decision preempting the State of Washington’s MRB rules for certain drivers of property-carrying CMVs. Waiver petitions were filed by the International Brotherhood of Teamsters; the Truck Safety Coalition, Citizens for Reliable and Safe Highways and Parents Against Tired Truckers; William B. Trescott; and the State of California.

DATES: Comments must be received on or before February 26, 2024.

ADDRESSES: You may submit comments to the Federal Docket Management System Docket No. FMCSA–2018–0304, Docket No. FMCSA–2019–0048, and/or Docket FMCSA–2019–0128 using any of the following methods:

- *Federal eRulemaking Portal:* Go to www.regulations.gov/, insert the docket number, FMCSA–2018–0304, docket number FMCSA–2019–0048, or docket FMCSA–2019–0128 in the keyword box, and click “Search.” Follow the online instructions for submitting a comment.

- *Mail:* Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Washington, DC 20590–0001.

- *Hand Delivery or Courier:* Dockets Operations, West Building, Ground Floor, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods.

Privacy Act: DOT solicits comments from the public to better inform its decisions regarding preemption of State laws. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.transportation.gov/privacy.

FOR FURTHER INFORMATION CONTACT: Tracy M. White, Enforcement and Litigation Division; FMCSA Office of Chief Counsel; 1200 New Jersey Avenue SE, Washington, DC 20590; (202) 493-0349; Tracy.White@dot.gov. If you have questions on viewing or submitting material to the docket, contact Dockets Operations, (202) 366-9317 or (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Background

On December 21, 2018, FMCSA granted petitions filed by the American Trucking Associations and the Specialized Carriers and Rigging Association, and determined that California's MRB rules, as applied to property-carrying CMV drivers subject to FMCSA's hours of service (HOS) regulations, are preempted under 49 United States Code (U.S.C.) 31141 (Docket No. FMCSA-2018-0304; 83 FR 67470 (Dec. 28, 2018)). On January 13, 2020, FMCSA granted a petition filed by the American Bus Association and determined that California's MRB rules, as applied to passenger-carrying CMV drivers subject to FMCSA's HOS regulations, are also preempted under 49 U.S.C. 31141 (Docket No. FMCSA-2019-0048; 85 FR 3469 (Jan. 21, 2020)). On November 27, 2020, FMCSA granted a petition filed by the Washington Trucking Associations and determined that Washington's MRB rules, as applied to property-carrying CMV drivers subject to FMCSA's HOS regulations, are preempted under 49 U.S.C. 31141 (Docket No. FMCSA-2019-0128, 85 FR 73335 (Nov. 17, 2020)). In each decision, FMCSA determined that the MRB rules are laws on CMV safety, that they are more stringent than the Federal regulations, and that they meet each of the three potential criteria for preemption under 49 U.S.C. 31141(c)(4) and (5) (see 83 FR 67470, 85 FR 3469; 85 FR 7333). On January 15, 2021, the U.S. Court of Appeals for the Ninth Circuit denied petitions for review challenging the first preemption decision. *Int'l Bhd. of Teamsters, Local 2785 v. FMCSA*, 986 F.3d 841 (9th Cir. 2021), cert. denied sub nom. *Trescott v. Fed. Motor Carrier*, No. 20-1662, 142 S. Ct. 93 (Oct. 4, 2021). The State of

California filed a petition for review in the Ninth Circuit in March 2020 challenging the second preemption decision, and the court has held that case in abeyance. *People of the State of Cal. ex rel. Bonta v. FMCSA*, No. 20-70706 (9th Cir.). The State of Washington filed a petition for review in the Ninth Circuit challenging the third preemption decision but voluntarily dismissed the case in August 2022. *State of Washington v. FMCSA*, No. 20-73730 (9th Cir.).

II. Applicable Law

A. California's MRB Rules

Under section 512 of the California Labor Code, employers must provide non-exempt employees a 30-minute meal break if they work more than 5 hours in a day, and employees who work a shift of 10 hours or more are entitled to a second 30-minute meal break. Under the California Code of Regulations (CCR) section 11090(12), employers are required to provide rest periods for non-exempt employees who work 3½ or more hours in a day. Employees are entitled to a 10-minute rest period for each 4 hours, or a substantial fraction thereof, that they work in a day. To the extent possible, these breaks are to be taken in the middle of each 4-hour period (8 CCR section 11090(12)); California Industrial Welfare Commission Order No. 9-2001. California law provides that an employer shall not require an employee to work during a mandated meal or rest break and provides for additional pay as a remedy for violating that prohibition (Cal. Labor Code 226.7(b) and (c)).

B. Washington's MRB Rules

Under the Washington Department of Labor and Industries' regulations in section 296-126-092 of Washington's Administrative Code (WAC), employers must provide employees a meal period of at least 30 minutes that commences after the second hour and before the fifth hour after the shift commences (WAC 296-126-092(1) and (2)). In addition, Washington's MRB rules provide for a 10-minute rest period "for each four hours of working time" and must occur no later than the end of the third working hour (WAC 296-126-092(4)). The rest period must be scheduled as near as possible to the midpoint of the 4 hours of working time, and no employee may be required to work more than 3 consecutive hours without a rest period.¹

¹ Department of Labor and Industries, Administrative Policy ES.C.6.1, paragraph 11, https://lni.wa.gov/workers-rights/_docs/esc6.1.pdf.

C. Federal Preemption Under the Motor Carrier Safety Act of 1984

Section 31141 of title 49, U.S.C., prohibits States from enforcing a law or regulation on CMV safety that the Secretary of Transportation (Secretary) has determined to be preempted. To determine whether a State law or regulation is preempted, the Secretary must decide whether a State law or regulation: (1) has the same effect as a regulation prescribed under 49 U.S.C. 31136, which is the authority for much of the Federal Motor Carrier Safety Regulations; (2) is less stringent than such a regulation; or (3) is additional to or more stringent than such a regulation (49 U.S.C. 31141(c)(1)).

If the Secretary decides that a State law or regulation is additional to or more stringent than a regulation prescribed by the Secretary under 49 U.S.C. 31136, the State law or regulation may be enforced unless the Secretary decides that the State law or regulation (1) has no safety benefit; (2) is incompatible with the regulation prescribed by the Secretary; or (3) would cause an unreasonable burden on interstate commerce (Id. 31141(c)(4)). In deciding whether a State law or regulation will cause an unreasonable burden on interstate commerce, the Secretary may consider the cumulative effect that the State's law or regulation and all similar laws and regulations of other States will have on interstate commerce (Id. 31141(c)(5)). The Secretary's authority under 49 U.S.C. 31141 is delegated to the FMCSA Administrator by 49 U.S.C. 113(f) and 49 CFR 1.87(f).

Pursuant to 49 U.S.C. 31141(d), FMCSA may grant a waiver of an FMCSA preemption decision. Under this provision, "[a] person (including a State) may petition the Secretary for a waiver of a decision of the Secretary that a State law or regulation may not be enforced under this section." Further, "[t]he Secretary shall grant the waiver, as expeditiously as possible, if the person demonstrates to the satisfaction of the Secretary that the waiver is consistent with the public interest and the safe operation of commercial motor vehicles" (Id. § 31141(d)(1)).

III. Request for Comment on Petitions for Waiver of California and Washington Meal and Rest Break Preemption Determinations

The International Brotherhood of Teamsters; the Truck Safety Coalition, Citizens for Reliable and Safe Highways, and Parents Against Tired Truckers; and William B. Trescott have submitted

petitions requesting the FMCSA waive all three determinations preempting California's MRB rules for drivers of property- and passenger-carrying CMVs subject to FMCSA's HOS rules and Washington's MRB rules for property-carrying CMVs subject to FMCSA's HOS rules.

The State of California has petitioned for waiver of the decisions preempting California's MRB rules. FMCSA has placed each petition for waiver in the "Documents" section of the appropriate docket.² Although waiver of a preemption determination under 49 U.S.C. 31141(d) is a legal determination reserved to the judgment of the Agency, FMCSA seeks comments on any issues raised in the above referenced petitions for waiver or otherwise relevant. In addition, FMCSA requests that commenters address the following issues:

1. Whether and to what extent enforcement of a State's meal and rest break laws with respect to intrastate property-carrying and passenger-carrying CMV drivers has impacted the health and safety of drivers.
2. Whether enforcement of State meal and rest break laws as applied to interstate property-carrying or passenger-carrying CMV drivers will exacerbate the existing truck parking shortages and result in more trucks parking on the side of the road and whether any such effect will burden interstate commerce or create additional dangers to drivers and the public; and
3. Whether enforcement of a State's meal and rest break laws as applied to interstate property-carrying or passenger-carrying CMV drivers will dissuade carriers from operating in that State; and
4. Whether enforcement of a State's meal and rest break laws as applied to interstate property-carrying or passenger-carrying CMV drivers will weaken or otherwise impact the resiliency of the national supply chain.

Robin Hutcheson,
Administrator.

[FR Doc. 2023-28399 Filed 12-22-23; 8:45 am]

BILLING CODE 4910-EX-P

² FMCSA also received a submission from Teamsters Locals 70, 87, 150, 386, 439, 948 and 2785 requesting that FMCSA reverse its preemption decisions, as well as a comment from the Owner-Operator Independent Drivers Association. These documents may be viewed in the "Comments" section of the appropriate docket.

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2023-0267]

RIN 2126-AB56

FMCSA Registration System Modernization

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of public meeting.

SUMMARY: FMCSA announces a public meeting to engage stakeholders, which includes motor carriers, brokers, freight forwarders, insurance companies, financial institutions, process agents, blanket companies, and third-party service providers; to get their perspective on improving the registration experience with FMCSA.

DATES: The meeting will be held on January 17, 2024, from 8 a.m. to 4 p.m. A copy of the agenda, will be available in advance of the meeting at <https://www.fmcsa.dot.gov/registration/fmcsa-registration-modernization-stakeholder-day>.

ADDRESSES: The meeting will be held at the DOT Headquarters Building, 1200 New Jersey Avenue SE, Washington, DC 20590-0001. Those interested in attending this public meeting must register at <https://www.fmcsa.dot.gov/registration/fmcsa-registration-modernization-stakeholder-day> by 11:59 p.m. eastern standard time (EST), on January 8, 2024. Attendance is limited to 90 people. Attendees should arrive by 8:00 a.m. to allow sufficient time to clear security. A virtual attendance option is not available for this meeting however, FMCSA will be affording additional engagement opportunities in the future which may include virtual attendance options.

FOR FURTHER INFORMATION CONTACT:

Alex Vanjani, Director, Office of the Chief Technology Officer (CTO), FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590-0001; (202) 510-7826; Alex.Vanjani@dot.gov.

Supreet Kaur, Project Manager, Office of the CTO, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590-0001; (202) 748-1204; Supreet.Kaur@dot.gov.

Services for individuals with disabilities: For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Alex Vanjani or Supreet Kaur using one of the above means by 11:59 p.m. EST, on January 8, 2024.

SUPPLEMENTARY INFORMATION:

Background

FMCSA is developing a new online registration system, to improve the transparency and efficiency of FMCSA's registration procedures as well as implement statutory requirements related to the registration program. FMCSA seeks user perspectives on improving the registration experience when engaging with FMCSA's registration system. During this meeting, FMCSA will invite attendees to participate in breakout sessions that will align with different groups of users the Agency expects will use the new online registration system. FMCSA moderators will facilitate discussions on what potential users would like to see, as well as what would not be helpful from a user experience perspective. The day will end with a general listening session, where FMCSA representatives will receive comments and concerns about a new online registration system.

Meeting Information

This meeting is intended for current and potential users of a new online registration system. Breakout sessions will focus on the following categories of registration IT system users:

- Motor carriers;
- Brokers and freight forwarders;
- Insurance companies/financial institutions and process agents/blanket companies; and
- Third party service providers.

The full meeting agenda will be available on the registration site (see **ADDRESSES** above for instructions on meeting registration) in advance of the meeting.

Robin Hutcheson,
Administrator.

[FR Doc. 2023-28362 Filed 12-22-23; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2023-0039]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of applications for exemption; request for comments.

SUMMARY: FMCSA announces receipt of applications from 12 individuals for an exemption from the prohibition in the

Federal Motor Carrier Safety Regulations (FMCSRs) against persons with a clinical diagnosis of epilepsy or any other condition that is likely to cause a loss of consciousness or any loss of ability to control a commercial motor vehicle (CMV) to drive in interstate commerce. If granted, the exemptions would enable these individuals who have had one or more seizures and are taking anti-seizure medication to operate CMVs in interstate commerce.

DATES: Comments must be received on or before January 25, 2024.

ADDRESSES: You may submit comments identified by the Federal Docket Management System Docket No. FMCSA–2023–0039 using any of the following methods:

- **Federal eRulemaking Portal:** Go to www.regulations.gov/, insert the docket number (FMCSA–2023–0039) in the keyword box and click “Search.” Next, choose the only notice listed, and click on the “Comment” button. Follow the online instructions for submitting comments.

- **Mail:** Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Washington, DC 20590–0001.

- **Hand Delivery:** West Building Ground Floor, 1200 New Jersey Avenue SE, Washington, DC, 20590–0001 between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal Holidays.

- **Fax:** (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the “Public Participation” portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, (202) 366–4001, fmcsamedical@dot.gov. Office hours are 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2023–0039), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You

may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to <https://www.regulations.gov/docket/FMCSA-2023-0039>. Next, choose the only notice listed, click the “Comment” button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. FMCSA will consider all comments and material received during the comment period.

B. Viewing Comments

To view comments go to www.regulations.gov. Insert the docket number (FMCSA–2023–0039) in the keyword box and click “Search.” Next, choose the only notice listed, and click “Browse Comments.” If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

C. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption request. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov. As described in the system of records notice DOT/ALL 14 (Federal Docket Management System), which can be reviewed at <https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices>, the comments are searchable by the name of the submitter.

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or

greater than, the level that would be achieved absent such exemption. The statutes also allow the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver’s medical certification.

The 13 individuals listed in this notice have requested an exemption from the epilepsy and seizure disorders prohibition in 49 CFR 391.41(b)(8). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding epilepsy found in § 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria¹ to assist medical examiners (MEs) in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

The criteria states that if an individual has had a sudden episode of a non-epileptic seizure or loss of consciousness of unknown cause that did not require anti-seizure medication, the decision whether that person’s condition is likely to cause the loss of consciousness or loss of ability to control a CMV should be made on an individual basis by the ME in consultation with the treating physician. Before certification is considered, it is suggested that a 6-month waiting period elapse from the time of the episode. Following the waiting period, it is suggested that the individual have a complete neurological examination. If the results of the examination are negative and anti-seizure medication is not required, then the driver may be qualified.

In those individual cases where a driver has had a seizure or an episode of loss of consciousness that resulted from a known medical condition (e.g., drug reaction, high temperature, acute infectious disease, dehydration, or acute metabolic disturbance), certification should be deferred until the driver has

¹ These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy*: § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at <https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf>.

recovered fully from that condition, has no existing residual complications, and is not taking anti-seizure medication.

Drivers who have a history of epilepsy/seizures, off anti-seizure medication, and seizure-free for 10 years, may be qualified to operate a CMV in interstate commerce. Interstate drivers with a history of a single unprovoked seizure may be qualified to drive a CMV in interstate commerce if seizure-free and off anti-seizure medication for a 5-year period or more.

As a result of MEs misinterpreting advisory criteria as regulation, numerous drivers have been prohibited from operating a CMV in interstate commerce based on the fact that they have had one or more seizures and are taking anti-seizure medication, rather than an individual analysis of their circumstances by a qualified ME based on the physical qualification standards and medical best practices.

On January 15, 2013, FMCSA announced in a notice of final disposition titled, "Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders," (78 FR 3069), its decision to grant requests from 22 individuals for exemptions from the regulatory requirement that interstate CMV drivers have "no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV." Since that time, the Agency has published additional notices granting requests from individuals for exemptions from the regulatory requirement regarding epilepsy found in § 391.41(b)(8).

To be considered for an exemption from the epilepsy and seizure disorders prohibition in § 391.41(b)(8), applicants must meet the criteria in the 2007 recommendations of the Agency's Medical Expert Panel (78 FR 3069).

III. Qualifications of Applicants

Lennie Beaudoin

Lennie Beaudoin is a 48-year-old class D license holder in New Hampshire. They have a history of epilepsy and have been seizure free since 2019. They take anti-seizure medication with the dosage and frequency remaining the same since 2019. Their physician states that they are supportive of Lennie Beaudoin receiving an exemption.

Joshua Braxton

Joshua Braxton is a 45-year-old class C license holder in Pennsylvania. They have a history of seizure disorder and have been seizure free since 2006. They take anti-seizure medication with the

dosage and frequency remaining the same since September 2021. Their physician states that they are supportive of Joshua Braxton receiving an exemption.

Robert A. Clark

Robert A. Clark is a 43-year-old class A commercial driver's license (CDL) holder in Indiana. They have a history of seizures and have been seizure free since January 2012. They take anti-seizure medication with the dosage and frequency remaining the same since 2012. Their physician states that they are supportive of Robert A. Clark receiving an exemption.

Chad Clement

Chad Clement is a 58-year-old class D license holder in Wisconsin. They have a history of seizure disorder and have been seizure free since 2007. They take anti-seizure medication with the dosage and frequency remaining the same since March 2007. Their physician states that they are supportive of Chad Clement receiving an exemption.

Michael Drent

Michael Drent is a 31-year-old class O license holder in Michigan. They have a history of seizure disorder and have been seizure free since 2015. They take anti-seizure medication with the dosage and frequency remaining the same since 2014. Their physician states that they are supportive of Michael Drent receiving an exemption.

Curtis Alan Hartman

Curtis Alan Hartman is a 58-year-old class BM CDL holder in Maryland. They have a history of seizure disorder and have been seizure free since April 1997. They take anti-seizure medication with the dosage and frequency remaining the same since April 1997. Their physician states that they are supportive of Curtis Alan Hartman receiving an exemption.

Ramon Hingosa

Ramon Hingosa is a 55-year-old class D license holder in Arizona. They have a history of generalized epilepsy and have been seizure free for over 10 years. They take anti-seizure medication with the dosage and frequency remaining the same since April 2016. Their physician states that they are supportive of Ramon Hingosa receiving an exemption.

Thomas Johnston

Thomas Johnston is a 68-year-old class DM license holder in Wisconsin. They have a history of epilepsy and have been seizure free since September 2017. They take anti-seizure medication with the dosage and frequency

remaining the same since January 2014. Their physician states that they are supportive of Thomas Johnston receiving an exemption.

Douglas Kelbley

Douglas Kelbley is a 37-year-old class A CDL holder in Ohio. They have a history of complex partial seizures and have been seizure free since September 2015. They take anti-seizure medication with the dosage and frequency remaining the same since 2015. Their physician states that they are supportive of Douglas Kelbley receiving an exemption.

Darren King

Darren King is a 57-year-old class C license holder in Pennsylvania. They have a history of seizure disorder and have been seizure free since 2001. They take anti-seizure medication with the dosage and frequency remaining the same since 2009. Their physician states that they are supportive of Darren King receiving an exemption.

Eric Langford

Eric Langford is a 51-year-old class D license holder in Kentucky. They have a history of seizure disorder and have been seizure free since 2010. They take anti-seizure medication with the dosage and frequency remaining the same for over 10 years. Their physician states that they are supportive of Eric Langford receiving an exemption.

Ronald Minor

Ronald Minor is a 56-year-old class A CDL holder in Illinois. They have a history of seizure disorder and have been seizure free since July 2000. They take anti-seizure medication with the dosage and frequency remaining the same since July 2018. Their physician states that they are supportive of Ronald Minor receiving an exemption.

IV. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315(b), FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated under the **DATES** section of the notice.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023-28400 Filed 12-22-23; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION**Federal Railroad Administration****[Docket No. FRA–2023–0099]****Notice of Proposed Nonavailability Waiver of Buy America Requirements for the Nevada Department of Transportation To Purchase Certain High-Speed Rail Components**

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice; request for comment.

SUMMARY: The Federal Railroad Administration (FRA) is seeking comments on whether to grant a waiver of its Buy America requirements to the Nevada Department of Transportation (NVDOT) for certain components that are not produced in the United States for use in a high-speed passenger train project between Las Vegas, NV and Rancho Cucamonga, CA (Project). FRA selected the Project for funding under the Federal-State Partnership for Intercity Passenger Rail Program (FSP Program), and therefore, FRA's Buy America requirements apply to the Project. FRA's Buy America requirements include both FRA's statutory requirements, which require 100 percent of the manufactured products and steel and iron used in an FRA-funded project to be produced in the United States, and the Build America, Buy America Act (BABA), which requires that all construction materials used in the FRA-funded project be produced in the United States. FRA is not proposing to waive the applicable BABA requirements for construction materials used in the Project, and therefore this proposed waiver would not apply to the construction materials used in the Project. The proposed waiver would apply to the trainset, signal systems, high-speed rail turnout and fire alarm systems based on the domestic nonavailability of such components, as identified by NVDOT's railroad operating partner Brightline West and the two potential suppliers (Alstom and Siemens) of the rolling stock and signaling systems for the project. NVDOT and Brightline estimate that over 95 percent of the total direct dollar expenditures for the Project would be spent on domestically sourced products and labor, including 100 percent of the civil infrastructure costs.

DATES: Comments must be received by January 25, 2024.

ADDRESSES: Please submit all comments electronically to the Federal

eRulemaking Portal. Go to <https://www.regulations.gov> and follow the instructions for submitting comments.

Instructions: All submissions must refer to the Federal Railroad Administration and the docket number in this notice (FRA–2023–0099). Note that all submissions received, including any personal information provided, will be posted without change and will be available to the public on <https://www.regulations.gov>. You may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000 (65 FR 19477), or at <https://www.transportation.gov/privacy>.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Ryan Arbuckle, Chief, Program Coordination and Strategy, Office of Railroad Development, FRA, telephone: (202) 617–0212, email: Ryan.Arbuckle@dot.gov. For legal questions, please contact Faris Mohammed, Attorney-Advisor, Office of the Chief Counsel, FRA, telephone: (202) 763–3230, email: Faris.Mohammed@dot.gov.

SUPPLEMENTARY INFORMATION:**I. Project History and Background**

On December 7, 2022, FRA published a Notice of Funding Opportunity (NOFO) announcing application requirements and procedures to obtain grant funding under the FSP Program for projects not located on the Northeast Corridor for Fiscal Year 2022. The FSP Program provides a Federal funding opportunity to improve passenger rail service, including privately operated intercity passenger rail service if an eligible applicant is involved. On February 3, 2023, FRA published a notice adding funding and extending the application period for the FSP Program NOFO. On March 22, 2023, FRA published a notice (March Notice) inviting high-speed rail project sponsors to voluntarily submit, in advance of being selected to receive FRA funding, their domestic sourcing and workforce plans (DSWP) to demonstrate how they will maximize the use of domestic goods, products and materials, consistent with FRA's Buy America requirements.¹

NVDOT submitted an application for FSP Program funding expressing its intent to partner with Brightline West, a privately-owned railroad, to advance a high-speed passenger rail system between Las Vegas, NV and Rancho Cucamonga, CA (Project). Brightline West, under the supervision and

oversight of NVDOT, would construct the Project, which would consist of a fully-grade separated high-speed train system largely within the I–15 right-of-way with stations in Rancho Cucamonga, Hesperia, and Victor Valley, CA, and Las Vegas, NV. Brightline West would then operate and maintain the system.

Consistent with FRA's March Notice, NVDOT and Brightline West submitted a DSWP,² which included a request for a waiver of FRA's Buy America requirements³ for certain components of the high-speed rail system that the applicant indicated are not produced in the United States. FRA reviewed the DSWP, including the market research conducted by Brightline West and their consideration of qualifying alternate items, products, or materials. FRA selected the Project to receive \$3,000,000,000 in funding under the FSP Program.

This notice summarizes FRA's Buy America requirements, NVDOT and Brightline West's request for a waiver, and FRA's proposed waiver decision.

II. FRA's Buy America Requirements and Policy

Projects that receive funding under the FSP Program are subject to FRA's Buy America requirements. FRA's Buy America requirements include both: (i) FRA's statutory requirements for steel, iron, and manufactured goods at 49 U.S.C. 22905(a); and (ii) requirements under the Build America, Buy America Act (BABA) and guidance at 2 CFR 184.6 for construction materials. This means that FRA can fund a project only if the steel, iron, and manufactured goods used in the project are produced in the United States. 49 U.S.C. 22905(a). In addition, FRA-funded projects must also comply with the relevant provisions of BABA, including the requirement that all construction materials used in the project must also be produced in the United States. Public Law 117–58, 70914(a); 2 CFR 184.6.

FRA strictly enforces compliance with its Buy America requirements to ensure that FRA-funded projects maximize the use of materials produced in the United States. FRA expects grantees to work with suppliers to conduct thorough market research and adequately consider, where appropriate, qualifying alternate items, products, or materials.

² The DSWP contains proprietary information that FRA has determined is confidential business information. As such, FRA is not making the DSWP available to the public at this time; however, pertinent non-proprietary information provided in the DSWP is discussed in this notice.

³ For FRA's Buy America requirements, see section II.

¹ Advancing High-Speed Rail Projects Intended for Operations Over 160 Miles Per Hour Through Domestic Sourcing Plans and Buy America Compliance, 88 FR 17289 (March 22, 2023).

Compliance with FRA's Buy America requirement supports domestic industry and well-paying jobs.

III. FRA's Authority To Waive Buy America Requirements

There are limited circumstances in which FRA can waive its Buy America requirements under section 22905(a) and BABA. FRA will grant a waiver request that is consistent with the statutory criteria for a waiver and where a project sponsor has adequately justified the need for a waiver.

FRA may waive its Buy America requirements if FRA determines that: applying the Buy America requirements would be inconsistent with the public interest; the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality; rolling stock or power train equipment cannot be bought and delivered in the United States within a reasonable time; or including domestic material will increase the cost of the overall project by more than 25 percent. 49 U.S.C. 22905(a)(2); *see also* Public Law 117–58, 70914(b)(prescribing similar statutory conditions for waivers); and 2 CFR 184.7 (doing the same).

If FRA determines a waiver is appropriate, FRA will provide notice and seek comment from the public in accordance with the requirements of both section 22905(a) and BABA, if applicable. In addition, FRA will consult with the National Institute of Standards and Technology's Manufacturing Extension Partnership before granting a waiver, consistent with section 70916 of BABA. Unless otherwise specified, waiver decisions are non-precedential and are only applicable to the entities and components for the specific project identified in the final decision.

IV. Summary of the Request for Waiver

In response to FRA's March Notice, NVDOT and Brightline West submitted a DSWP outlining the efforts Brightline West would take to ensure maximum use of available domestic materials in the project if NVDOT's application is selected for funding under the FSP Program. In the DSWP, NVDOT and Brightline West explain that certain components intended to be used on the project are not produced in the United States and thus request a waiver of FRA's Buy America requirements under section 22905(a) for these components. No construction materials covered under BABA are included in the waiver request.

V. Summary of Components Requiring Waiver

Brightline West sought to identify a domestic supplier for the rolling stock and signal system components of the Project. Brightline West received two responses to its Request for Interest, from Siemens and Alstom, who represented they could provide high-speed rail components that meet Brightline West's specifications and applicable FRA safety requirements. However, both suppliers certified that certain non-domestic components would be required to meet the specifications, as those types of high-speed rail equipment are not produced in the United States. Brightline West consulted with each potential supplier so that their lists of non-domestic components would include only those components for which there is no available domestic option.

Brightline West received responses from both Siemens and Alstom for the signal systems and both responses indicated a need for a waiver for certain components. Brightline West selected Siemens as the preferred vendor for the signal systems for the Project, and therefore the proposed waiver only describes the non-domestic components in Siemens' proposal.

For rolling stock, both Alstom and Siemens indicated that certain components that perform safety critical functions for the operation of the high-speed rail system would not be compliant with FRA's Buy America requirements. At the time of this proposed waiver, Brightline West has not selected its preferred vendor for rolling stock. The non-domestic components identified by Brightline West that would require a waiver from FRA's Buy America requirements are described in this section.⁴

a. Siemens Proposal—Non-Domestic Rolling Stock Components

Siemens is proposing to introduce the next generation Velaro NOVO Electric-Multiple-Unit (EMU) for the Project. As this would be the first introduction of this technology into the United States, Siemens would plan for the first two trainsets to be manufactured and assembled in its German headquarters with American workers present to witness and learn in advance of commencing the manufacturing and assembly of the remaining eight

trainsets at a new factory, which would be constructed in Nevada. Under the Siemens proposal, the following components would not be produced in the United States:

- First Two Complete Trainsets
- Car Shells for All 10 Trainsets (shell structure, frame, vehicle paintwork)

b. Alstom Proposal—Non-Domestic Rolling Stock Components

Alstom is proposing to adapt the Avelia technology planned for deployment on the NEC for use in the Project by increasing power capacity and traction to achieve the speed and performance capability required by Brightline West, and consistent with that achieved with its TGV trains in Europe. Manufacturing would take place at its existing facility in Hornell, New York, where all 10 trainsets would be built. For this procurement, the following components would not be produced in the United States:

- Car Shells (shell structure, frame, vehicle paintwork)
- Brake Control Units

c. Non-Domestic Infrastructure Components

Brightline West notes that the Project would also require the use of specialty high-speed rail turnouts to allow trains to smoothly diverge to a passing siding, which plays a key role in safety and stability of train operations. In addition, the Project would require fire alarm panels and devices for use in stations, garages, and maintenance facilities. Brightline West has researched known suppliers and was not able to identify a domestic manufacturer for the following components:

- Eurobalises and Euroloops⁵
- Counting Heads and Axle Counter Sensors
- Truck Press (test stand)
- Turnout Systems including Derailers
- Fire Alarm Systems

VI. Applicant's Request for Waiver

In their request for a waiver, NVDOT and Brightline West indicated that they believe a waiver is justified because no manufacturers exist in the United States that can produce the components described above, and that the use of these non-domestic components is necessary to ensure the safety and reliability of the high-speed rail system.

⁴ The non-domestic component lists may vary among suppliers depending on the specific manufacturing processes used and system design. In highly specialized systems, such as high-speed rail trainsets, components cannot be easily substituted without potential impacts to performance and safety.

⁵ Eurobalise and euroloops are components installed between the rails of a railway that are part of the European train control system used by Siemens. These components store infrastructure data (e.g., position reference, speed limits, line gradient, works on the line, etc) and can send this information to the train.

NVDOT's and Brightline West's DSWP further explains that over 95 percent of the total direct dollar expenditures for the Project would be spent on domestically sourced products and labor, including 100 percent of the civil infrastructure costs. In addition, the Project is expected to support approximately 35,000 domestic jobs across the construction period and includes a project labor agreement (PLA). The operator has reached an agreement with rail labor which may result in ongoing operations and maintenance work being performed by union labor.⁶ The DSWP further explains efforts Brightline West would take to facilitate, where feasible, a ramp up in domestic production capabilities for the materials that are not currently produced in the United States on future high-speed rail projects in the United States.

In the absence of a waiver, NVDOT and Brightline West argue that the Project could not be delivered within the planned schedule and budget because there is no domestic supplier for the components listed above. To ensure safety of the system, Brightline West expects to conform with FRA's Passenger Equipment Safety Standards governing Tier III equipment,⁷ which allows for service-proven high-speed rail technologies from around the world (in this case Europe) to be introduced to the United States with minimal modification.

For example, the high-speed rolling stock aluminum car shells are critical to the achievement of high speeds, due to aluminum's strength and light weight, and it has taken decades of development in technology by highly specialized experts that can shape, mold, and weld these car shells to the required safety and quality standards, including crashworthiness. There is currently no available aluminum car shell manufacturer in the United States, and it would take years to establish a domestic, quality-controlled manufacturing capability. The relatively small size of the Project's order (ten trainsets) is also not considered by the applicant to be sufficient to justify the significant capital investments required to initiate development of domestic production capacity for those products.

In its request for a waiver, NVDOT and Brightline West explain how they conducted due diligence and performed thorough market research to adequately

consider qualifying alternate items, products, or materials. Brightline West engaged with both Alstom and Siemens to determine the systems that could be manufactured domestically. These efforts included considering options for the establishment of either temporary or permanent manufacturing facilities, alternative manufacturing processes, and system design. In addition, Brightline West conducted market research to identify a domestic supplier for high-speed turnout and fire alarm components. However, Brightline West was unable to identify a domestic supplier for the rolling stock, signal systems, turnout, and fire alarm components.

VII. Proposed Waiver

Based on its review of the waiver request and DSWP, FRA proposes to waive its Buy America requirements for the following components for the Project:

- The infrastructure components listed above in Section V(c); and the rolling stock components listed in either:
 - Section V(a), if Siemens is selected as the preferred supplier; or
 - Section V(b), if Alstom is selected as the preferred supplier.

The proposed waiver would apply only to components listed above for use in the Project, as described in the grant agreement between FRA and NVDOT. FRA is not proposing to waive any requirements under BABA, as the proposed waiver does not apply to any construction materials used in the Project. The proposed waiver would not apply to other FRA grantees or to other grants that might be made to NVDOT or Brightline West for other projects (including any future phases related to the Project).

VIII. Request for Comment

FRA will consider comments received during the comment period, consistent with BABA and 2 CFR 184.7. FRA may consider comments received after this period to the extent practicable. Consistent with 49 U.S.C. 22905(a)(4), if FRA determines it is necessary to waive its Buy America requirements, FRA will publish its decision in the **Federal Register** and provide an opportunity for public comment on such finding for a reasonable period of time not to exceed 15 days. After such period, FRA's decision will be effective.

Issued in Washington, DC.

Amitabha Bose,
Administrator.

[FR Doc. 2023-28424 Filed 12-22-23; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA-2023-0002-N-36]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of information collection; request for comment.

SUMMARY: Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, FRA seeks approval of the Information Collection Request (ICR) summarized below. Before submitting this ICR to the Office of Management and Budget (OMB) for approval, FRA is soliciting public comment on specific aspects of the activities identified in the ICR.

DATES: Interested persons are invited to submit comments on or before February 9, 2024.

ADDRESSES: Written comments and recommendations for the proposed ICR should be submitted on regulations.gov to the docket, Docket No. FRA-2023-0002. All comments received will be posted without change to the docket, including any personal information provided. Please refer to the assigned OMB control number (2130-0533) in any correspondence submitted. FRA will summarize comments received in a subsequent 30-day notice and include them in its information collection submission to OMB for approval.

FOR FURTHER INFORMATION CONTACT: Ms. Arlette Mussington, Information Collection Clearance Officer, at email: arlette.mussington@dot.gov or telephone: (571) 609-1285, or Ms. Joanne Swafford, Information Collection Clearance Officer, at email: joanne.swafford@dot.gov or telephone: (757) 897-9908.

SUPPLEMENTARY INFORMATION: The PRA, 44 U.S.C. 3501-3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to provide 60 days' notice to the public to allow comment on information collection activities before seeking OMB approval of the activities. See 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. Specifically, FRA invites interested parties to comment on the following ICR regarding: (1) whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (2) the accuracy of FRA's estimates of the

⁶ In March 2023, thirteen rail unions representing more than 160,000 workers signed a Memorandum of Understanding with Brightline West, establishing a commitment for the use of highly skilled union labor required to operate and maintain the System.

⁷ See 49 CFR part 238.

burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways for FRA to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology. *See* 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1).

FRA believes that soliciting public comment may reduce the administrative and paperwork burdens associated with the collection of information that Federal regulations mandate. In summary, comments received will advance three objectives: (1) reduce reporting burdens; (2) organize information collection requirements in a “user-friendly” format to improve the use of such information; and (3)

accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. 3501.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

Title: Qualification and Certification of Locomotive Engineers.

OMB Control Number: 2130–0533.

Abstract: Section 4 of the Rail Safety Improvement Act of 1988, Public Law 100–342, 102 Stat. 624 (June 22, 1988), later amended and re-codified by Public Law 103–272, 108 Stat. 874 (July 5, 1994), required FRA to issue regulations to establish any necessary program for certifying or licensing locomotive engineers. The collection of information is used by FRA to ensure that railroads employ and properly train qualified individuals as locomotive engineers and designated supervisors of locomotive engineers (DSLEs).

The collection of information is used by FRA to verify that railroads have established required certification programs for locomotive engineers and that these programs fully conform to the standards specified in the regulation.

In this 60-day notice, FRA makes adjustments that increased the burden hours from 23,964 to 23,969 hours. This increase is a result of a correction of rounding errors from the previous submission and in the number of estimated qualified DSLEs and locomotive engineers as required under 49 CFR 240.201 and 240.221.

Type of Request: Extension without change (with changes in estimates) of a currently approved collection.

Affected Public: Businesses (Railroads).

Form(s): N/A.

Respondent Universe: 784 Railroads.

Frequency of Submission: On occasion; annually; triennially.

REPORTING BURDEN

CFR section	Respondent universe	Total annual responses (A)	Average time per response (B)	Total annual burden hours (C = A * B)	Wage rate	Total cost equivalent in U.S. dollars (D = C * wage rates) ¹
240.9—Waivers	784 railroads	2 waiver petitions ...	1.00 hour	2.00	\$85.93	\$171.86
240.101/103—Certification Program: written program for certifying qualifications of locomotive engineers—material modifications.	784 railroads	25 material modifications.	5.00 minutes	2.08	85.93	178.73
—Certification programs for new railroads	5 new railroads	5 programs	1.00 hour	5.00	85.93	429.65
—New railroads final review and submission of certification program.	5 new railroads	5 reviews	1.00 hour	5.00	85.93	429.65
—(b)(1)—RR provision of copy of certification program submission or resubmission to president of labor unions representing employees simultaneously with filing with FRA.	62 railroads	62 copies	5.00 minutes	5.17	85.93	444.26
—(b)(2)—RR affirmative statement that it has served certification program copy to labor unions.	62 railroads	62 copies	5.00 minutes	5.17	85.93	444.26
—(c)—RR employee comment on submission, resubmission, or material modification of RR certification program.	62 railroads	62 comments	8.00 hours	496.00	85.93	42,621.28
—(h)—RR material modifications to program after initial FRA approval (formerly under (e)).	784 railroads	10 modified programs.	10.00 minutes	1.67	85.93	143.50
240.105(c) Written reports/determinations of DSLE performance skills.	784 railroads	10 written reports ...	30.00 minutes	5.00	123.41	617.05
240.109/App. C—Prior safety conduct data.	17,667 candidates ..	25 responses	5.00 minutes	2.08	63.07	131.19
240.111/App C—Driver's license data requests from chief of driver licensing agency of any jurisdiction, including foreign countries.	17,667 candidates ..	17,667 requests	10.00 minutes	2,944.50	85.93	253,020.89
—NDR match—notifications and requests for data.	784 railroads	177 notices +177 requests.	5 + 5 minutes	29.50 ²	85.93	2,197.75
—Written response from candidate on driver's license data.	784 railroads	20 cases/comments	10.00 minutes	3.33	63.07	210.02
240.111(g)—Notice to RR of absence of license.	53,000 candidates ..	4 letters	5.00 minutes	0.33	63.07	20.81
240.111(h)—Duty to furnish data on prior safety conduct as motor vehicle operator.	784 railroads	100 communications.	5.00 minutes	8.33	63.07	525.37
240.113—Notice to RR furnishing data on prior safety conduct—different RR.	17,667 candidates ..	353 requests + 353 responses.	5 + 5 minutes	58.84 ³	85.93	4,383.58
240.115(d)—RR temporary certification or recertification of locomotive engineer for 60 days after having requested the motor vehicle information specified in paragraph (h) of this section.	784 railroads	25 recertifications ...	5.00 minutes	2.08	85.93	178.73

REPORTING BURDEN—Continued

CFR section	Respondent universe	Total annual responses (A)	Average time per response (B)	Total annual burden hours (C = A * B)	Wage rate	Total cost equivalent in U.S. dollars (D = C * wage rates) ¹
—(i)(2)—RR drug and alcohol counselor request of employee's record of prior counseling or treatment.	17,667 candidates ..	400 requests	5.00 minutes	33.33	63.07	2,102.12
—(i)(3)—Conditional certification based on recommendation by drug and alcohol counselor (DAC) of employee aftercare and/or follow-up testing for alcohol/drugs.	17,667 candidates ..	100 conditional certifications/DAC recommendations.	1.00 hour	100.00	63.07	6,307.00
—(i)(4)—RR employee is evaluated by DAC as having an active substance abuse disorder.	17,667 candidates ..	100 DAC evaluations.	1.00 hour	100.00	63.07	6,307.00
240.117(i)(4)—RR employee completion of training/retraining prior to return to service—records.	53,000 locomotive engineers.	400 trained/re-trained records.	5.00 minutes	33.33	63.07	2,102.12
240.119(c)—Written records indicating dates that the engineer stopped performing or returned to certification service + compliance/observation test.	784 railroads	400 records	5.00 minutes	33.33	63.07	2,102.12
240.119(d)—Self-referral re: active substance abuse disorder.	53,000 locomotive engineers.	150 self-referrals	5.00 minutes	12.50	63.07	788.38
240.119(e)(3)(i)—RR determination that the most recent incident occurred.	<i>The estimated paperwork burden for this requirement is included above under § 240.119(c).</i>					
240.119(e)(3)(ii)—RR notification to person that recertification has been denied or revoked.	784 railroads	200 notifications	30.00 minutes	100.00	63.07	6,307.00
240.119(e)(4)(iii)—Locomotive engineer waiver of investigation in case of one violation of section 219.101.	53,000 locomotive engineers.	200 waivers	2.00 minutes	6.67	63.07	420.68
240.121—Criteria—vision/hearing acuity data—new railroads.	5 railroads	5 copies	5.00 minutes	0.42	85.93	36.09
240.121—Criteria—vision/hearing acuity data—condition certification.	784 railroads	5 reports	5.00 minutes	0.42	123.41	51.83
240.121—Criteria—vision/hearing acuity data—not meeting standards—notice by employee.	784 railroads	10 notifications	5.00 minutes	0.83	63.07	52.35
240.129(b)—RR documents on file regarding determination made regarding operational fitness.	53,000 locomotive engineers.	1,000 records	5.00 minutes	83.33	85.93	7,160.55
240.201/221—List of qualified DSLEs	784 railroads	784 updates	5.00 minutes	65.33	85.93	5,613.81
240.201/221—List of qualified locomotive engineers.	784 railroads	784 updated lists	5.00 minutes	65.33	85.93	5,613.81
240.201/223/301—Locomotive engineers certificate.	53,000 candidates ..	17,667 certificates ..	5.00 minutes	1,472.25	85.93	126,510.44
240.207—Medical certificate showing hearing/vision standards are met.	53,000 candidates ..	17,667 certificates ..	30.00 minutes	8,833.50	123.41	1,090,142.24
—Written determinations waiving use of corrective device.	784 railroads	30 determinations ...	5.00 minutes	2.50	123.41	308.53
240.219(a)—RR notification letter to employee of certification denial + employee written rebuttal.	17,667 candidates ..	90 letters and responses.	30.00 minutes	45.00	85.93	3,866.85
—RR Notice/written documents/records to candidate that support its pending denial decision.	784 railroads	45 documents/records.	2.00 minutes	1.50	85.93	128.90
240.229(3)(ii)—Joint operations—notice—not qualified.	321 railroads	184 employee calls	5.00 minutes	15.33	63.07	966.86
240.301(b)—Temporary replacement certificates valid for no more than 30 days.	784 railroads	600 replacement certificates.	30.00 minutes	300.00	85.93	25,779.00
240.305(c)—Engineer's notice of non-qualification to RR.	53,000 engineers or candidates.	100 notifications	5.00 minutes	8.33	63.07	525.37
—(d)—Relaying certification denial or revocation status to other certifying railroad.	1,060 engineers	2 letters	15.00 minutes	0.50	63.07	31.54
240.307(a–b)—Notice to engineer of disqualification.	784 railroads	550 + 550 letters	1 + 1 hour	1,100.00 ⁴	85.93 63.07 85.93	81,950.00
240.307(b)(4)—RR provision to employee of copy of written information and list of witnesses that it will present at hearing.	784 railroads	690 copies/list	5.00 minutes	57.50	85.93	4,940.98
240.307(b)(5)—RR determination on hearing record whether person no longer meets certification requirements of this CFR part.	784 railroads	690 hearing determination.	1.00 hour	690.00	85.93	59,291.70
240.307(c)(11)(i)(ii)—RR written decision after close of hearing containing findings of fact & whether a revocable event occurred.	784 railroads	690 written decisions.	30.00 minutes	345.00	85.93	29,645.85

REPORTING BURDEN—Continued

CFR section	Respondent universe	Total annual responses (A)	Average time per response (B)	Total annual burden hours (C = A * B)	Wage rate	Total cost equivalent in U.S. dollars (D = C * wage rates) ¹
240.307(c)(11)(iii)—RR service of written decision on employee and employee's representative.	784 railroads	690 copies	5.00 minutes	57.50	85.93	4,940.98
240.307(f)—Personal waiver of right to hearing under this section.	784 railroads	750 written waivers	5.00 minutes	62.50	63.07	3,941.88
240.307(j)—RR update of record with relevant information.	784 railroads	50 updated records	10.00 minutes	8.33	85.93	715.80
240.309—RR oversight responsibilities: detected poor safety conduct—annotation.	15 railroads	6 annotations	15.00 minutes	1.50	63.07	94.61
—Railroad annual review	51 railroads	51 reviews	3.00 hours	153.00	85.93	13,147.29
240.205—Data to DAC Counselor	784 railroads	177 records	5.00 minutes	14.75	123.41	1,820.30
240.209/213—Written documentation of tests.	53,000 candidates ..	17,667 testing records.	1.00 minute	294.45	85.93	25,302.09
240.211/213—Written documentation of performance tests.	53,000 candidates ..	17,667 testing records.	1.00 minute	294.45	85.93	25,302.09
240.215—Retaining information supporting determination.	784 railroads	17,667 records	5.00 minutes	1,472.25	85.93	126,510.44
240.303—Annual operational monitoring observation.	53,000 candidates ..	53,000 testing records.	1.00 minute	883.33	85.93	75,904.55
240.303—Annual operating rules compliance test.	53,000 candidates ..	53,000 testing records.	1.00 minute	883.33	85.93	75,904.55
240.307(b)(4)—RR hearings/hearing records.	784 railroads	690 hearings/records.	4.00 hours	2,760.00	85.93	237,166.80
Total ⁵	784 railroads	224,652 responses	N/A	23,969	N/A	2,365,953

Total Estimated Annual Responses: 224,652.

Total Estimated Annual Burden: 23,969.

Total Estimated Annual Dollar Cost Equivalent: \$2,365,953.

FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information that does not display a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Allison Ishihara Fultz,
Chief Counsel.

[FR Doc. 2023–28382 Filed 12–22–23; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2023–0002–N–38]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of information collection; request for comment.

SUMMARY: Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, FRA seeks approval of the Information Collection Request (ICR) summarized below. Before submitting this ICR to the Office of Management and Budget (OMB) for approval, FRA is soliciting public comment on specific aspects of the activities identified in the ICR.

DATES: Interested persons are invited to submit comments on or before February 26, 2024.

ADDRESSES: Written comments and recommendations for the proposed ICR should be submitted on *regulations.gov* to the docket, Docket No. FRA–2023–0002. All comments received will be posted without change to the docket, including any personal information provided. Please refer to the assigned OMB control number (2130–0597) in any correspondence submitted. FRA will summarize comments received in a

subsequent 30-day notice and include them in its information collection submission to OMB for approval.

FOR FURTHER INFORMATION CONTACT: Ms. Arlette Mussington, Information Collection Clearance Officer, at email: arlette.mussington@dot.gov or telephone: (571) 609–1285, or Ms. Joanne Swafford, Information Collection Clearance Officer, at email: joanne.swafford@dot.gov or telephone: (757) 897–9908.

SUPPLEMENTARY INFORMATION: The PRA, 44 U.S.C. 3501–3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to provide 60 days' notice to the public to allow comment on information collection activities before seeking OMB approval of the activities. See 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. Specifically, FRA invites interested parties to comment on the following ICR regarding: (1) whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways for FRA to minimize the burden of information collection activities on the public,

¹ Throughout the tables in this document, the dollar equivalent cost is derived from the 2022 Surface Transportation Board Full Year Wage A & B data series using the appropriate employee group to calculate the average hourly rate that includes 75 percent overhead.

² Total burden hours are divided equally for each requirement 14.75 + 14.75 = 84.84 hours.

³ Total burden hours are divided equally for each requirement 29.42 + 29.42 = 84.84 hours.

⁴ Total burden hours are divided equally for each requirement 550 + 550 = 84.84 hours.

⁵ Totals may not add up due to rounding.

including the use of automated collection techniques or other forms of information technology. *See* 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1).

FRA believes that soliciting public comment may reduce the administrative and paperwork burdens associated with the collection of information that Federal regulations mandate. In summary, comments received will advance three objectives: (1) reduce reporting burdens; (2) organize information collection requirements in a “user-friendly” format to improve the use of such information; and (3) accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. 3501.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

Title: Training, Qualification, and Oversight for Safety-Related Railroad Employees.

OMB Control Number: 2130–0597.

Abstract: The regulations under 49 CFR part 243 set forth FRA’s minimum training and qualification requirements for each category and subcategory of safety-related railroad employee, regardless of whether the employee is employed by a railroad or a contractor

of the railroad. In 2014, FRA published a final rule establishing minimum training standards for all safety-related railroad employees, as required by the Rail Safety Improvement Act (RSIA) of 2008.¹ The final rule required each railroad or contractor that employs one or more safety-related employees to develop and submit a training program to FRA for approval and to designate the minimum training qualifications for each occupational category of employee. Additionally, the rule required most employers to conduct periodic oversight of their own employees and annual written reviews of their training programs to close performance gaps.²

FRA will use the information collected to ensure each employer—railroad or contractor—conducting operations subject to 49 CFR part 243 develops, adopts, submits, and complies with a training program for each category and subcategory of safety-related railroad employee. Each program must have training components identified so that FRA will understand how the program works when it reviews the program for approval. Further, FRA will review the required training programs to ensure they include initial, ongoing, and on-the-job criteria; testing

and skills evaluation measures designed to foster continual compliance with Federal standards; and the identification of critical safety defects and plans for immediate remedial actions to correct them. In 2020, FRA developed requirements for a training program under § 243.101 for each Class I railroad, and each intercity or commuter passenger railroad conducting operations with 400,000 or more total annual employee work hours.

In this 60-day notice, FRA makes adjustments that will reduce the currently approved burden hours from 91,069 to 66,565 hours. The decrease, after a thorough review, is the result of a reduced estimate of annual responses for the number of training programs under § 243.103.

Type of Request: Extension without change (with changes in estimates) of a currently approved collection.

Affected Public: Businesses.

Form(s): N/A.

Respondent Universe: 1,155 railroads/contractors/training organizations/learning institutions.

Frequency of Submission: On occasion.

Total Estimated Annual Responses: 164,275.

REPORTING BURDEN

CFR section	Respondent universe	Total annual responses (A)	Average time per response (B)	Total annual burden hours (C = A * B)	Wage rates	Total cost equivalent in U.S. dollars (D = C * wage rates) ³
243.101(a)(2)—Training program required for each employer not covered by (a)(1) and subject to this part by May 1, 2021.	1,046 railroads/contractors.	200 training programs.	250 hours	50,000.00	\$85.93	\$4,296,500.00
—(b) Submission by new employers commencing operations after Jan. 1, 2020, not covered by (a)(2).	10 new railroads/contractors.	10 training programs.	20 hours	200.00	123.41	24,682.00
—(e) Contractor’s duty to validate approved program to a railroad (Revised requirement).	400 railroad contractors.	150 documents	15 minutes	37.50	85.93	3,222.38
—(f) Railroad’s duty to retain copies of contractor’s validation documents (Revised requirement).	1,046 railroads/contractors.	1,046 copies	2 minutes	34.87	85.93	2,996.38
243.103(d)—Training components identified in program; modifications to components of the training programs.	1,155 railroads/contractors.	10 modified training programs.	5 hours	50.00	85.93	4,296.50
243.109(b)—Previously approved programs requiring an informational filing when modified.	155 railroads/contractors/learning institutions.	75 informational filings.	8 hours	600.00	85.93	51,558.00
—(c) New portions or substantial revisions to an approved training program.	10 railroads/contractors.	10 revised training programs.	16 hours	160.00	85.93	13,748.80
—(c) New portions or substantial revisions to an approved training program found non-conforming to this part by FRA—revisions required.	50 railroads/contractors.	50 revised training programs.	8 hours	400.00	85.93	34,372.00
—(d)(1)(i) Copy of additional submissions, resubmissions, and informational filings to labor organization presidents.	50 railroads/contractors.	50 copies	10 minutes	8.33	85.93	715.80
—(d)(1)(ii) Railroad statement affirming that a copy of submissions, resubmissions, or informational filings has been served to labor organization presidents.	228 railroads/contractors.	76 affirming statements.	10 minutes	12.67	85.93	1,088.73

¹ Public Law 110–432, 122 Stat. 4883 (Oct. 16, 2008), codified at 49 U.S.C. 20162.

² 79 FR 66459.

REPORTING BURDEN—Continued

CFR section	Respondent universe	Total annual responses (A)	Average time per response (B)	Total annual burden hours (C = A * B)	Wage rates	Total cost equivalent in U.S. dollars (D = C * wage rates) ³
—(d)(2) Labor comments on railroad training program submissions, re-submissions, or informational filings.	228 railroad labor organizations.	3 comments	30 minutes	1.50	85.93	128.90
243.111(g)—Safety-related railroad employees instructed by training organizations or learning institution—record-keeping.	109 training organizations/learning institutions.	5,450 records	5 minutes	454.17	85.93	39,026.83
—(h) Training organizations or learning institutions to provide student's training transcript or training record to any employer upon request by the student.	109 training organizations/learning institutions.	545 records	5 minutes	45.42	85.93	3,902.94
—(b) New employers operating after January 1, 2020, not covered by (a)(2), designation of safety-related employees by job category—lists.	10 new railroads/contractors.	10 designation lists	15 minutes	2.50	85.93	214.83
—(c) Training records of newly hired employees or those assigned new safety-related duties.	4,800 employees	4,800 records	15 minutes	1,200.00	85.93	103,116.00
—(d)(1)(i) Requests for relevant qualification or training record from an entity other than current employer.	4,800 employees	250 record requests	5 minutes	20.83	85.93	1,789.92
243.203—(a)—(e) Recordkeeping—Systems set up to meet FRA requirements—general requirements for qualification status records, accessibility.	10 railroads/contractors/training organizations/learning institutions.	10 recordkeeping systems.	30 minutes	5.00	85.93	429.65
—(f) Transfer of records to successor employer—If an employer ceases to do business and its assets will be transferred to a successor employer, it shall transfer to the successor employer all records required to be maintained under this part, and the successor employer shall retain them for the remainder of the period prescribed in this part.	1,155 railroads/contractors/training organizations/learning institutions.	3 railroads	30 minutes	1.50	85.93	128.90
243.205(c)—Railroad identification of supervisory employees who conduct periodic oversight tests by category/sub-category.	746 railroads	300 identifications ..	5 minutes	24.90	85.93	2,139.66
—(f) Notification by RR of contractor employee non-compliance with federal laws/regulations/orders to employee and employee's employer.	300 contractors	90 employee notices.	10 minutes	15.00	85.93	1,288.95
—(f) Notification by RR of contractor employee non-compliance with federal laws/regulations/orders to employee and employee's employer.	300 contractors	270 employer notices.	10 minutes	45.00	85.93	3,866.85
—(i) and (j) Employer records of periodic oversight.	1,046 railroads/contractors.	150,000 records	5 minutes	12,500.00	85.93	1,074,125.00
243.207(a)—Written annual review of safety data (Railroads with 400,000 annual employee work hours or more).	22 railroads	22 reviews	16 hours	352.00	85.93	30,247.36
—(b) Railroad copy of written annual review at system headquarters.	22 railroads	22 review copies	5 minutes	1.83	85.93	157.25
—(e) Railroad notification to contractor of relevant training program adjustments.	22 railroads	2 notifications	15 minutes	0.50	85.93	42.97
243.209(a)—(b)—Railroad-maintained list of contractors utilized.	746 railroads	746 lists	30 minutes	373.00	85.93	32,051.89
—(c) Railroad duty to update list of contractors utilized and retain record for at least 3 years showing if a contractor was utilized in last 3 years.	746 railroads	75 updated lists	15 minutes	18.75	85.93	1,611.19
Total ⁴	1,155 railroads/contractors/training organizations/learning institutions.	164,275 responses	N/A	66,565	.....	5,727,450

Total Estimated Annual Responses:
164,275.

Total Estimated Annual Burden:
66,565.

Total Estimated Annual Burden Hour
Dollar Cost Equivalent: \$5,727,450.

FRA informs all interested parties that it may not conduct or sponsor, and a

respondent is not required to respond to, a collection of information that does

not display a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Allison Ishihara Fultz,
Chief Counsel.

[FR Doc. 2023–28380 Filed 12–22–23; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[DOT–NHTSA–2023–0033]

National Emergency Medical Services Advisory Council; Notice of Public Meeting

AGENCY: National Highway Traffic Safety Administration, U.S. Department of Transportation (DOT).

ACTION: Notice of public meeting.

SUMMARY: This notice announces a meeting of the National Emergency Medical Services Advisory Council (NEMSAC).

DATES: This meeting will be held in-person and simultaneously transmitted via virtual interface. It will be held on February 7–8, 2024, from 12 p.m. to 5 p.m. ET. Pre-registration is required to attend this meeting. Once registered, a link permitting access to the meeting will be distributed to registrants by email. If you wish to speak during the meeting, you must submit a written copy of your remarks to DOT by January 31, 2024.

ADDRESSES: General information about the Council is available on the NEMSAC internet website at www.ems.gov. The registration portal and meeting agenda will be available on the NEMSAC internet website at www.ems.gov at least one week in advance of the meeting.

FOR FURTHER INFORMATION CONTACT: Clary Mole, EMS Specialist, National Highway Traffic Safety Administration, U.S. Department of Transportation is available by phone at (202) 868–3275 or by email at Clary.Mole@dot.gov. Any committee-related requests should be sent to the person listed in this section.

SUPPLEMENTARY INFORMATION:

I. Background

The NEMSAC was established pursuant to section 31108 of the Moving Ahead for Progress in the 21st Century

(MAP–21) Act of 2012, under the Federal Advisory Committee Act. The purpose of NEMSAC is to serve as a nationally recognized council of emergency medical services (EMS) representatives to provide advice and consult with:

a. The Federal Interagency Committee on Emergency Medical Services (FICEMS) on matters relating to EMS issues; and

b. The Secretary of Transportation on matters relating to EMS issues affecting DOT.

The NEMSAC provides an important national forum for the non-Federal deliberation of national EMS issues and serves as a platform for advice on DOT's national EMS activities. NEMSAC also provides advice and recommendations to the FICEMS. NEMSAC is authorized under section 31108 of the MAP–21 Act of 2012, codified at 42 U.S.C. 300d–4.

II. Agenda

At the meeting, the agenda will cover the following topics:

- Informational sessions
- Updates on NHTSA Initiatives
- Subcommittee Reports on Advisory Statuses
- Strategic Planning

III. Public Participation

This meeting will be open to the public. We are committed to providing equal access to this meeting for all participants. Persons with disabilities in need of an accommodation should send a request to the individual in the **FOR FURTHER INFORMATION CONTACT** section of this notice no later than January 31, 2024.

A period of time will be allotted for comments from members of the public joining the meeting. Members of the public may present questions and comments to the Council using the live chat feature available during the meeting. Members of the public may also submit materials, questions, and comments in advance to the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Members of the public wishing to reserve time to speak directly to the Council during the meeting must submit a request. The request must include the name, contact information (address, phone number, and email address), and organizational affiliation of the individual wishing to address NEMSAC; it must also include a written copy of prepared remarks and must be forwarded to the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice no later than January 31, 2024.

All advance submissions will be reviewed by the Council Chairperson and Designated Federal Officer. If approved, advance submissions shall be circulated to NEMSAC representatives for review prior to the meeting. All advance submissions will become part of the official record of the meeting.

Authority: 42 U.S.C. 300d–4(b); 49 CFR 1.95(i)(4).

Issued in Washington, DC.

Gamunu Ukwattege Wijetunge,

Acting Associate Administrator, Research and Program Development.

[FR Doc. 2023–28378 Filed 12–22–23; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

[Docket No. DOT–OST–2023–0166]

Transportation Services for Individuals With Disabilities: ADA Standards for Transportation Facilities

AGENCY: Department of Transportation (DOT).

ACTION: Extension of comment period.

SUMMARY: The U.S. Department of Transportation (DOT, or Department) is extending through February 20, 2024 the period for interested persons to submit comments to its request for information on whether to amend the accessibility requirements for transportation facilities under the Americans with Disabilities Act of 1990 (ADA) currently contained in appendix A to DOT's regulations governing transportation services for individuals with disabilities.

DATES: The comment period for the notice published November 6, 2023, at 88 FR 76272, is extended. Comments should be submitted on or before February 20, 2024. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may file comments identified by docket number OST–2023–0166 by any of the following methods:

- *Federal eRulemaking Portal:* Go to <https://www.regulations.gov> and follow the online instructions for submitting comments.

- *Mail:* Docket Operations, U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. Commenters using this method of

³ Throughout the tables in this document, the dollar equivalent cost is derived from the 2022 Surface Transportation Board Full Year Wage A & B data series using the appropriate employee group to calculate the average hourly rate that includes 75 percent overhead.

⁴ Totals may not add up due to rounding.

delivery should contact Docket Services at 202–366–9826 or 202–366–9317 before delivery to ensure staff is available to receive the delivery.

- **Fax:** (202) 493–2251.

All submissions received must include the agency name and docket number OST–2023–0166. All comments received will be posted without change to www.regulations.gov, including any personal information provided. For information on DOT's compliance with the Privacy Act, please visit <https://www.transportation.gov/privacy>.

For access to the docket to read background documents or comments received, go to www.regulations.gov at any time and search for docket number OST–2023–0166.

FOR FURTHER INFORMATION CONTACT: For general questions, Holly Ceasar-Fox, DOT Office of General Counsel, (202) 366–7420 or holly.ceasarfox@dot.gov. For program questions related to transit, John Day, FTA Office of Civil Rights, (202) 366–1671 or john.day@dot.gov. For legal questions related to transit, Bonnie Graves, FTA Office of Chief Counsel, (202) 366–0944 or bonnie.graves@dot.gov. For questions related to intercity or high-speed rail, Alana Kuhn, FRA Office of Chief Counsel, (202) 493–0842 or alana.kuhn@dot.gov.

SUPPLEMENTARY INFORMATION: On November 6, 2023, the Department of Transportation (Department) published a request for information (RFI) in the **Federal Register** seeking input from the public on whether to propose amendments to the Department's standards for transportation facilities under its regulations implementing the transportation provisions of the Americans with Disabilities Act of 1990 (ADA) to improve accessibility and equity for persons with disabilities. (88 FR 76272)

The Department proposed a series of questions to guide public input to areas of interest to the Department, and invited comment on means to improve other aspects of the existing standards for buildings and facilities.

Since the publication of the RFI, commenters have requested that the Department extend the comment period given the complexity of the issues for which comment is being sought. The American Public Transportation Association (APTA) requested an extension of 30 days. The National Railroad Passenger Corporation (Amtrak) requested an extension of 45 days.

The Department has reviewed the requests for extension of the comment period, and by this notice extends the

comment period for the RFI from January 5, 2024, to February 20, 2024. The Department believes that granting this extension of the original comment period is sufficient to allow stakeholders to conduct a thorough and careful consideration of the request for information and prepare comments.

All interested parties are encouraged to provide input in response to the RFI. Submissions are strictly voluntary. Individuals or entities providing comments should state their role as well as knowledge of and experience with the ADA in a transportation environment. DOT may request additional clarifying information from any or all respondents. If a respondent does not wish to be contacted by DOT for additional information, a statement to that effect should be included in the response. All information submitted should be unclassified and should not contain proprietary information, as it will be posted to www.regulations.gov without changes.

DOT is not obligated to officially respond to the information received, but the responses will assist DOT in its consideration of whether to revise the ADA standards for transportation buildings and facilities.

Comments may be submitted and viewed at Docket No. DOT–OST–2023–0166 at <https://www.regulations.gov>.

Signed pursuant to authority delegated at 49 CFR 1.27(a) on December 19, 2023.

Subash S. Iyer,

Acting General Counsel, Department of Transportation.

[FR Doc. 2023–28332 Filed 12–22–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Submission for OMB Review; Mandatory Contractual Stay Requirements for Qualified Financial Contracts

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites comment on a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA). In accordance with the requirements of the PRA, the OCC may not conduct or

sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning the renewal of its information collection titled, “Mandatory Contractual Stay Requirements for Qualified Financial Contracts.” The OCC also is giving notice that it has sent the collection to OMB for review.

DATES: Comments must be received by January 25, 2024.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- **Email:** prainfo@occ.treas.gov.

- **Mail:** Chief Counsel's Office,

Attention: Comment Processing, Office of the Comptroller of the Currency, Attention: 1557–0339, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

- **Hand Delivery/Courier:** 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

- **Fax:** (571) 293–4835.

Instructions: You must include “OCC” as the agency name and “1557–0339” in your comment. In general, the OCC will publish comments on www.reginfo.gov without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Written comments and recommendations for the proposed information collection should also be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. You can find this information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

You may review comments and other related materials that pertain to this information collection following the close of the 30-day comment period for this notice by the method set forth in the next bullet.

- **Viewing Comments Electronically:**

Go to www.reginfo.gov. Hover over the “Information Collection Review” tab and click on “Information Collection Review” from the drop-down menu. From the “Currently under Review”

drop-down menu, select “Department of Treasury” and then click “submit.” This information collection can be located by searching OMB control number “1557–0339” or “Mandatory Contractual Stay Requirements for Qualified Financial Contracts.” Upon finding the appropriate information collection, click on the related “ICR Reference Number.” On the next screen, select “View Supporting Statement and Other Documents” and then click on the link to any comment listed at the bottom of the screen.

- For assistance in navigating www.reginfo.gov, please contact the Regulatory Information Service Center at (202) 482–7340.

FOR FURTHER INFORMATION CONTACT:

Shaquita Merritt, Clearance Officer, (202) 649–5490, Chief Counsel’s Office, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor. “Collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. The OCC asks that OMB extend its approval of the collection in this notice.

Title: Mandatory Contractual Stay Requirements for Qualified Financial Contracts.

OMB Control No.: 1557–0339.

Type of Review: Regular.

Frequency of Response: On occasion.

Affected Public: A national bank or Federal savings association (FSA) (or any subsidiary of either) that is a subsidiary of a global systemically important bank holding company that has been designated pursuant to the Federal Reserve Board’s Regulation YY, 12 CFR 252.82; a national bank or FSA (or any subsidiary of either) that is a subsidiary of a global systemically important foreign banking organization designated pursuant to the Federal Reserve Board’s Regulation YY, 12 CFR 252.87; a Federal branch or agency (or any U.S. subsidiary of a Federal branch or agency) of a global systemically important foreign banking organization designated pursuant to 12 CFR 252.87 of the Federal Reserve Board’s Regulation YY; and any national bank or FSA that is not under a bank holding company and that has more than \$700 billion in

total assets as reported on its most recent Consolidated Reports of Condition and Income (Call Report).

Abstract: Under 12 CFR part 47, a covered bank is required to ensure that a covered qualified financial contract (QFC)—(1) contains a contractual stay-and-transfer provision analogous to the statutory stay-and-transfer provision imposed under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (see 12 U.S.C. 5390(c)(9)–(10)) and in the Federal Deposit Insurance Act (see 12 U.S.C. 1821(e)(8)–(10)) and (2) limits the exercise of default rights based on the insolvency of an affiliate of the covered bank. A covered bank is defined in 12 CFR 47.3(b) as:

- A national bank or FSA that has more than \$700 billion in total assets as reported on the national bank’s or FSA’s most recent Call Report;
- A national bank or FSA that is a subsidiary of a global systemically important bank holding company that has been designated pursuant to § 252.82 of this title (Federal Reserve Board Regulation YY) (12 CFR 252.82);
- A national bank or FSA that is a subsidiary of a global systemically important foreign banking organization that has been designated pursuant to § 252.87 of this title (Federal Reserve Board Regulation YY) (12 CFR 252.87);
- A Federal branch or agency, as defined in subpart B of this chapter (governing Federal branches and agencies), of a global systemically important foreign banking organization that has been designated pursuant to § 252.87 of this title (Federal Reserve Board Regulation YY) (12 CFR 252.87); or
- A subsidiary of a covered bank, except, as defined in 12 CFR 47.3(b)(3):
 - Subsidiaries held in satisfaction of debt previously contracted in good faith,
 - Portfolio companies held under the Small Business Investment Act of 1956, and
 - Certain companies engaged in the business of making public welfare investments.

The requirements are intended to enhance the resilience and the safety and soundness of Federally chartered and licensed financial institutions by addressing concerns relating to the exercise of default rights of certain financial contracts that could interfere with the orderly resolution of certain systemically important financial firms.

Covered banks may comply either by amending the contractual provisions of their QFCs consistent with the requirements of §§ 47.4 and 47.5 within a specified period of time or by adhering to the International Swaps and

Derivatives Association 2015 Universal Resolution Stay Protocol or U.S. Protocol (ISDA Protocols). Alternatively, 12 CFR 47.6(b)(1) provides that a covered bank may request that the OCC approve as compliant with the requirements of §§ 47.4 and 47.5 provisions of one or more forms of covered QFCs, or amendments to one or more forms of covered QFCs, with enhanced creditor protection conditions.

In order for the OCC to evaluate a covered bank’s request, 12 CFR 47.6(b)(3) requires that the request include (1) an analysis of the proposal that addresses a range of factors laid out in § 47.6(d) that are intended to facilitate the OCC’s consideration of whether the proposal would be consistent with the restrictions and the main objectives of the rule; (2) a written legal opinion verifying that the covered bank’s proposed provisions or amendments would be valid and enforceable under applicable laws of the relevant jurisdictions, including, in the case of proposed amendments, the validity and enforceability of the proposal to amend the covered QFCs; and (3) any additional information relevant to the OCC’s approval that the OCC requests. The OCC will then use the information collected to determine whether the covered bank’s proposed alternative creditor protection conditions comply with the requirements of the rule and achieve its policy goals.

Estimated Burden:

Number of Respondents: 44.

Estimated Burden per Respondent: 140 hours.

Total Estimated Annual Burden: 6,160 hours.

Comments: On June 28, 2023, the OCC published a 60-day notice for this information collection (88 FR 42002). No comments were received. Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC’s estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation,

maintenance, and purchase of services to provide information.

Patrick T. Tierney,

Assistant Director, Bank Advisory, Office of the Comptroller of the Currency.

[FR Doc. 2023–28373 Filed 12–22–23; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Revision of an Approved Information Collection; Comment Request; Bank Activities and Operations; Investment in Bank Premises

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites comment on a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning a revision to its information collection titled, “Bank Activities and Operations; Investment in Bank Premises.”

DATES: Comments must be received by February 26, 2024.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email:* prainfo@occ.treas.gov.
- *Chief Counsel’s Office,*

Attention: Comment Processing, Office of the Comptroller of the Currency, Attention: 1557–0204, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

- *Fax:* (571) 293–4835.

Instructions: You must include “OCC” as the agency name and “1557–0204” in your comment. In general, the OCC will publish comments on www.reginfo.gov without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other

supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection by the method set forth in the next bullet. Following the close of this notice’s 60-day comment period, the OCC will publish a second notice with a 30-day comment period.

- *Viewing Comments Electronically:* Go to www.reginfo.gov. Hover over the “Information Collection Review” drop-down menu. Click on “Information Collection Review.” From the “Currently under Review” drop-down menu, select “Department of Treasury” and then click “submit.” This information collection can be located by searching OMB control number “1557–0204” or “Bank Activities and Operations; Investment in Bank Premises.” Upon finding the appropriate information collection, click on the related “ICR Reference Number.” On the next screen, select “View Supporting Statement and Other Documents” and then click on the link to any comment listed at the bottom of the screen.

- For assistance in navigating www.reginfo.gov, please contact the Regulatory Information Service Center at (202) 482–7340.

FOR FURTHER INFORMATION CONTACT:

Shaquita Merritt, Clearance Officer, (202) 649–5490, Chief Counsel’s Office, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from OMB for each collection of information that they conduct or sponsor.

“Collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, and/or provide information to a third party. Section 3506(c)(2)(A) of title 44 requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To

comply with this requirement, the OCC is publishing notice of the renewal of this collection.

Title: Bank Activities and Operations; Investment in Bank Premises.

OMB Control No.: 1557–0204.

Type of Review: Revision of a currently approved collection.

Affected Public: Businesses or other for-profit.

Estimated Frequency of Response: On occasion; Quarterly.

Description: The information collection requirements ensure that institutions conduct their operations in a safe and sound manner and in accordance with applicable Federal banking law and regulations. The collections of information provide needed information for examiners and offer protections for institutions. The collections are necessary for regulatory and examination purposes and for national banks to ensure their compliance with Federal law and regulations.

The information collection requirements are as follows:

- *Investment in national bank or Federal savings association premises—*A national bank or Federal savings association may invest in banking premises and other premises-related investments, loans, or indebtedness by filing an application for prior approval whenever its investment in bank premises will cause it to exceed its capital stock. The application must describe the present and proposed investment and the business reason for exceeding the limit. A bank with a composite 1 or 2 CAMELS rating entering a transaction that increases its aggregate bank premises investment to not more than 150 percent of its capital and surplus may proceed without prior OCC approval but must provide an after-the-fact notice. 12 CFR 5.37.

- *Sale of money orders at nonbanking outlets—*A national bank may designate bonded agents to sell the bank’s money orders at nonbanking outlets. The responsibility of both the bank and its agent should be defined in a written agreement setting forth the duties of both parties and providing for remuneration of the agent. 12 CFR 7.1014.

- *Tax equity finance transactions—*Written requests are required for waiver to participate in a renewable energy tax equity finance transaction exceeding the aggregate investment limit. Prior written notification to OCC is required for each renewable energy tax equity finance transaction. 12 CFR 7.1025.

- *Payment systems—*Thirty (30) days advance written notice is required before joining a payment system that

would expose the institution to open-ended liability. After-the-fact written notice must be filed within 30 days of becoming a member of a payment system that does not expose the institution to open-ended liabilities with certain representations. Both notices must include safety and soundness representations. 12 CFR 7.1026.

- *Derivatives activities*—Thirty (30) days prior written notice is required before engaging in certain derivatives hedging activities, expanding the bank's derivatives hedging activities to include a new category of underlying for derivatives transactions, engaging in certain customer-driven financial intermediation derivatives activities, and expanding the bank's customer-driven financial intermediation derivatives activities to include a new category of underlyings specified in the regulation. 12 CFR 7.1030.

- *Corporate governance procedures*—Other sources of guidance—A national bank shall designate in its bylaws the body of law selected for its corporate governance procedures. 12 CFR 7.2000(b).

- *State corporate governance*—Requests for OCC's staff position on ability of a national bank to engage in a particular State corporate governance procedure must include name, citations, discussion of similarly situated State banks, identification of Federal banking statutes and regulations, and analysis of consistency with statutes, regulations, and safety and soundness. 12 CFR 7.2000(d).

- *Honorary directors or advisory boards*—Any listing of a national bank's honorary or advisory directors must distinguish between those directors and the bank's board of directors or indicate their advisory status. 12 CFR 7.2004.

- *Indemnification of institution-affiliated parties—written agreement required for advancement*—A written agreement that an IAP will reimburse the institution for any portion of non-reimbursed indemnification that the IAP is found not entitled to before advancing funds to an IAP. 12 CFR 7.2014(c).

- *Issuing stock in certificate form*—National banks must include certain information, signatures, and seal when issuing stock in certificate form. 12 CFR 7.2016.

- *Staggered terms for national bank directors*—Any national bank may adopt bylaws that provide for staggering the terms of its directors. National banks must provide the OCC with copies of any bylaws so amended. 12 CFR 7.2024(a).

- *Size of bank board*—A national bank seeking to increase the number of

its directors must notify the OCC any time the proposed size would exceed 25 directors. 12 CFR 7.2024(c).

Estimated Number of Respondents: 1,727.

Estimated Total Annual Burden: 1,138 hours.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Patrick T. Tierney,

Assistant Director, Bank Advisory, Office of the Comptroller of the Currency.

[FR Doc. 2023–28374 Filed 12–22–23; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Action

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of persons and a vessel that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons and a vessel are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for effective date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Bradley T. Smith, Director, tel.:

202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (<https://www.treasury.gov/ofac>).

Notice of OFAC Action(s)

On December 20, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

Entities

1. BELLATRIX ENERGY LIMITED, Unit 601, 6/F of Mill 5 of the Mills, 45 Pak Tin Par Street, Hong Kong, China; Organization Established Date 09 Dec 2020; Registration Number 3000934 (Hong Kong) [RUSSIA–EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 of April 15, 2021, “Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation,” 86 FR 20249, 3 CFR, 2021 Comp., p. 542 (Apr. 15, 2021) (E.O. 14024) for operating or having operated in the marine sector of the Russian Federation economy.

2. COVART ENERGY LIMITED, 5/F, Lee Garden Three, 1 Sunning Road, Causeway Bay, Hong Kong, China; Ofis 417, Ul. Maksima Gorkogo 276, Rostov-na-Donu 344019, Russia; Organization Established Date 08 Nov 2019; Identification Number IMO 6357849; Registration Number 2890985 (Hong Kong) [RUSSIA–EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the marine sector of the Russian Federation economy.

3. SUN SHIP MANAGEMENT D LTD (a.k.a. SCF MANAGEMENT SERVICES DUBAI LTD), PO Box 507065, Unit OT 17–32, Central Park Towers, Office Tower, Dubai, United Arab Emirates; Organization Established Date 02 Aug 2012; UAE Identification 1244 (United Arab Emirates); Registration Number 11440513 (United Arab Emirates) [RUSSIA–EO14024].

Designated pursuant to section 1(a)(vii) of Executive Order 14024 for being owned or controlled by, or having acted or purported to act for or on behalf

of, directly or indirectly, the Government of the Russian Federation.

4. VOLITON DMCC (a.k.a. PETROKIM TRADING MIDDLE EAST AND ASIA DMCC), Unit No: R29–33, Reef Tower, Plot No: JLT–PH2–O1A, Jumeirah Lakes Towers, Dubai, United Arab Emirates; Organization Established Date 22 May 2018; License DMCC–476388 (United Arab Emirates); Registration Number 124420 (United Arab Emirates) [RUSSIA–EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the marine sector of the Russian Federation economy.

On December 20, 2023, OFAC also identified the following vessel as property in which a blocked person has an interest, under the relevant sanctions authority listed below:

Vessels

1. SANAR 15 (UALW) Oil Products Tanker Russia flag; Vessel Registration Identification IMO 9777670; MMSI 273375360 (vessel) [RUSSIA–EO14024] (Linked To: COVART ENERGY LIMITED).

Identified as property in which Covart Energy Limited, a person whose property and interests in property are

blocked pursuant to E.O. 14024, has an interest.

Dated: December 20, 2023.

Bradley T. Smith,

*Director, Office of Foreign Assets Control,
U.S. Department of the Treasury.*

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BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC’s Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC’s determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging

in transactions with them. OFAC is also publishing updates to the identifying information of seven persons currently included on the SDN List.

DATES: See Supplementary Information section for effective date(s).

FOR FURTHER INFORMATION CONTACT:

OFAC: Bradley T. Smith, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC’s website (<https://www.treasury.gov/ofac>).

Notice of OFAC Action(s)

A. On November 2, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

Individuals

1. TURKEN, Berk, Turkey; DOB 25 Jul 1980; POB Ankara, Turkey; nationality Turkey; citizen Turkey; Gender Male; National ID No. 13420073134 (Turkey) (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 of April 15, 2021, “Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation,” 86 FR 20249, 3 CFR, 2021 Comp., p. 542 (Apr. 15, 2021) (E.O. 14024) for operating or having operated in the technology sector of the Russian Federation economy.

2. GOLOVTCHENKO, Andrei (a.k.a. GOLOVTCHENKO, Andrey), United Arab Emirates; DOB 06 Jun 1963; nationality Sweden; Gender Male; Passport 35169175 (Sweden) expires 19 Aug 2025 (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

3. GAREVSKIKH, Anton, Switzerland; DOB 1968; nationality Russia; alt. nationality Switzerland; Gender Male (individual) [RUSSIA-EO14024] (Linked To: ADVANCED INDUSTRIAL TECHNOLOGIES GMBH).

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

4. GEORGIOU, Georgios, United Arab Emirates; DOB 10 Oct 1963; POB Nicosia, Cyprus; nationality Cyprus; Gender Male; Passport K00489150 (Cyprus) (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

5. ZHARIKOV, Dmitry Ivanovich, Russia; DOB 30 Jun 1970; POB Potsdam, Germany; nationality Russia; Gender Male; Passport 716622064 (Russia) (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy, and pursuant to section 1(a)(iii)(C) of E.O. 14024 for being or having been a leader, official, senior executive officer, or member of the board of directors of PUBLICHNOE AKTSIONERNOE OBSHCHESTVO

KOMMERCHESKI BANK RUSSKI REGIONALNY BANK, an entity whose property and interests in property are blocked pursuant to E.O. 14024.

6. VORONTSOV, Boris Gennadiyevich, Moscow, Russia; DOB 16 Feb 1978; nationality Russia; Gender Male (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(iii)(A) of E.O. 14024 for being or having been a leader, official, senior executive officer, or member of the board of directors of the Government of the Russian Federation.

7. FRAHER, Liam Eoin, United Arab Emirates; DOB 20 Jul 1972; POB Ireland; nationality Ireland; Gender Male; Passport LT4885304 (Ireland) expires 12 Jan 2032 (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

8. ISAEV, Beyshen Kasymovich, United Arab Emirates; DOB 24 Jul 1975; POB Moscow, Russia; nationality Russia; Gender Male; Passport 756769025 (Russia) (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

9. O'REILLY, Dermot, United Arab Emirates; DOB 18 Oct 1979; POB Ireland; nationality Ireland; Gender Male; Passport LT8798899 (Ireland) (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(iii)(C) of E.O. 14024 for being or having been a leader, official, senior executive officer, or member of the board of directors of ARX FINANCIAL ENGINEERING LIMITED, an entity whose property and interests in property are blocked pursuant to E.O. 14024.

10. SKUTELIS, Donats, Dubai, United Arab Emirates; DOB 23 Oct 1984; POB Riga, Latvia; nationality Latvia; Gender Male; Passport LV6145783 (Latvia) (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

11. SOLOZHENTSEVA, Natalia Vladimirovna, United Arab Emirates; DOB 11 Jul 1966; POB Moscow, Russia; nationality Russia; Gender Female; Passport 750670051 (Russia); alt. Passport K00231120 (Cyprus) (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

12. TAMANI-PHELLA, Aegli (a.k.a. TAMANI, Aegli), Cyprus; DOB 21 Jun 1978; POB Limassol, Cyprus; nationality Cyprus; Gender Female; National ID No. 788990 (Cyprus) (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(iii)(C) of E.O. 14024 for being or having been a leader,

official, senior executive officer, or member of the board of directors of SOLINVEST LTD, an entity whose property and interests in property are blocked pursuant to E.O. 14024.

13. PETROV, Artur Aleksandrovich (a.k.a. "PETROV, Arthur"), 36 Leoforos Aigyptou, Larnaca, Cyprus; Umm Haram 66 Flat 1, Larnaca, Cyprus; DOB 04 Sep 1989; POB Tselinograd, Kazakhstan; nationality Russia; Gender Male; Passport 757582978 (Russia) expires 19 Apr 2028; National ID No. 2209415706 (Russia) (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

14. DOBROV, Vadim Sergeevich, Russia; DOB 10 Jul 1963; nationality Russia; Gender Male (individual) [RUSSIA-EO14024] (Linked To: PUBLIC JOINT STOCK COMPANY RESEARCH & PRODUCTION CORPORATION ISTOK NAMED AFTER AI SHOKIN).

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

15. ERMAKOV, Maksim Yuryevich (a.k.a. ERMAKOV, Maxim), Moscow, Russia; DOB 16 Mar 1979; POB Moscow, Russia; nationality Russia; Gender Male; Tax ID No. 772200526045 (Russia) (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

16. VYALOV, Aleksandr Aleksandrovich, Russia; DOB 30 Dec 1977; nationality Russia; Gender Male (individual) [RUSSIA-EO14024] (Linked To: PUBLIC JOINT STOCK COMPANY RESEARCH & PRODUCTION CORPORATION ISTOK NAMED AFTER AI SHOKIN).

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

Entities:

1. KAMI GROUP LIMITED LIABILITY COMPANY (a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU KAMI GRUPP), Ul. Bolshaya Semenovskay D. 40, Str. 13, Floor 3, Pom. 307, Moscow 107023, Russia; Organization Established Date 06 Nov 2015; Tax ID No. 7719429480 (Russia); Government Gazette Number 14126265 (Russia); Registration Number 5157746020526 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

2. PROMYSHLENNAYA GRUPPA VEKPROM LIMITED LIABILITY COMPANY (a.k.a. PG VEKPROM LLC), Ul. Pravolineinaya D. 33, Office 310-315, Zhukovskiy 140181, Russia; Organization Established Date 14 Jun 2011; Tax ID No. 5040108151 (Russia); Government Gazette Number 92660626 (Russia); Registration Number 1115040007378 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

3. STANKI.RU LIMITED LIABILITY COMPANY (a.k.a. OBSHCHESTVO S OGRANICHENNO OTVETSTVENNOSTYU STANKI.RU), Ul. Semenovskaya B D. 40, Moscow 107023, Russia; Organization Established Date 21 Nov 2016; Tax ID No. 7719461839 (Russia); Government Gazette Number 92660626 (Russia); Registration Number 5167746348853 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

4. ZAVOD PRIBORNYKH PODSHIPNIKOV LIMITED LIABILITY COMPANY (a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU ZAVOD PRIBORNYKH PODSHIPNIKOV; a.k.a. "ZPP OOO"), Ter. 18 KM Moskovskogo Shosse D. Litera 67, Kom. 5, Samara 443072, Russia; Organization Established Date 25 Dec 2001; Tax ID No. 6367032625 (Russia); Government Gazette Number 11031529 (Russia); Registration Number 1026300769417 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

5. HAITIAN PRECISION LLC (a.k.a. KHAITIAN PRESIZHN), Proezd Novovladykinskii D. 8, Str. 5, Moscow 127106, Russia; Tax ID No. 7733375405 (Russia); Registration Number 1217700496958 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

6. JOINT STOCK COMPANY VNIIR PROGRESS, Pr-Kt I.Ya.Yakovleva D.4, Cheboksary 428024, Russia; Tax ID No. 2130094170 (Russia); Registration Number 1112130013270 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

7. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU KHAITIAN SNG (a.k.a. HAITIAN CIS LLC), Volokolamskoe Shosse Dom 116, Str.4, Moscow 125310, Russia; Tax ID No. 7733847577 (Russia); Registration Number 1137746577770 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

8. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU SFT (a.k.a. "OOO CFT"), d. 10 str. 1, ul. Kozhevnikeskaya, Moscow, Moscow 115114, Russia; Tax ID No. 7725842590 (Russia); Registration Number 5147746114786 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

9. DUBAI SEA BREEZE, PO Box 85546, Sheikh Zayed Road, Saeed Tower, Dubai, United Arab Emirates; Ibn Battuta Gate Office, 302E, Dubai, United Arab Emirates; License 525341 (United Arab Emirates); Chamber of Commerce Number 63032 (United Arab Emirates); Economic Register Number (CBLS) 10402951 (United Arab Emirates) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the transportation sector of the Russian Federation economy.

10. GLOBE TREKKERS LLC, Salah Al Din Street 131, Dubai, United Arab Emirates; PO Box 32276, M01, Saif Abdulrehman Building, Salahuddin St, Deira, Dubai, United Arab Emirates; License 224100 (United Arab Emirates); Chamber of Commerce Number 20374 (United Arab Emirates); Economic Register Number (CBLS) 10788984 (United Arab Emirates) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

11. KOBOLT TRADING FZ LLC, PO Box 10055, office AB216, Administration Building, RAKEZ Business Zone-FZ, Ras Al Khaimah, United Arab Emirates; Tax ID No. 100488566900003 (United Arab Emirates); License 5020807 (United Arab Emirates); Economic Register Number (CBLS) 11401274 (United Arab Emirates) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

12. MOBITRONIX LLC, 302, Al Sanabil, Naser Square, PO Box 41618, Dubai, United Arab Emirates; License 543800 (United Arab Emirates); Chamber of Commerce Number 76722 (United Arab Emirates); Economic Register Number (CBLS) 10813190 (United Arab Emirates) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

13. JACBAC TECHNOLOGY DIS TICARET LIMITED SIRKETI, Istanbul Tower D:4, No: 17-19 Muratpasa Mahallesi, Istanbul 34040, Turkey; Muratpasa Mh. Uluysol Cd. Istanbul Tower Blok No: 17-19 Ic Kapi: 4 Bayrampasa, Istanbul, Turkey; Organization Established Date 21 Feb 2019; Tax ID No. 4830828574 (Turkey) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

14. SMART TECHNO GROUP DIS TICARET VE LOJISTIK LIMITED SIRKETI, Iskender Pasa Mah. Simitci Sakir Sk. Ana Palas, Istanbul, Turkey; Registration Number 370525-5 (Turkey) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

15. TECHNOPARTNER TEKNOLOJI URUNLERI BILISIM SANAYI VE TICARET LIMITED SIRKETI (a.k.a. TECHNOPARTNER TEKNOLOJI URUNLERI SAN VE TIC LTD STI), Koksalan Apartmani, Sehit Adem Yavuz Sokak No: 6-28, Kizilay Mahallesi, Cankaya 06420, Turkey; Tax ID No. 8330894846 (Turkey); Registration Number

0833089484600001 (Turkey) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

16. LLC NIZHNEKAMSK MECHANICAL PLANT (a.k.a. "NMZ"), Ter. Promzona ZD. 32, Office 1, Nizhnekamsk 423570, Russia; Tax ID No. 1651091698 (Russia); Registration Number 1221600057150 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

17. BAIKOV INSTITUTE OF METALLURGY AND MATERIALS SCIENCE, RUSSIAN ACADEMY OF SCIENCES (a.k.a. "IMET RAS"), Leninskii Pr-T D. 49, Moscow 119991, Russia; Organization Established Date 24 May 1994; Tax ID No. 7736045483 (Russia); Registration Number 1027700298702 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

18. JSC KOMPOZIT (a.k.a. AO KOMPOZIT), Ul. Pionerskaya D. 4, Korolev 141074, Russia; Organization Established Date 28 Jan 2002; Tax ID No. 5018078448 (Russia); Registration Number 1025002043813 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

19. ANISOPRINT RUS LLC (a.k.a. ANIZOPRINT RUS), Pr-D Sosnovyi D. 8, Kv. 55, Krasnyi Bor 150518, Russia; Tax ID No. 7627051977 (Russia); Registration Number 1197627007588 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

20. CYBERCOM LIMITED (a.k.a. NITS KIBERNETIKI I AVTOMATIKI), Pr-D Mikhailovskii D.3, Str.13, Moscow 109029, Russia; Tax ID No. 7722551867 (Russia); Registration Number 1057747611294 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

21. JSC IQB TECHNOLOGIES (a.k.a. AKTSIONERNOE OBSHCHESTVO AIKYUB TEKHNologii), Km Mzhd Kievskoe 5-I D. 1, Str. 1,2, Kom. 87, Moscow 119950, Russia; Tax ID No. 7728361686 (Russia); Registration Number 1177746110233 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

22. LLC F2 INNOVATIONS, Ul. Akademika Koroleva D. 21D, Perm 614068, Russia; Tax ID No. 9731015129 (Russia); Registration Number 1187746926333 (Russia) [RUSSIA-

EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

23. LLC RESEARCH AND PRODUCTION ASSOCIATION 3D INTEGRATION (a.k.a. NAUCHNO PROIZVODSTVENNOE OBYEDINENIE 3D INTEGRATSIYA; a.k.a. NPO 3D INTEGRATSIYA), Sh. Dmitrovskoe D. 9, Str. 3, Pmeshch. 1/1, Moscow 127434, Russia; Tax ID No. 5001109779 (Russia); Registration Number 1165001053007 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

24. NIK LLC, Ul. Bazhenova D. 10 A, Zhukovskiy 140188, Russia; Organization Established Date 03 Mar 1997; Tax ID No. 5013031485 (Russia); Registration Number 1025001630158 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

25. AKTSIONERNOE OBSHCHESTVO NAUCHNO PROIZVODSTVENNOE OBYEDINENIE MKM (a.k.a. "AO NPO MKM"; a.k.a. "MKM LTD"), 24 Ilfata Zakirova St, Izhevsk 426072, Russia; Tax ID No. 1833001787 (Russia); Registration Number 1021801504460 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

26. BAZIS CENTER LLC, Ul. Makeeva 1-A, Office 116, Kolomna 140411, Russia; Tax ID No. 5022031587 (Russia); Registration Number 1025002741675 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

27. CSOFT DEVELOPMENT (a.k.a. AO SISOFT DEVELOPMENT), Ul. Boitsovaya D. 17, K. 3, Pomesch. 12 Komnata 3B, Moscow 107150, Russia; Tax ID No. 7722570620 (Russia); Registration Number 1067746335711 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

28. JOINT STOCK COMPANY ASCON (a.k.a. AO ASKON), Ul. Odoevskogo D.5, Lit. A, Saint Petersburg 199155, Russia; Tax ID No. 7809009923 (Russia); Registration Number 1027810229908 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

29. NAUCHNO PROIZVODSTVENNOE OBYEDINENIE PROMODEL (a.k.a. NPO PROMODEL), Ul. Peshe-Streletskaya D. 108, Office 301, Voronezh 394038, Russia; Tax ID

No. 3665082859 (Russia); Registration Number 1113668016879 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

30. QUANTORFORM (a.k.a. KVANTORFORM), Pr-D 2-I Yuzhnoportovyi D. 16, Str. 2, Floor 1, Komn. 101A, 101-108, Moscow 115088, Russia; Tax ID No. 7731199056 (Russia); Registration Number 1027739562421 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

31. LIMITED COMPANY LASER SYSTEMS (a.k.a. "LASER SYSTEMS LTD."), Ul. Svyazi D.34 Liter A, Strelna 198515, Russia; Tax ID No. 7819039902 (Russia); Registration Number 1187847309913 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

32. LLC SPC LASERS AND APPARATUS TM, Proezd 4922-I D. 4, Str. 4, Floor 1, Pomeschch. 1, Komn. 18, Zelenograd 124498, Russia; Tax ID No. 7735090927 (Russia); Registration Number 1027700257782 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

33. SYNCAM ADDITIVE CENTER (a.k.a. SINKAM), Pr-D Khlebozavodskii D. 7, Str. 9, ET 9 Pom.Xvi Kom 3B, Moscow 115230, Russia; Tax ID No. 7724412379 (Russia); Registration Number 1177746569340 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

34. AKTSIONERNOE OBSHCHESTVO OPTRON, D. 53 k. 7 kabinet 37, ul. Shcherbakovskaya, Moscow 105187, Russia; Tax ID No. 7719019691 (Russia); Registration Number 1027700006751 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

35. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU VIDIS GRUPP (a.k.a. WIDIS GRUPP), d. 4k. 1 etazh/pomeshch, 3/XI kom., 39A, ul. Sadovniki, Moscow 115487, Russia; Tax ID No. 7719019691 (Russia); Registration Number 1107746791910 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

36. ZAKRYTOE AKTSIONERNOE OBSHCHESTVO INSTRUMENT (a.k.a. "INSTRUMENT AO"), d. 16 pom, 2, ul. Krasnodarskaya, Moscow 109382, Russia; Tax ID No. 5261020674

(Russia); Registration Number 1025202395140 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

37. BEIJING JIAHEHENGDE TECHNOLOGY COMPANY LIMITED (a.k.a. JIAHE HENGDE TECHNOLOGY COMPANY; a.k.a. JIAHEHENGDE TECHNOLOGY COMPANY LIMITED), Beijing, China; Organization Established Date 06 Dec 2005; Unified Social Credit Code (USCC) 9111010878321053X0 (China) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(vi)(B) of E.O. 14024 for having materially assisted, sponsored, or provided financial, material, or technological support for LLC LASER COMPONENTS, a person whose property and interests in property are blocked pursuant to E.O. 14024.

38. BEIJING SHANGYIXIANDA TECHNOLOGY COMPANY LIMITED, Beijing, China; Organization Established Date 13 Dec 2012; Unified Social Credit Code (USCC) 91110108059235795A (China) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(vi)(B) of E.O. 14024 for having materially assisted, sponsored, or provided financial, material, or technological support for LLC LASER COMPONENTS, a person whose property and interests in property are blocked pursuant to E.O. 14024.

39. LIMITED LIABILITY COMPANY CLEAN GASES PLUS (a.k.a. LIMITED LIABILITY COMPANY CHISTIE GAZY PLYUS; a.k.a. "CHISTYE GAZY PLYUS"), Ul. Tvardovskogo D. 3, Str. 2, Office 1, Novosibirsk 630068, Russia; Tax ID No. 5409002937 (Russia); Registration Number 1165476068504 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

40. RESEARCH AND PRODUCTION COMPANY HORST (a.k.a. "FIRMA KHORST"), Ul. Akademika Yangelya D 14, Korp 2, KV 257, Moscow 117534, Russia; Tax ID No. 7726038952 (Russia); Registration Number 1037739344004 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

41. CENTRAL INSTITUTE OF AVIATION MOTORS (a.k.a. "CIAM" (Cyrillic: "ЦИАМ")), ul. Aviamotornaya, D. 2, Moscow 111116, Russia; Tax ID No. 7722497881 (Russia); Registration Number 1217700087285 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the aerospace sector of the Russian Federation economy.

42. BALTIYSKAYA PROMISHLENNAYA KOMPANIYA (a.k.a. AO BALTIYSKAYA PROMYSHLENNAYA KOMPANIYA), Malaya Bukharestskaya str., 5, building 2/39, St. Petersburg 192288, Russia; Prospekt Kultury, 49A, St. Petersburg 195276, Russia; 3rd Ribatskii lane, 3 production, St. Petersburg 192177, Russia; Tax ID No. 7801200558 (Russia); Registration Number 1037800041773 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

43. OOO ABSOLYUT SHAR, ul. Priozernaya, d. 4, floor 2, office 1, Chelyabinsk 454046, Russia; Tax ID No. 7449138543 (Russia); Registration Number 1197456012258 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

44. OOO INSTRUMENTALNO PODSHIPNIKOVAYA KOMPANIYA, sh. Metallurgov, d. 33P, pom. 6, Chelyabinsk, Russia; Sverdlovskii Trakt, 14 3 floor, Chelyabinsk 454036, Russia; Tax ID No. 7453188579 (Russia); Registration Number 1077453020556 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

45. OOO TD PODSHIPNIK TRADE (a.k.a. "PODTRADE"), ul. Marshala Rybalko, d. 2, bldg. 6, floor 3, pom. 1, kom. 20, office 19, Moscow 123060, Russia; Ostapovsky proezd, d. 3, bldg. 6/7, office 211, Moscow 109316, Russia; Tax ID No. 7724850252 (Russia); Registration Number 1127747042830 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

46. OOO TD SIBIRSKIY PODSHIPNIK, ul. Dzerzhinskovo, 31-9, Vologda 160033, Russia; ul. Gagarina, d. 84A, Vologda 160028, Russia; Tax ID No. 5403180330 (Russia); Registration Number 1055403103865 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

47. ZAVOD PODSHIPNIKOVYKH UZLOV (a.k.a. "OOO ZPU"), ul. Priozernaya, d. 4, Chelyabinsk 454046, Russia; ul. Elkina 112, floor 2, office 218B, Chelyabinsk, Russia; Tax ID No. 7449117247 (Russia); Registration Number 1147449000643 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

48. AKTSIONERNOE OBSHCHESTVO LAMA, Proezd Garazhnyi D.13, Cheboksary 428003, Russia; Tax ID No. 2127017009 (Russia); Registration Number 1022100972442 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

49. NT SERVICE, Ul. Berzina D. 6, Bilibino 689450, Russia; Tax ID No. 8703011233 (Russia); Registration Number 1208700000266 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the transportation sector of the Russian Federation economy.

50. PROMKOMPLEKT SINTEZ, Ul. Orshanskaya D. 5, Pom. 2, Moscow 121552, Russia; Nab. Presnenskaya D. 10, Moscow 123112, Russia; Tax ID No. 7729754778 (Russia); Registration Number 1137746986519 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the construction sector of the Russian Federation economy.

51. ZAVOD KOMPLEKSNYE DOROZHNYE MASHINY (a.k.a. OOO ZAVOD KDM), Ul. Udarnikov D.1, Smolensk 214012, Russia; Tax ID No. 6730053398 (Russia); Registration Number 1046758319090 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

52. BSB GRUP INTERNET VE YAPAY ZEKA TEKNOLOJILERI ANONIM SIRKETI (a.k.a. BSB GROUP), Alacaath Mah. 4841 Cad. A1 Blok No: 3a Ic Kapi No: 122, Cankaya, Ankara, Turkey; Organization Established Date 2021; Registration Number 0187141297700001 (Turkey) [RUSSIA-EO14024] (Linked To: TURKEN, Berk).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, Berk TURKEN, a person whose property and interests in property are blocked pursuant to E.O. 14024.

53. TURKEN DIJITAL MATBAA TEKNOLOJILERI BILGISAYAR BILISIM KIRTASIYE FOTOGRAFCILIK SANAYI VE DIS TICARET LIMITED SIRKETI, Konutkent Mahallesi 3028 Cad. B Block Apt. No: 16 B/31, Cankaya, Ankara, Turkey; Organization Established Date 2007; Registration Number 0877025089900016 (Turkey) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

54. CHINA TALY AVIATION TECHNOLOGIES CORP. (Chinese Simplified: 中国天利航空科技实业公司) (a.k.a. CHINA TIANLI AVIATION TECHNOLOGY INDUSTRIAL COMPANY), No.7, Da Cheng Road, Feng Tai District, Beijing 100071, China; Organization Established Date 24 Oct 1988; Target Type State-Owned Enterprise; Unified Social Credit Code (USCC) 911100001000090614 (China) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the aerospace sector of the Russian Federation economy.

55. AZINT ELEKTRONIK MAKINA GIDA URUNLERI TEKSTIL NAKLIYAT ITHALAT IHRACAT SANAYI TICARET LIMITED, Veysel Karani Mah. Kanuni Cad E Blok D.23, Sancaktepe, Istanbul, Turkey; Tax ID No. 1270919292 (Turkey); Istanbul Chamber of Comm. No. 232409-5 (Turkey) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the

electronics sector of the Russian Federation economy.

56. BASILEVS LOJISTIK MEDIKAL TARIM TICARET VE SANAYI LIMITED SIRKETI, Nordic Life Sitesi C Blok, No: 26C/35, Tosmur Mahallesi, Antalya 07400, Turkey; Organization Established Date 22 Jun 2020; Tax ID No. 1431371354 (Turkey) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

57. BOSPHORUS GATE DIS TICARET LIMITED SIRKETI (a.k.a. BOSPHORUS GATE DIS TICARET LIMSTED SIRKETI), Merkez Neighborhood, Palazoghlu St., Han Riyet Block No: 6, Door No: 3, Sisli, Istanbul, Turkey; Istanbul Chamber of Comm. No. 389161-5 (Turkey) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

58. KUZHEY LOGISTICS TASIMACILIK ITHALAT IHRACAT VE DIS TICARET LIMITED SIRKETI (a.k.a. KUZHEY LOGISTICS TASIMACILIK ITHALAT IHRACAT SANAYI VE DIS TICARET LIMITED SIRKETI; a.k.a. KUZHEY LOJISTIK), Oruchreish Neighborhood, Giyimkent Street, B228, Block 58A, Esenler, Istanbul, Turkey; Tax ID No. 6010494326 (Turkey); Identification Number 601049432600001 (Turkey); Istanbul Chamber of Comm. No. 93964-5 (Turkey) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the transportation sector of the Russian Federation economy.

59. ALCOTECH INTERNATIONAL TRADING DMCC (a.k.a. ALCOTECH IT DMCC), 2968, DMCC Business Centre, Level No 1, Jewellery & Gemplex 3, Dubai, United Arab Emirates; Organization Established Date 07 May 2017; Economic Register Number (CBLS) 11467659 (United Arab Emirates) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

60. FLAVIC FZE, P.O. Box: 513830, Sharjah Airport International Free Zone, Sharjah, United Arab Emirates; M2 Warehouse, Sharjah Airport International Free Zone, Sharjah, United Arab Emirates; Organization Established Date 31 Jan 2016; Identification Number 0051909189 (United Arab Emirates) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

61. HYPEREL FZCO, 342001, Unit 101 Ifza, Dubai Silicon Oasis, DDP Building A2, Dubai, United Arab Emirates; Organization Established Date 28 Mar 2022; Economic Register Number (CBLS) 11868929 (United Arab Emirates) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

62. ADVANCED INDUSTRIAL TECHNOLOGIES GMBH, Dorfstrasse 28, Niederhasli 8155, Switzerland; Tax ID No. 296534195 (Switzerland); Company Number CHE-296.534.195 (Switzerland); Registration Number CH-020.4.068.609-3 (Switzerland) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

63. COMMERCIAL BANK ABSOLUT BANK PAO, Tsvetnoy Boulevard, 18, Moscow 127051, Russia; SWIFT/BIC ABSLRUMM; Website www.absolutbank.ru; alt. Website www.absolutbank.com; Target Type Financial Institution; Tax ID No. 7736046991 (Russia); Identification Number PDR8ZD.00000.LE.643 (Russia); Legal Entity Number 253400YGMAHH3EQH3G74; Registration Number 1027700024560 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

64. JOINT STOCK COMPANY RUSSIAN STANDARD BANK, Ul. Tkatskaya 36, Moscow 105187, Russia; SWIFT/BIC RSJSRUMM; Website www.rsb.ru; alt. Website russianstandard.com; Organization Established Date 01 Jan 1992; Target Type Financial Institution; Tax ID No. 7707056547 (Russia); Legal Entity Number 549300F4ZEG3A9JDGZ08; Registration Number 1027739210630 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

65. ALFA MACHINERY GROUP (a.k.a. KOMPANIYA AMG), ul. Kuskovskaya d. 20A, pom. XIIA komn. 114, Moscow 111141, Russia; Tax ID No. 7720821959 (Russia); Registration Number 1147746889531 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

66. LIMITED LIABILITY COMPANY I MACHINE TECHNOLOGY (a.k.a. AI MASHIN TEKHNODZHI), Pr-kt Mira d. 95, pomesch. 80, Moscow 129085, Russia; Tax ID No. 7718835552 (Russia); Registration Number 1117746078262 (Russia) [RUSSIA-EO14024]. Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

67. LLC ETALON PRO, ul. Lenina d. 146, office 203, Izhevsk 426075, Russia; Tax ID No. 1841055627 (Russia); Registration Number 1151832011561 (Russia) [RUSSIA-EO14024]. Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

68. STANKIM, ul. 10 Let Oktyabrya d. 60, office 308 D, Izhevsk 426065, Russia; ul. Svobody d. 173, kv. 905, Izhevsk 426011, Russia; Tax ID No. 1831097040 (Russia); Registration Number 1041800261579 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the

manufacturing sector of the Russian Federation economy.

69. GAZPROMNEFT CATALYTIC SYSTEM LIMITED LIABILITY COMPANY, Pr-Kt Gubkina D. 1, Omsk 644040, Russia; Organization Established Date 16 Sep 2016; Tax ID No. 5501177142 (Russia); Registration Number 1165543085542 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

70. GAZPROMNEFT SCIENCE AND TECHNOLOGY CENTRE LIMITED LIABILITY COMPANY (a.k.a. GAZPROMNEFT NTC; a.k.a. GAZPROMNEFT STC LLC), Ul. Galernaya D. 5A, Saint Petersburg 190000, Russia; Organization Established Date 15 Nov 2007; Tax ID No. 7838395487 (Russia); Registration Number 1079847089673 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

71. IRS LASER TECHNOLOGY LIMITED LIABILITY COMPANY (a.k.a. IRS LAZER TEKHNODZHI; a.k.a. "IRS LASER TECH"), Ul. Komsomolskaya D. 19, Berezovskiy 623704, Russia; Organization Established Date 22 Jun 2017; Tax ID No. 6678083936 (Russia); Registration Number 1176658062129 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

72. SCIENTIFIC AND TECHNICAL CENTER PRIVODNAYA TEHNIKA LIMITED LIABILITY COMPANY (a.k.a. LTD NTC PRIVODNAYA TEKHNIKA; a.k.a. NAUCHNO TEKHNICHESKII TSENTR PRIVODNAYA TEKHNIKA; a.k.a. NTTS PRIVODNAYA TEKHNIKA), Ul. 40-Letiya Oktyabrya D. 19, Chelyabinsk 454007, Russia; Organization Established Date 28 Feb 2000; Tax ID No. 7453060480 (Russia); Registration Number 1027402926891 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

73. HOME CREDIT & FINANCE BANK LIMITED LIABILITY COMPANY (a.k.a. HOME CREDIT & FINANCE BANK LLC; a.k.a. HOME CREDIT AND FINANCE BANK LIMITED LIABILITY COMPANY; a.k.a. HOME CREDIT AND FINANCE BANK LLC; a.k.a. "HCF BANK"), Build. 1 Pravdi Str., 8, Moscow 125040, Russia; SWIFT/BIC HCFBRUMM; Target Type Financial Institution; Tax ID No. 7735057951 (Russia); Identification Number ADQ9VQ.00005.ME.643 (Russia); Legal Entity Number 2534007XNRQ38CWWDP74; Registration Number 1027700280937 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

74. JOINT STOCK COMPANY POST BANK (a.k.a. POCHTA BANK; a.k.a. POST BANK JSC), Preobrazhenskaya ploshchad, 8, Moscow 107061, Russia; SWIFT/BIC POSBRUMM;

Target Type Financial Institution; Tax ID No. 3232005484 (Russia); Identification Number DN2Q9U.99999.SL.643 (Russia); Legal Entity Number 2534001VHLQ1L34HNW95; Registration Number 1023200000010 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

75. JOINT STOCK COMPANY RUSSIAN REGIONAL DEVELOPMENT BANK (a.k.a. VSEROSSIYSKY BANK RAZVITIYA REGIONOV; a.k.a. "VBRR"), 65/1 Sushevsky Val, Moscow 129594, Russia; SWIFT/BIC RRDBRUMM; Target Type Financial Institution; Tax ID No. 7736153344 (Russia); Identification Number XC6QLI.00000.LE.643 (Russia); Legal Entity Number 549300FIJ3MYU0VX6Y72; Registration Number 1027739186914 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

76. BLANC BANK LIMITED LIABILITY COMPANY (a.k.a. BLANC BANK LLC; f.k.a. INVESTMENT BANK VESTA LIMITED LIABILITY COMPANY), d. 9 str. 1, shosse Varshavskoe, Moscow 117105, Russia; SWIFT/BIC VSTARUMM; Target Type Financial Institution; Tax ID No. 6027006032 (Russia); Identification Number ABTHPP.00007.ME.643 (Russia); Legal Entity Number 253400CW8F4L53HWU734; Registration Number 1026000001796 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

77. AKTSIONERNOE OBSHCHESTVO IPK FINVAL (a.k.a. IPK FINVAL AO), 2-I Yuzhnoportovyi PR D. 14/22, Moscow 115088, Russia; Organization Established Date 28 Oct 2014; Tax ID No. 7722860417 (Russia); Government Gazette Number 26121066 (Russia); Registration Number 5147746279621 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

78. AKTSIONERNOE OBSHCHESTVO MASHINOSTROITELNYI K HOLDING, Ul. Simskaya D. 1, Of. 401, Yekaterinburg 620024, Russia; Organization Established Date 01 Sep 2004; Tax ID No. 6673116225 (Russia); Government Gazette Number 74366691 (Russia); Registration Number 1046604803475 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

79. JOINT STOCK COMPANY OMUTNINSK METALLURGICAL PLANT (a.k.a. AKTSIONERNOE OBSHCHESTVO OMUTNINSKI METALLURGICHESKI ZAVOD; a.k.a. "OMZ AO"), 2 Rus Kokovikhina, Omutninsk 612740, Russia; Organization Established Date 04 Sep 2002; Tax ID No. 4322000130 (Russia); Government Gazette Number 00186329 (Russia); Registration Number 1024300962971 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the

manufacturing sector of the Russian Federation economy.

80. PROMOIL LIMITED LIABILITY COMPANY (a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU PROMOIL), Ul. Khokhryakova D. 9, Perm 614068, Russia; Organization Established Date 20 May 2004; Tax ID No. 5904112229 (Russia); Government Gazette Number 72205682 (Russia); Registration Number 1045900509885 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

81. AKTSIONERNOE OBSHCHESTVO RUST 95 (a.k.a. "AO RUST 95"), Ul. Severnaya D. 12, Kolpino 196655, Russia; Tax ID No. 7445024175 (Russia); Registration Number 1027700457443 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

82. LIMITED LIABILITY COMPANY TEK KOM MANUFACTURING (a.k.a. TEK KOM MANUFACTURING LLC), Nab. Presnenskaya D. 10, BTS Bashnya Na Naberezhnoi, Blok S, 52 Floor, Moscow 123317, Russia; Str. 1V, Pom.2.11, Promzona Borovlevo 2 179540, Russia; Tax ID No. 7703444041 (Russia); Registration Number 1187746275870 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

83. URALDOMNOREMONT EKATERINBURG, Ul. Kolmogorova D. 3, Yekaterinburg 620034, Russia; Ul. Kultury D.8, Kom. 36, Yekaterinburg 620143, Russia; Tax ID No. 6658206185 (Russia); Registration Number 1056602684830 (Russia) [RUSSIA-EO14024]. Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

84. ZAKRYTOE AKTSIONERNOE OBSHCHESTVO MAGNITOGORSKII ZAVOD PROKATNYKH VALKOV (a.k.a. CJSC MAGNITOGORSK MILL ROLLS PLANT; a.k.a. "CJSC MMRP"; a.k.a. "ZAO MZPV"), Ul. Kirova D. 93, Pom. 8, Magnitogorsk 455002, Russia; Ul. Kirova D. 93, ZD. Administrativno Bytovoe Tsekh Izlozhnits, Pom. 8, Magnitogorsk 455000, Russia; Tax ID No. 7445024175 (Russia); Registration Number 1047420504493 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

85. BALTPROMSERVIS, Ul. Kaspiiskaya D. 22, K. 1 Str. 3, Pomesheh. I Kom. 6-12, Moscow 115304, Russia; Tax ID No. 5048057212 (Russia); Registration Number 1205000079954 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

86. PUBLIC JOINT STOCK COMPANY SASTA, Ul. Pushkina D.21, Sasovo 391434, Russia; Tax ID No. 6232000019 (Russia); Registration Number 1026201399608 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

87. STAN LLC, Ul. Sushchevskii Val D. 18, Moscow 127018, Russia; Organization Established Date 17 Dec 2009; Tax ID No. 7703712332 (Russia); Registration Number 1097746813010 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

88. STANKOMASHSTROY (a.k.a. STANKOMASHSTROI), Ul. Germana Titova D. 9, Penza 440600, Russia; Tax ID No. 5835103100 (Russia); Registration Number 1135835003370 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

89. STANKOPROM OOO, Pr-kt Leninskii D. 160, Office 133, Voronezh 394033, Russia; Tax ID No. 3661073772 (Russia); Registration Number 1163668096327 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

90. SISTEMA PUBLIC JOINT STOCK FINANCIAL CORPORATION (a.k.a. PUBLICHNOE AKTSIONERNOE OBSHESTVO AKTSIONERNAYA FINANSOVAYA SISTEMA), 10, Leontievskiy Pereulok, Moscow 125009, Russia; 13/1 Mokhovaya St, Moscow 125009, Russia; Tax ID No. 7703104630 (Russia); Identification Number V65SV5.99999.SL.643 (Russia); Legal Entity Number 213800JSZ2UUK4QQK694; Registration Number 1027700003891 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services and technology sectors of the Russian Federation economy.

91. EAST WEST UNITED BANK SA, Villa Foch, 10 Blvd Joseph II, Luxembourg L-1840, Luxembourg; SWIFT/BIC EWUBLULL; Target Type Financial Institution; V.A.T. Number LU 12023787 (Luxembourg); Identification Number 4R1MXL.99999.SL.442 (Luxembourg); Legal Entity Number 549300S54HVJT5564C37; Registration Number B 12049 (Luxembourg) [RUSSIA-EO14024] (Linked To: SISTEMA PUBLIC JOINT STOCK FINANCIAL CORPORATION).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, SISTEMA PUBLIC JOINT STOCK FINANCIAL CORPORATION, a person whose property and interests in property are blocked pursuant to E.O. 14024.

92. SISTEMA ASIA PTE LTD, 77 Ayer Rajah Crescent #03-32, Singapore 139954, Singapore; Organization Established Date 01 Aug 2012; Registration Number 201218988Z (Singapore) [RUSSIA-EO14024] (Linked To: SISTEMA PUBLIC JOINT STOCK FINANCIAL CORPORATION).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, SISTEMA PUBLIC JOINT STOCK FINANCIAL CORPORATION, a person whose property and interests in property are blocked pursuant to E.O. 14024.

93. SISTEMA SMARTTEKH, Per. Bolshoi Balkanskii D. 20, Str. 1, Et 2 Pom.24, Moscow 129090, Russia; Tax ID No. 7708374327 (Russia); Registration Number 1207700073459 (Russia) [RUSSIA-EO14024] (Linked To: SISTEMA PUBLIC JOINT STOCK FINANCIAL CORPORATION).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, SISTEMA PUBLIC JOINT STOCK FINANCIAL CORPORATION, a person whose property and interests in property are blocked pursuant to E.O. 14024.

94. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU INNOVATSIONNYE TEKHNologii I MATERIALY (a.k.a. ITEKMA OOO; a.k.a. "ITECMA"), D. 2 K. 121, Ul. Zavodskaya (Klimovsk Mkr.), Podolsk 142181, Russia; Tax ID No. 5074050189 (Russia); Registration Number 1145074004723 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

95. PUBLIC JOINT STOCK COMPANY SAINT PETERSBURG EXCHANGE (a.k.a. PUBLIC JOINT STOCK COMPANY SPB EXCHANGE; a.k.a. "PJSC SPB EXCHANGE"), Ul. Dolgorukovskaya D. 38, Korp. 1, Moscow 127006, Russia; SWIFT/BIC XPETRU21; Website spbexchange.ru; Organization Established Date 21 Jan 2009; Target Type Financial Institution; Tax ID No. 7801268965 (Russia); Government Gazette Number 45573578 (Russia); Legal Entity Number 253400T8G8SXRUHTL526; Registration Number 1097800000440 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

96. JOINT STOCK COMPANY COMPANY SCAN (a.k.a. CLOSED JOINT STOCK COMPANY COMPANY SCAN; a.k.a. "JSC COMPANY SCAN"), Ul. Druzhby D.10B, Moscow 119330, Russia; Organization Established Date 01 Apr 2010; Tax ID No. 7729652960 (Russia); Government Gazette Number 65369101 (Russia); Registration Number 1107746244330 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

97. JOINT STOCK COMPANY COMPANY SCAN (a.k.a. CLOSED JOINT STOCK COMPANY SCAN; a.k.a. "JSC SCAN"), Ul. Druzhby D.10 B, Moscow 119330, Russia; Organization Established Date 04 Apr 2007; Tax ID No. 7729571904 (Russia); Government Gazette

Number 80712625 (Russia); Registration Number 5077746460380 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

98. ASTRAFTEROS TECHNOKOSMOS LTD, Aigypou 36, Larnaca 6030, Cyprus; Organization Established Date 19 Nov 2021; Registration Number HE428104 (Cyprus) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

99. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU ELEKTROKOM VPK (a.k.a. LIMITED LIABILITY COMPANY ELECTROCOM VPK; a.k.a. "ELECTROCOM SPB"), Pr-Kt Prosveshcheniya D. 99, Lit. A, Pomeschch., 180N Office 1, Saint Petersburg 195299, Russia; Tax ID No. 7840062534 (Russia); Registration Number 1177847049049 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

100. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU FAM GRUPP (a.k.a. "FAM GROUP LIMITED LIABILITY COMPANY"), Malyi Prospekt V. O D.57, K. 3, Saint Petersburg 199178, Russia; Tax ID No. 7801494474 (Russia); Registration Number 1097847123065 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

101. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU FAM KHOLDING (a.k.a. "FAM HOLDING LIMITED LIABILITY COMPANY"), Malyi Prospekt V.O., 57 K3 - 12N Pomeshchenie 1 Floor, Saint Petersburg 199178, Russia; Tax ID No. 7801454070 (Russia); Registration Number 1079847091411 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

102. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU FAM ROBOTIKS (a.k.a. "FAM ROBOTICS LLC"; a.k.a. "LIMITED LIABILITY COMPANY FAMROBOTIKS"), Pr-Kt Malyi V.O. D. 57, K. 3 Lit. A, Pom.12N, Saint Petersburg 199178, Russia; Tax ID No. 7801431788 (Russia); Registration Number 1077847102695 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

103. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU RUSAVTOMATIKA (a.k.a. "LIMITED LIABILITY COMPANY RUSAVTOMATIKA"), Pr-Kt Malyi V.O. D. 57, K. 3 Lit. A, Pomeschch. 12N, Saint Petersburg 199178, Russia; Tax ID No. 7801325780 (Russia); Registration Number 1167847501161 (Russia) [RUSSIA-

EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

104. PUBLICHNOE AKTSIONERNOE OBSHCHESTVO KOMMERCHESKI BANK RUSSKI REGIONALNY BANK (a.k.a. RUSREGIONBANK JSC), d. 1 str. 1 pom. 2N/9, km. Kaluzhskoe Shosse 24-1, Moscow 108814, Russia; 9 Floor, Kaluzhskaya ploshchad 1, korpus 1, Moscow 119049, Russia; SWIFT/BIC RRBKRU21; Website www.rrbank.ru; Target Type Financial Institution; Tax ID No. 6017000271 (Russia); Identification Number QGIJHO.99999.SL.643 (Russia); Registration Number 1026000001983 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

105. 365 DAYS FREIGHT SERVICES FZCO, Warehouse No. F24, Dubai Airport Free Zone, PO Box 99083, Dubai, United Arab Emirates; License 1303 (United Arab Emirates); Economic Register Number (CBLS) 11436269 (United Arab Emirates) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

106. ALFA LOGISTICS FZCO, Office 4EA 324, Dubai Airport Free Zone, Dubai, United Arab Emirates; License 05136 (United Arab Emirates); Economic Register Number (CBLS) 12075023 (United Arab Emirates) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

107. SM DISTRIBUTION INC FZCO, Dubai Silicon Oasis, DDP Building A1, Unit 001, Dubai, United Arab Emirates; License 17750 (United Arab Emirates); Economic Register Number (CBLS) 11902588 (United Arab Emirates) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

108. TCH CONSULTANCY, 119 Al Bateen Street, Al Bateen, Abu Dhabi, United Arab Emirates; License CN-3929524 (United Arab Emirates); Economic Register Number (CBLS) 11632699 (United Arab Emirates) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy.

109. ARX FINANCIAL ENGINEERING LIMITED, 17-35 Central Park Towers, DIFC, Dubai, United Arab Emirates; Organization Established Date 10 Mar 2021; Registration Number 11649186 (United Arab Emirates) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

110. SOLINVEST LTD, Abu Dhabi, United Arab Emirates; Organization Established Date 09 Sep 2022; Target Type Private Company [RUSSIA-EO14024].

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Natalia Vladimirovna SOLOZHENTSEVA, a person whose property and interests in property are blocked pursuant to E.O. 14024.

111. TADAWUL FINANCIAL SERVICES SAOC (a.k.a. TADAWUL CAPITAL), Muscat, Oman; Organization Established Date 11 Mar 2008; Registration Number 1041405 (Oman) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

112. ENGINEERING CENTER OF INNOVATIVE TECHNOLOGIES (a.k.a. TSENTR INNOVATSIONNYKH TEKHNologii I INZHINIRINGA; a.k.a. "ECITECH"), 2 Zavodskoy proezd, office 632, Fryazino 141190, Russia; Tax ID No. 5050127869 (Russia); Registration Number 1165050054949 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

113. FREGAT OOO, ul. Moiseenko, d. 24, lit. A, pom. 1-N, office 404-404A, Saint Petersburg 191144, Russia; Tax ID No. 7814533642 (Russia); Registration Number 1127847215891 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

114. OOO TK FLY BRIDGE (a.k.a. OBSHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU TEKHNologicheskaya kompaniya FLAI BRIDZH), Pr-Kt Patsaeva, d. 7, k. 1, office 28/1, Dolgoprudnyy 141707, Russia; Tax ID No. 5008054416 (Russia); Registration Number 1105047006954 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

- B. On November 2, 2023, OFAC updated the entry on the SDN List for the following person, whose property and interests in property subject to U.S. jurisdiction continues to be blocked under the relevant sanctions authority listed below.

1. AVEN, Petr Olegovich (Cyrillic: АВЕН, Пётр Олегович) (a.k.a. AVEN, Peter Olegovich; a.k.a. AVEN, Pjotr; a.k.a. AVEN, Pyotr; a.k.a. AVENS, Pjotrs), Surrey, United Kingdom; Moscow, Russia; Latvia; DOB 16 Mar 1955; POB Moscow, Russia; nationality Russia; alt. nationality Latvia; alt. nationality Luxembourg; Gender Male; Tax ID No. 770400328495 (Russia) (individual) [RUSSIA-EO14024].

-to-

AVEN, Petr Olegovich (Cyrillic: АВЕН, Пётр Олегович) (a.k.a. AVEN, Peter

Olegovich; a.k.a. AVEN, Pjotr; a.k.a. AVEN, Pyotr; a.k.a. AVENS, Pjotrs), Surrey, United Kingdom; Moscow, Russia; Latvia; DOB 16 Mar 1955; POB Moscow, Russia; nationality Russia; alt. nationality Latvia; Gender Male; Tax ID No. 770400328495 (Russia) (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

- C. On November 16, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

Entities:

1. GALLION NAVIGATION INCORPORATED, 80 Broad Street, Monrovia, Liberia; Unit 27610-001, Building A1, IFZA Business Park, Dubai Silicon Oasis, Dubai, United Arab Emirates; Identification Number IMO 4112088 [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the marine sector of the Russian Federation economy.

2. KAZAN SHIPPING INCORPORATED, Office OT 17-32, 17th Floor, Office Tower, Central Park Towers, Dubai, United Arab Emirates; Unit 27610-001, Building A1, IFZA Business Park, DDP, Dubai Silicon Oasis, Dubai, United Arab Emirates; Identification Number IMO 1142781 [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the marine sector of the Russian Federation economy.

3. PROGRESS SHIPPING COMPANY LIMITED, 80 Broad Street, Monrovia, Liberia; Unit 27610-001, Building A1, IFZA Business Park, Dubai Silicon Oasis, Dubai, United Arab Emirates; Identification Number IMO 4075276 [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the marine sector of the Russian Federation economy.

Vessels:

1. NS CENTURY (A8IJ8) Crude Oil Tanker Liberia flag; Vessel Registration Identification IMO 9306782; MMSI 636012853 (vessel) [RUSSIA-EO14024] (Linked To: GALLION NAVIGATION INCORPORATED).
2. KAZAN (A8CE6) Crude Oil Tanker Liberia flag; Vessel Registration Identification IMO 9258002; MMSI 636011916 (vessel) [RUSSIA-EO14024] (Linked To: KAZAN SHIPPING INCORPORATED).

3. LIGOVSKY PROSPECT (A8AP5) Crude Oil Tanker Liberia flag; Vessel Registration Identification IMO 9256066; MMSI 636011641 (vessel) [RUSSIA-EO14024] (Linked To: PROGRESS SHIPPING COMPANY LIMITED).

D. On November 29, 2023, OFAC updated the entry on the SDN List for the following persons and entities, whose property and interests in property subject to US. Jurisdiction continues to be blocked under the relevant sanctions authority listed below.

1. ZHARIKOV, Dmitry Ivanovich, Russia; DOB 30 Jun 1970; POB Potsdam, Germany; nationality Russia; Gender Male; Passport 716622064 (Russia) (individual) [RUSSIA-EO14024].

-to-

ZHARIKOV, Dmitry Ivanovich, Russia; DOB 30 Jun 1970; POB Potsdam, Germany; nationality Russia; Gender Male; Passport 716622064 (Russia) (individual) [RUSSIA-EO14024] (Linked To: PUBLICHNOE AKTSIONERNOE OBSHCHESTVO KOMMERCHESKI BANK RUSSKI REGIONALNY BANK).

Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the financial services sector of the Russian Federation economy, and pursuant to section 1(a)(iii)(C) of E.O. 14024 for being or having been a leader, official, senior executive officer, or member of the board of directors of PUBLICHNOE AKTSIONERNOE OBSHCHESTVO KOMMERCHESKI BANK RUSSKI REGIONALNY BANK, an entity whose property and interests in property are blocked pursuant to E.O. 14024.

2. O'REILLY, Dermot, United Arab Emirates; DOB 18 Oct 1979; POB Ireland; nationality Ireland; Gender Male; Passport LT8798899 (Ireland) (individual) [RUSSIA-EO14024].

-to-

O'REILLY, Dermot, United Arab Emirates; DOB 18 Oct 1979; POB Ireland; nationality Ireland; Gender Male; Passport LT8798899 (Ireland) (individual) [RUSSIA-EO14024] (Linked To: ARX FINANCIAL ENGINEERING LIMITED).

Designated pursuant to section 1(a)(iii)(C) of E.O. 14024 for being or having been a leader, official, senior executive officer, or member of the board of directors of ARX FINANCIAL ENGINEERING LIMITED, an entity whose property and interests in property are blocked pursuant to E.O. 14024.

3. TAMANI-PHELLA, Aegli (a.k.a. TAMANI, Aegli), Cyprus; DOB 21 Jun 1978; POB Limassol, Cyprus; nationality Cyprus; Gender Female; National ID No. 788990 (Cyprus) (individual) [RUSSIA-EO14024].

-to-

TAMANI-PHELLA, Aegli (a.k.a. TAMANI, Aegli), Cyprus; DOB 21 Jun 1978; POB Limassol, Cyprus; nationality Cyprus; Gender Female; National ID No. 788990 (Cyprus) (individual) [RUSSIA-EO14024] (Linked To: SOLINVEST LTD).

Designated pursuant to section 1(a)(iii)(C) of E.O. 14024 for being or having been a leader, official, senior executive officer, or member of the board of directors of SOLINVEST LTD, an entity whose property and interests in property are blocked

pursuant to E.O. 14024.

4. SOLINVEST LTD, Abu Dhabi, United Arab Emirates; Organization Established Date 09 Sep 2022; Target Type Private Company [RUSSIA-EO14024].

-to-

SOLINVEST LTD, Abu Dhabi, United Arab Emirates; Organization Established Date 09 Sep 2022; Target Type Private Company [RUSSIA-EO14024] (Linked To: SOLOZHENTSEVA, Natalia Vladimirovna).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Natalia Vladimirovna SOLOZHENTSEVA, a person whose property and interests in property are blocked pursuant to E.O. 14024.

5. BEIJING JIAHEHENGDE TECHNOLOGY COMPANY LIMITED (a.k.a. JIAHE HENGDE TECHNOLOGY COMPANY; a.k.a. JIAHEHENGDE TECHNOLOGY COMPANY LIMITED), Beijing, China; Organization Established Date 06 Dec 2005; Unified Social Credit Code (USCC) 9111010878321053X0 (China) [RUSSIA-EO14024].

-to-

BEIJING JIAHEHENGDE TECHNOLOGY COMPANY LIMITED (a.k.a. JIAHE HENGDE TECHNOLOGY COMPANY; a.k.a. JIAHEHENGDE TECHNOLOGY COMPANY LIMITED), Beijing, China; Organization Established Date 06 Dec 2005; Unified Social Credit Code (USCC) 9111010878321053X0 (China) [RUSSIA-EO14024] (Linked To: LLC LASER COMPONENTS).

Designated pursuant to section 1(a)(vi)(B) of E.O. 14024 for having materially assisted, sponsored, or provided financial, material, or technological support for LLC LASER COMPONENTS, a person whose property and interests in property are blocked pursuant to E.O. 14024.

6. BEIJING SHANGYIXIANDA TECHNOLOGY COMPANY LIMITED, Beijing, China; Organization Established Date 13 Dec 2012; Unified Social Credit Code (USCC) 91110108059235795A (China) [RUSSIA-EO14024].

-to-

BEIJING SHANGYIXIANDA TECHNOLOGY COMPANY LIMITED, Beijing, China; Organization Established Date 13 Dec 2012; Unified Social Credit Code (USCC) 91110108059235795A (China) [RUSSIA-EO14024] (Linked To: LLC LASER COMPONENTS).

Designated pursuant to section 1(a)(vi)(B) of E.O. 14024 for having materially assisted, sponsored, or provided financial, material, or technological support for LLC LASER COMPONENTS, a person whose property and interests in property are blocked pursuant to E.O. 14024.

Bradley T. Smith,
Director, Office of Foreign Assests Control,
U.S. Department of the Treasury.
 [FR Doc. 2023-28360 Filed 12-22-23; 8:45 am]
BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; U.S. Business Income Tax Return

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (PRA). The IRS is soliciting comments on forms used by business entity taxpayers.

DATES: Comments should be received on or before January 25, 2024 to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Melody Braswell by emailing PRA@treasury.gov, calling (202) 622-1035, or viewing the entire information collection request at www.reginfo.gov.

SUPPLEMENTARY INFORMATION:

Internal Revenue Service (IRS)
Title: U.S. Business Income Tax Return.

OMB Number: 1545-0123.
Form Numbers: Forms 1065, 1066, 1120, 1120-C, 1120-F, 1120-H, 1120-ND, 1120-S, 1120-SF, 1120-FSC, 1120-L, 1120-PC, 1120-REIT, 1120-RIC, 1120-POL and all attachments to these forms.

Abstract: These forms are used by businesses to report their income tax liability.

Current Actions: There have been changes in regulatory guidance related to various forms approved under this approval package during the past year.

There have been additions and removals of forms included in this approval package. It is anticipated that these changes will have an impact on the overall burden and cost estimates requested for this approval package. This approval package is being submitted for renewal purposes.

Type of Review: Revision of currently approved collections.

Affected Public: Corporations, Partnerships and Pass-Through Entities.

Estimated Number of Respondents: 13,300,000.

Estimated Time (Hours): 920,000,000.

Estimated Time per Respondent (Hours): 35.

Total Monetized Time:

\$54,743,000,000.

Total Estimated Out-of-Pocket Costs:

\$66,717,000,000.

Total Monetized Burden:

\$121,460,000,000.

Note: Total Monetized Burden = Total Out-of-Pocket Costs + Total Annual Monetized Time.

Note: Amounts below are estimates for Fiscal Year (FY) 2024. Reported time and cost burdens are national averages and do not necessarily reflect a “typical case.” Most taxpayers experience lower than average burden, with taxpayer burden varying considerably by taxpayer type. Detail may not add due to rounding.

FISCAL YEAR (FY) 2024 BURDEN TOTAL ESTIMATES FOR FORM 1120 AND 1065 SERIES AND ASSOCIATED FORMS, SCHEDULES, AND REGULATIONS FY2024

	FY23	Program change due to adjustment	Program change due to new legislation	Program change due to agency	FY24
Number of Taxpayers	12,500,000	800,000	0	0	13,300,000
Burden in Hours	952,000,000	(32,000,000)	1,000,000	0	920,000,000
Burden in Monetized Hours	52,736,000,000	1,950,000,000	57,000,000	0	54,743,000,000
Out-of-Pocket Costs	\$59,487,000,000	\$7,165,000,000	\$65,000,000	0	\$66,717,000,000
Total Monetized Burden*	\$112,223,000,000	\$9,115,000,000	\$122,000,000	0	\$121,460,000,000

Source: IRS:RAAS:KDA (12-1-23)

* Total monetized burden = Monetized hours + Out-of-pocket costs Note: Reported time and cost burdens are national averages and do not necessarily reflect a “typical” case. Most taxpayers experience lower than average burden, with taxpayer burden varying considerably by taxpayer type. Detail may not add due to rounding.

TABLE 1—TAXPAYER BURDEN FOR ENTITIES TAXED AS PARTNERSHIPS

Primary form filed or type of taxpayer	Total number of returns (in millions)	Average time (hrs.)	Average out-of-pocket cost	Average monetized burden
All Partnerships	5.3	60	\$5,000	\$8,700
Small	4.9	50	3,200	5,200
Large*	0.4	200	27,800	50,800

Forms 1065, 1066, and all attachments

TABLE 2—TAXPAYER BURDEN FOR ENTITIES TAXED AS TAXABLE CORPORATIONS

Primary form filed or type of taxpayer	Total number of returns (in millions)	Average time (hrs.)	Average out-of-pocket cost	Average monetized burden
All Taxable Corporations	2.1	105	\$6,700	\$14,900
Small	2.0	55	3,600	6,200
Large *	0.1	830	53,800	149,000

Forms 1120, 1120-C, 1120-F, 1120-H, 1120-ND, 1120-SF, 1120-FSC, 1120-L, 1120-PC, 1120-POL and all attachments

TABLE 3—TAXPAYER BURDEN FOR ENTITIES TAXED AS PASS-THROUGH CORPORATIONS

Primary form filed or type of taxpayer	Total number of returns (in millions)	Average time (hrs.)	Average out-of-pocket cost	Average monetized burden
All Pass-through Corporations	5.8	65	\$4,400	\$7,500
Small	5.7	60	3,800	6,400
Large *	0.1	295	37,700	71,800

Forms 1120-REIT, 1120-RIC, 1120-S and all attachments

Source: IRS: RAAS:KDA:TBL (12-1-23)

* A large business is defined as one having end-of-year assets greater than \$10 million. Total filers counts may not equal the burden total estimates table due to rounding.

FY2024

Total positive income	Average time (hrs.)	Average out-of-pocket costs	Average monetized burden

Table 1A—Taxpayer Burden for Taxable Corporations on Form 1120

1. < 100k	42	1,330	1,987
2. 100k to 1mil	63	4,323	6,916
3. 1mil to 10mil	113	12,359	24,573
4. 10mil to 100mil	546	43,055	105,788
5. > 100mil	4,398	220,425	725,848

Table 2A—Taxpayer Burden for Pass-through Corporations on Form 1120S

1. < 100k	52	1,564	2,338
2. 100k to 1mil	59	3,814	6,015
3. 1mil to 10mil	79	9,595	17,797
4. 10mil to 100mil	287	36,698	69,606
5. > 100mil	1,200	148,905	286,533

Table 3A—Taxpayer Burden for Partnerships on Form 1065

1. < 100k	45	1,627	2,530
2. 100k to 1mil	56	4,601	7,501
3. 1mil to 10mil	93	12,960	23,196
4. 10mil to 100mil	327	46,258	83,805
5. > 100mil	1,447	190,307	356,260

Source: IRS: RAAS: KDA:TBL (12-1-23).

Detail may not add to total due to rounding.

Authority: 44 U.S.C. 3501 *et seq.*

Melody Braswell,

Treasury PRA Clearance Officer.

[FR Doc. 2023-28446 Filed 12-22-23; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF VETERANS AFFAIRS

Cooperative Studies Scientific Evaluation Committee; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. ch. 10, that the Cooperative Studies Scientific Evaluation Committee (CSSEC) will hold a meeting on January 18, 2024, via Zoom from 1-4 p.m. EST.

The Committee provides expert advice on VA cooperative studies, multi-site clinical research activities and policies related to conducting and managing these efforts. The session will be open to the public for the first 30 minutes of the meeting (approximately) for the discussion of administrative matters and the general status of the program. The remaining portion of the meeting will be closed to the public for the Committee's review, discussion and evaluation of research and development applications.

During the closed portion of the meeting, the Committee's discussions and recommendations will address the qualifications of the personnel conducting the studies; staff and consultant critiques of research proposals and similar documents; and the medical records of study subjects, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Additionally, premature disclosure of research information to the public could significantly obstruct implementation of

approved research activities. As provided by Public Law 92–463 subsection 10(d), and amended by Public Law 94–409, closing the Committee meeting is in accordance with 5 U.S.C. 552b(c)(6) and (9)(B).

The Committee will accept oral comments from the public for the open portion of the meeting. Members of the public who wish to attend the open teleconference should call 872–701–0185, conference ID 456 277 285#. Those who plan to attend or would like additional information should contact

David Burnaska, Program Manager, Cooperative Studies Program (14RD), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, at *David.Burnaska@va.gov*. Those wishing to submit written comments may send them to Mr. Burnaska at the same address and email.

Dated: December 20, 2023.

LaTonya L. Small,

Federal Advisory Committee Management Officer.

[FR Doc. 2023–28377 Filed 12–22–23; 8:45 am]

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Part II

Department of Defense

32 CFR Part 170

Cybersecurity Maturity Model Certification (CMMC) Program and Program
Guidance; Proposed Rule and Notice

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 170

[Docket ID: DoD–2023–OS–0063]

RIN 0790–AL49

Cybersecurity Maturity Model Certification (CMMC) Program

AGENCY: Office of the Department of Defense Chief Information Officer (CIO), Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to establish requirements for a comprehensive and scalable assessment mechanism to ensure defense contractors and subcontractors have, as part of the Cybersecurity Maturity Model Certification (CMMC) Program, implemented required security measures to expand application of existing security requirements for Federal Contract Information (FCI) and add new Controlled Unclassified Information (CUI) security requirements for certain priority programs. DoD currently requires covered defense contractors and subcontractors to implement the security protections set forth in the National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171 Rev 2 to provide adequate security for sensitive unclassified DoD information that is processed, stored, or transmitted on contractor information systems and to document their implementation status, including any plans of action for any NIST SP 800–171 Rev 2 requirement not yet implemented, in a System Security Plan (SSP). The CMMC Program provides the Department the mechanism needed to verify that a defense contractor or subcontractor has implemented the security requirements at each CMMC Level and is maintaining that status across the contract period of performance, as required.

DATES: Comments must be received by February 26, 2024.

ADDRESSES: You may use the following methods to submit comments on:

- the proposed rule, identified by docket number DoD–2023–OS–0063 and/or Regulatory Identifier Number (RIN) 0790–AL49 and title
 - the guidance in the Appendix documents, identified by docket number DoD–2023–OS–0096 and title
 - the information collection requirements, identified by docket number DoD–2023–OS–0097 and title
- Comment Submission Methods include:

• *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.

• *Mail:* Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name and docket number or RIN for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at <https://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Diane Knight, Office of the DoD CIO, 202–770–9100.

SUPPLEMENTARY INFORMATION:**History of the Program**

The CMMC Program is designed to verify protection of sensitive unclassified information shared between the Department and its contractors and subcontractors or generated by the contractors and subcontractors. CMMC increases assurance that contractors and subcontractors are meeting cybersecurity requirements applying to acquisition programs and systems processing CUI.

The beginnings of CMMC start with the November 2010, Executive Order (E.O.) 13556,¹ *Controlled Unclassified Information*. The intent of this Order was to “establish an open and uniform program for managing [unclassified] information that requires safeguarding or dissemination controls.” Prior to this E.O., more than 100 different markings for this information existed across the executive branch. This ad hoc, agency-specific approach created inefficiency and confusion, led to a patchwork system that failed to adequately safeguard information requiring protection, and unnecessarily restricted information-sharing.

As a result, the E.O. established the CUI Program to standardize the way the executive branch handles information requiring safeguarding or dissemination controls (excluding information that is classified under E.O. 13526, *Classified National Security Information*² or any predecessor or successor order; or the

Atomic Energy Act of 1954,³ as amended).

In 2019, DoD announced the development of CMMC in order to move away from a “self-attestation” model of security. It was first conceived by the Office of the Under Secretary of Defense for Acquisition and Sustainment (OUSD(A&S)) to secure the Defense Industrial Base (DIB) sector against evolving cybersecurity threats. In September 2020, DoD published an interim rule, *Defense Federal Acquisition Regulation Supplement (DFARS): Assessing Contractor Implementation of Cybersecurity Requirements (DFARS Case 2019–D041)*,⁴ which implemented the DoD’s initial vision for the CMMC Program (“CMMC 1.0”) and outlined the basic features of the framework (tiered model of practices and processes, required assessments, and implementation through contracts) to protect FCI and CUI. The interim rule became effective on 30 November 2020, establishing a five-year phase-in period. In response to approximately 750 public comments on the CMMC 1.0 Program, in March 2021, the Department initiated an internal review of CMMC’s implementation.

In November 2021, the Department announced “CMMC 2.0,” an updated program structure and requirements designed to achieve the primary goals of the internal review:

- Safeguard sensitive information to enable and protect the warfighter
- Enforce DIB cybersecurity standards to meet evolving threats
- Ensure accountability while minimizing barriers to compliance with DoD requirements
- Perpetuate a collaborative culture of cybersecurity and cyber resilience
- Maintain public trust through high professional and ethical standards

The CMMC 2.0 Program has three key features:

• *Tiered Model:* CMMC requires companies entrusted with national security information to implement cybersecurity standards at progressively advanced levels, depending on the type and sensitivity of the information. The program also describes the process for requiring protection of information flowed down to subcontractors.

• *Assessment Requirement:* CMMC assessments allow the Department to verify the implementation of clear cybersecurity standards.

³ <https://www.govinfo.gov/link/uscode/42/2011>, et seq.

⁴ <https://www.federalregister.gov/documents/2020/09/29/2020-21123/defense-federal-acquisition-regulation-supplement-assessing-contractor-implementation-of>.

¹ <https://www.federalregister.gov/citation/75-FR-68675> (November 4, 2010).

² <https://www.federalregister.gov/citation/75-FR-707> (December 29, 2009).

• *Implementation through Contracts:* Once CMMC is fully implemented, certain DoD contractors handling sensitive unclassified DoD information will be required to achieve a particular CMMC level as a condition of contract award.

CMMC 2.0 Overview as Proposed by This Rule

Current Requirements for Defense Contractors and Subcontractors

Currently, federal contracts (including defense contracts) involving the transfer of FCI to a non-Government organization follow the requirements specified in FAR clause 52.204–21, *Basic Safeguarding of Covered Contractor Information Systems*.⁵ FAR clause 52.204–21 requires compliance with 15 security requirements, FAR 52.204–21(b)(1), items (i) through (xv). These requirements are elementary for any entity wishing to achieve basic cybersecurity.

Defense contracts involving the transfer of CUI to a non-Government organization may include applicable requirements of DFARS clause 252.204–7012, *Safeguarding Covered Defense Information and Cyber Incident Reporting*.⁶ The DFARS clause 252.204–7012 requires defense contractors to provide adequate security on all covered contractor information systems by implementing the 110 security requirements specified in the National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171, *Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations*. The DFARS clause 252.204–7012 includes additional requirements; for example, defense contractors must meet Federal Risk and Authorization Management Program (FedRAMP) standards by confirming that their Cloud Service Providers (CSP) have achieved the FedRAMP Baseline Moderate or Equivalent standard. The DFARS clause 252.204–7012 also requires defense contractors to flow down all the requirements to their subcontractors.

Currently, to comply with DFARS clause 252.204–7012, contractors are required to develop a System Security Plan (SSP)⁷ detailing the policies and

procedures their organization has in place to comply with NIST SP 800–171. The SSP serves as a foundational document for the required NIST SP 800–171 self-assessment. Self-assessment scores, as referenced in DFARS clause 252.204–7020, must be submitted in the DoD's Supplier Performance Risk System (SPRS).⁸ The highest score is 110, meaning all 110 NIST SP 800–171 security requirements have been fully implemented. If a contractor's SPRS score is less than 110, indicating security gaps exist, then the contractor must create a Plan of Action (POA)⁹ identifying security tasks that still need to be accomplished. In essence, an SSP describes the cybersecurity plan the contractor has in place to protect CUI. The SSP needs to go through each NIST SP 800–171 security requirement and explain how the requirement is implemented, monitored, and enforced. This can be through policy, technology, or a combination of both. The SSP will also outline the roles and responsibilities of security personnel to ensure that CUI is appropriately protected.

In November 2020, the DoD released its DFARS Interim Rule, the *Defense Federal Acquisition Regulation Supplement: Assessing Contractor Implementation of Cybersecurity Requirements*.¹⁰ The goal of this rule was to increase compliance with its cybersecurity regulations and improve security throughout the DIB. This rule introduced three new clauses—DFARS clause 252.204–7019, DFARS clause 252.204–7020, and DFARS clause 252.204–7021.

• DFARS clause 252.204–7019 strengthens DFARS clause 252.204–7012 by requiring contractors to conduct a NIST SP 800–171 self-assessment according to NIST SP 800–171 DoD Assessment Methodology.¹¹ Self-assessment scores must be reported to the Department via SPRS. SPRS scores must be submitted by the time of contract award and not be more than three years old.

• DFARS clause 252.204–7020 notifies contractors that DoD reserves the right to conduct a higher-level assessment of contractors' cybersecurity

compliance, and contractors must give DoD assessors full access to their facilities, systems, and personnel. Further, DFARS clause 252.204–7020 strengthens DFARS clause 252.204–7012's flow down requirements by holding contractors responsible for confirming their subcontractors have SPRS scores on file prior to awarding them contracts.

• DFARS clause 252.204–7021 paves the way for rollout of the CMMC Program. Once CMMC is implemented, DFARS clause 252.204–7021 requires contractors to achieve the CMMC level required in the DoD contract. DFARS clause 252.204–7021 also stipulates contractors will be responsible for flowing down the CMMC requirements to their subcontractors.

Additional Requirements for Defense Contractors and Subcontractors Discussed in This Proposed Rule

A key difference between the DFARS 252.204–7012 and CMMC Level 2 requirements is that compliance with NIST SP 800–171 under DFARS 252.204–7012 has not been consistently verified. Under CMMC, compliance will be checked by independent third-party assessors certified by DoD.

When this 32 CFR CMMC Program rule is finalized, solicitations for defense contracts involving the processing, storing, or transmitting of FCI or CUI on a non-Federal system will, in most cases, have a CMMC level and assessment type requirement a contractor must meet to be eligible for a contract award. CMMC-related contractual processes will be addressed in DoD's DFARS Case 2019–D041, *Assessing Contractor Implementation of Cybersecurity Requirements*, which will be proposed by the Department in a separate rulemaking.¹²

This rule establishes the CMMC Program and defines requirements both in general and based on the specific CMMC level and assessment type required by the contract and applicable subcontract. Each CMMC level and assessment type is described.

1. Contracts or Subcontracts With a CMMC Level 1 Self-Assessment Requirement

a. Security Requirements

For CMMC Level 1, contractors and applicable subcontractors are already required to implement the 15 security requirements currently required by the FAR clause 52.204–21.

¹² Information on the Department's agenda for all rulemakings can be found at <https://www.reginfo.gov/public/do/eAgendaMain> and then selecting the relevant agency and rule name.

⁸ <https://www.sprcs.csd.disa.mil/> under OMB control number 0750–0004.

⁹ The POA requirement described under DFARS clause 252.204–7012 is different from a Plan of Action and Milestones (POA&M) requirement in CMMC as POAs do not require milestones.

¹⁰ <https://www.federalregister.gov/documents/2020/09/29/2020-21123/defense-federal-acquisition-regulation-supplement-assessing-contractor-implementation-of>.

¹¹ <https://www.acq.osd.mil/asda/dpc/cp/cyber/docs/safeguarding/NIST-SP-800-171-Assessment-Methodology-Version-1.2.1-6.24.2020.pdf>

⁵ <https://www.acquisition.gov/far/52.204-21>.

⁶ <https://www.acquisition.gov/dfars/252.204-7012-safeguarding-covered-defense-information-and-cyber-incident-reporting>.

⁷ Required since November 2016, NIST SP 800–171 security requirement 3.12.4 states organizations must “develop, document, and periodically update system security plans that describe system boundaries, system environments of operation, how security requirements are implemented, and the relationships with or connections to other systems.”

b. Assessment Requirements (New)

At Level 1, CMMC adds a requirement for contractors and applicable subcontractors to verify through self-assessment that all applicable security requirements outlined in FAR clause 52.204–21 have been implemented. This self-assessment must be performed annually and the results must be entered electronically in the Supplier Performance Risk System (SPRS) (see § 170.15 for details on CMMC Level 1 Self-Assessment requirements and procedures, and specifically § 170.15(a)(1)(i) for the information collection).

c. Affirmation Requirements (New)

A senior official from the prime contractor and any applicable subcontractor will be required to annually affirm continuing compliance with the specified security requirements. Affirmations are entered electronically in SPRS (see § 170.22 for details on Affirmation requirements and procedures).

2. Contracts or Subcontracts With a CMMC Level 2 Self-Assessment Requirement

a. Security Requirements

For CMMC Level 2, contractors and applicable subcontractors are already required to implement the 110 security requirements currently required by the DFARS clause 252.204–7012, which are aligned with NIST SP 800–171 Rev 2.

b. Assessment Requirements (New)

At Level 2, CMMC adds a requirement for contractors and applicable subcontractors to verify that all applicable security requirements outlined in NIST SP 800–171 Rev 2 and required via DFARS clause 252.204–7012 have been implemented. As determined by DoD, program contracts will include either a CMMC Level 2 Self-Assessment requirement or a CMMC Level 2 Certification Assessment requirement to verify a contractor's implementation of the CMMC Level 2 security requirements. Selected requirements are allowed to have a Plan of Action and Milestones (POA&M) that must be closed out within 180 days of the assessment (see § 170.21 for details on POA&M). This self-assessment must be performed on a triennial basis and the results must be entered electronically in SPRS (see § 170.16 for details on CMMC Level 2 Self-Assessment requirements and procedures, and specifically § 170.16(a)(1)(i) for information collection).

c. Affirmation Requirements (New)

A senior official from the prime contractor and any applicable subcontractor will be required to affirm continuing compliance with the specified security requirements after every assessment, including POA&M closeout, and annually thereafter. Affirmations are entered electronically in SPRS (see § 170.22 for details on Affirmation requirements and procedures).

3. Contracts or Subcontracts With a CMMC Level 2 Certification Assessment Requirement

a. Security Requirements

For CMMC Level 2 Certification Assessment, contractors and applicable subcontractors are already required to implement the security requirements currently required by the DFARS clause 252.204–7012, which are aligned with NIST SP 800–171 Rev 2.

b. Assessment Requirements (New)

At Level 2, CMMC adds a requirement for contractors and applicable subcontractors to verify that all applicable security requirements outlined in NIST SP 800–171 Rev 2 and required via DFARS clause 252.204–7012 have been implemented. As determined by DoD, program contracts will include either a CMMC Level 2 Self-Assessment requirement or a CMMC Level 2 Certification Assessment requirement to verify a contractor's implementation of the CMMC Level 2 security requirements. Selected requirements are allowed to have a POA&M that must be closed out within 180 days of the assessment (see § 170.21 for details on POA&M). The final certification will have up to a three-year duration. The third-party assessment organization will enter the assessment information electronically into the CMMC Enterprise Mission Assurance Support Service (eMASS), that will electronically transmit the assessment results into SPRS (see § 170.17 for details on CMMC Level 2 Certification Assessment requirements and procedures, and specifically § 170.17(a)(1)(i) for information collection).

c. Affirmation Requirements (New)

A senior official from the prime contractor and any applicable subcontractor will be required to affirm continuing compliance with the specified security requirements after every assessment, including POA&M closeout, and annually thereafter. Affirmations are entered electronically in SPRS (see § 170.22 for details on

Affirmation requirements, procedures, and information collection).

4. Contracts or Subcontracts With a CMMC Level 3 Certification Assessment Requirement

a. Security Requirements (New)

For CMMC Level 3, when CMMC becomes a final rule, contractors and applicable subcontractors will be required to implement the 24 selected security requirements from NIST SP 800–172, as detailed in table 1 to § 170.14(c)(4). CMMC Level 2 is a prerequisite for CMMC Level 3.

b. Assessment Requirements (New)

At Level 3, CMMC adds a requirement for contractors and applicable subcontractors to verify through DoD assessment and receive certification that all applicable CMMC Level 3 security requirements from NIST SP 800–172 have been implemented. Selected requirements are allowed to have a POA&M that must be closed out within 180 days of the assessment (see § 170.21 for details on POA&Ms). The final certification will be valid for up to three years. The DoD assessor will enter the assessment information electronically into the eMASS, that will electronically transmit the assessment results into SPRS (see § 170.18 for details on CMMC Level 3 Certification Assessment requirements and procedures, and specifically § 170.18(a)(1)(i) for information collection).

c. Affirmation Requirements (New)

A senior official from the prime contractor and any applicable subcontractor will be required to affirm continuing compliance with the specified security requirements after every assessment, including POA&M closeout, and annually thereafter. Affirmations are entered electronically in SPRS (see § 170.22 for details on Affirmation requirements, procedures, and information collection).

Summary of Provisions Contained in This Rule

Section 170.1 Purpose

Section 170.1 addresses the purpose of this rule. It describes the CMMC Program and establishes policy for requiring the protection of FCI and CUI that is processed, stored, or transmitted on defense contractor and subcontractor information systems. The security standards utilized in the CMMC Program are from the FAR clause 52.204–21; NIST SP 800–171 Rev 2; and selected requirements from the NIST SP 800–172, as applicable. The purpose of the CMMC Program is for contractors

and subcontractors to demonstrate that FCI and CUI being processed, stored, or transmitted is adequately safeguarded through the methodology provided in the rule.

Section 170.2 Incorporation by Reference

Section 170.2 addresses the standards and guidelines that are incorporated by reference. The Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51 approves any materials that are incorporated by reference (as detailed in the Office of the Federal Register's Incorporation By Reference (IBR) Handbook, June 2023). Materials that are incorporated by reference in this rule are reasonably available. Information on how to access the documents is detailed in § 170.2. Materials that are incorporated by reference in this rule are from the NIST (see § 170.2(a)), the Committee on National Security Systems (see § 170.2(b)), and the International Organization for Standardization/International Electrotechnical Commission (ISO/IEC) (see § 170.2(c)) which may require payment of a fee.

Note: While the ISO/IEC standards are issued jointly, they are available from the ISO Secretariat (see § 170.2(c)).

The American National Standards Institute (ANSI) IBR Portal provides access to standards that have been incorporated by reference in the U.S. Code of Federal Regulations at <https://ibr.ansi.org>. These standards incorporated by the U.S. government in rulemakings are offered at no cost in "read only" format and are presented for online reading. There are no print or download options. All users will be required to install the FileOpen plug-in and accept an online end user license agreement prior to accessing any standards.

The materials that are incorporated by reference are summarized below.

(a) Federal Information Processing Standard (FIPS) Publication (PUB) 200 (FIPS PUB 200), titled "Minimum Security Requirements for Federal Information and Information Systems" is the second of two security standards mandated by the Federal Information Security Management Act (FISMA). It specifies minimum security requirements for information and information systems supporting the executive agencies of the federal government and a risk-based process for selecting the security controls necessary to satisfy the minimum security requirements. This standard promotes the development, implementation, and operation of more secure information

systems within the federal government by establishing minimum levels of due diligence for information security and facilitating a more consistent, comparable, and repeatable approach for selecting and specifying security controls for information systems that meet minimum security requirements. This document is incorporated by reference as a source for definitions.

(b) FIPS PUB 201–3, titled "Personal Identity Verification (PIV) of Federal Employees and Contractors" establishes a standard for a PIV system that meets the control and security objectives of Homeland Security Presidential Directive-12. It is based on secure and reliable forms of identity credentials issued by the Federal Government to its employees and contractors. These credentials are used by mechanisms that authenticate individuals who require access to federally controlled facilities, information systems, and applications. This Standard addresses requirements for initial identity proofing, infrastructure to support interoperability of identity credentials, and accreditation of organizations and processes issuing PIV credentials. This document is incorporated by reference as a source for definitions.

(c) NIST SP 800–37, revision 2, titled "Risk Management Framework for Information Systems and Organizations: A System Life Cycle Approach for Security and Privacy" describes the Risk Management Framework (RMF) and provides guidelines for applying the RMF to information systems and organizations. The RMF provides a disciplined, structured, and flexible process for managing security and privacy risk that includes information security categorization; control selection, implementation, and assessment; system and common control authorizations; and continuous monitoring. The RMF includes activities to prepare organizations to execute the framework at appropriate risk management levels. The RMF also promotes near real-time risk management and ongoing information system and common control authorization through the implementation of continuous monitoring processes; provides senior leaders and executives with the necessary information to make efficient, cost-effective, risk management decisions about the systems supporting their missions and business functions; and incorporates security and privacy into the system development life cycle. Executing the RMF tasks links essential risk management processes at the system level to risk management processes at the organization level. In

addition, it establishes responsibility and accountability for the controls implemented within an organization's information systems and inherited by those systems. This document is incorporated by reference as a source for definitions.

(d) NIST SP 800–39, titled "Managing Information Security Risk: Organization, Mission, and Information System View" provides guidance for an integrated, organization-wide program for managing information security risk to organizational operations (*i.e.*, mission, functions, image, and reputation), organizational assets, individuals, other organizations, and the Nation resulting from the operation and use of federal information systems. SP 800–39 provides a structured, yet flexible approach for managing risk that is intentionally broad-based, with the specific details of assessing, responding to, and monitoring risk on an ongoing basis provided by other supporting NIST security standards and guidelines. The guidance provided in this publication is not intended to replace or subsume other risk-related activities, programs, processes, or approaches that organizations have implemented or intend to implement addressing areas of risk management covered by other legislation, directives, policies, programmatic initiatives, or mission/business requirements. Rather, the risk management guidance described herein is complementary to and should be used as part of a more comprehensive Enterprise Risk Management (ERM) program. This document is incorporated by reference as a source for definitions.

(e) NIST SP 800–53, revision 5, titled "Security and Privacy Controls for Information Systems and Organizations" provides a catalog of security and privacy controls for information systems and organizations to protect organizational operations and assets, individuals, other organizations, and the Nation from a diverse set of threats and risks, including hostile attacks, human errors, natural disasters, structural failures, foreign intelligence entities, and privacy risks. The controls are flexible and customizable and implemented as part of an organization-wide process to manage risk. The controls address diverse requirements derived from mission and business needs, laws, executive orders, directives, regulations, policies, standards, and guidelines. Finally, the consolidated control catalog addresses security and privacy from a functionality perspective (*i.e.*, the strength of functions and mechanisms provided by the controls) and from an assurance perspective (*i.e.*, the measure

of confidence in the security or privacy capability provided by the controls). Addressing functionality and assurance helps to ensure that information technology products and the systems that rely on those products are sufficiently trustworthy. This document is incorporated by reference as a source for definitions.

(f) NIST SP 800–82, revision 2, titled “Guide to Industrial Control Systems (ICS) Security” provides guidance on how to secure ICS, including Supervisory Control and Data Acquisition (SCADA) systems, Distributed Control Systems (DCS), and other control system configurations such as Programmable Logic Controllers (PLC), while addressing their unique performance, reliability, and safety requirements. The document provides an overview of ICS and typical system topologies, identifies typical threats and vulnerabilities to these systems, and provides recommended security countermeasures to mitigate the associated risks. This document is incorporated by reference as a source for definitions.

(g) NIST SP 800–115, titled “Technical Guide to Information Security Testing and Assessment” assists organizations in planning and conducting technical information security tests and examinations, analyzing findings, and developing mitigation strategies. The guide provides practical recommendations for designing, implementing, and maintaining technical information security test and examination processes and procedures. These can be used for several purposes, such as finding vulnerabilities in a system or network and verifying compliance with a policy or other requirements. The guide is not intended to present a comprehensive information security testing and examination program but rather an overview of key elements of technical security testing and examination, with an emphasis on specific technical techniques, the benefits and limitations of each, and recommendations for their use. This document is incorporated by reference as a source for definitions.

(h) NIST SP 800–160, Volume 2, revision 1, titled “Developing Cyber-Resilient Systems: A Systems Security Engineering Approach” focuses on cyber resiliency engineering—an emerging specialty systems engineering discipline applied in conjunction with systems security engineering and resiliency engineering to develop survivable, trustworthy secure systems. Cyber resiliency engineering intends to architect, design, develop, implement, maintain, and sustain the

trustworthiness of systems with the capability to anticipate, withstand, recover from, and adapt to adverse conditions, stresses, attacks, or compromises that use or are enabled by cyber resources. From a risk management perspective, cyber resiliency is intended to help reduce the mission, business, organizational, enterprise, or sector risk of depending on cyber resources. This document is incorporated by reference as a source for definitions.

(i) NIST SP 800–171, revision 2, titled “Security Requirements for Controlled Unclassified Information” provides agencies with recommended security requirements for protecting the confidentiality of CUI when the information is resident in nonfederal systems and organizations; when the nonfederal organization is not collecting or maintaining information on behalf of a federal agency or using or operating a system on behalf of an agency; and where there are no specific safeguarding requirements for protecting the confidentiality of CUI prescribed by the authorizing law, regulation, or governmentwide policy for the CUI category listed in the CUI Registry. The requirements apply to all components of nonfederal systems and organizations that process, store, and/or transmit CUI, or that provide protection for such components. The security requirements are intended for use by federal agencies in contractual vehicles or other agreements established between those agencies and nonfederal organizations. This document is incorporated by reference as a foundational source for definitions and security requirements.

(j) NIST SP 800–171A, titled “Assessing Security Requirements for Controlled Unclassified Information” provides federal and nonfederal organizations with assessment procedures and a methodology that can be employed to conduct assessments of the CUI security requirements in NIST SP 800–171. The assessment procedures are flexible and can be customized to the needs of the organizations and the assessors conducting the assessments. Security assessments can be conducted as self-assessments; independent, third-party assessments; or government-sponsored assessments and can be applied with various degrees of rigor, based on customer-defined depth and coverage attributes. The findings and evidence produced during the security assessments can facilitate risk-based decisions by organizations related to the CUI requirements. This document is incorporated by reference as a foundational source for definitions and assessment.

(k) NIST SP 800–172, titled “Enhanced Security Requirements for Controlled Unclassified Information” provides federal agencies with recommended enhanced security requirements for protecting the confidentiality of CUI: (1) when the information is resident in nonfederal systems and organizations; (2) when the nonfederal organization is not collecting or maintaining information on behalf of a federal agency or using or operating a system on behalf of an agency; and (3) where there are no specific safeguarding requirements for protecting the confidentiality of CUI prescribed by the authorizing law, regulation, or government-wide policy for the CUI category listed in the CUI Registry. The enhanced requirements apply only to components of nonfederal systems that process, store, or transmit CUI or that provide security protection for such components when the designated CUI is associated with a critical program or high value asset. The enhanced requirements supplement the basic and derived security requirements in NIST SP 800–171 and are intended for use by federal agencies in contractual vehicles or other agreements established between those agencies and nonfederal organizations. This document is incorporated by reference as a foundational source for security requirements.

(l) NIST SP 800–172A, titled “Assessing Enhanced Security Requirements for Controlled Unclassified Information” provides federal agencies and nonfederal organizations with assessment procedures that can be used to carry out assessments of the requirements in NIST SP 800–172. The assessment procedures are flexible and can be tailored to the needs of organizations and assessors. Assessments can be conducted as (1) self-assessments; (2) independent, third-party assessments; or (3) government-sponsored assessments. The assessments can be conducted with varying degrees of rigor based on customer-defined depth and coverage attributes. The findings and evidence produced during the assessments can be used to facilitate risk-based decisions by organizations related to the CUI enhanced security requirements. This document is incorporated by reference as a foundational source for definitions and assessment.

(m) Committee on National Security Systems (CNSS) Instruction No. 4009 provides a glossary of terms and applies to all U.S. Government Departments, Agencies, Bureaus and Offices, supporting contractors and agents that collect, generate, process, store, display,

transmit or receive classified or controlled unclassified information, or that operate, use, or connect to National Security Systems (NSS). This document is incorporated by reference as a source for definitions.

(n) ISO/IEC 17011:2017, titled “Conformity assessment—Requirements for accreditation bodies accrediting conformity assessment bodies” specifies requirements for the competence, consistent operation and impartiality of accreditation bodies assessing and accrediting conformity assessment bodies. This document is incorporated by reference as a source for requirements on the CMMC Ecosystem.

(o) ISO/IEC 17020:2012, titled “Conformity assessment—Requirements for the operation of various types of bodies performing inspection” specifies requirements for the competence of bodies performing inspection and for the impartiality and consistency of their inspection activities. It applies to inspection bodies of type A, B or C, as defined in ISO/IEC 17020:2012, and it applies to any stage of inspection.” This document is incorporated by reference as a source for requirements on the CMMC Ecosystem.

(p) ISO/IEC 17024:2012, titled “Conformity assessment—Requirements for the operation of various types of bodies performing inspection” contains principles and requirements for a body certifying persons against specific requirements, and includes the development and maintenance of a certification scheme for persons.” This document is incorporated by reference as a source for requirements on the CMMC Ecosystem.

Section 170.3 Applicability

Section 170.3 identifies entities to which the rule applies and how the Department intends to implement the rule. The rule applies to defense contractors and subcontractors that will process, store, or transmit FCI or CUI, and private-sector businesses or other entities that are specified in Subpart C. Government information systems that are operated by contractors and subcontractors in support of the Government do not apply to this rule. CMMC Program requirements apply to DoD solicitations and contracts requiring defense contractors and subcontractors to process, store, or transmit FCI or CUI. Exceptions to the applicability of this rule are addressed in § 170.3(c)(1) and (2). Department Program Managers or requiring activities will determine which CMMC Level will apply to a contract or procurement. Applicability of the CMMC Level to subcontractors is addressed in § 170.23.

Section 170.3 addresses the four-phased implementation plan of the CMMC Program requirements in solicitations and contracts. Phase 1 begins on the effective date of the CMMC revision to DFARS 252.204–7021. More information regarding Phase 1 can be found in § 170.3(e)(1). Phase 2 begins six months after the start date of Phase 1. More information regarding Phase 2 can be found in § 170.3(e)(2). Phase 3 begins one calendar year after the start date of Phase 2. More information regarding Phase 3 can be found in § 170.3(e)(3). Phase 4, or full implementation, begins one calendar year after the start date of Phase 3. More information regarding Phase 4 can be found in § 170.3(e)(4).

Section 170.4 Acronyms and Definitions

Section 170.4 includes acronyms and definitions used in the rule text and can be used as a reference while reading the text and tables. CMMC introduces new terms and associated definitions, and customizes definitions for existing terms, as applied to the CMMC Program. CMMC-custom terms and definitions are clearly marked to distinguish from terms sourced externally. CMMC also utilizes terms created by other authoritative sources, including NIST. Terms from other authoritative sources are also listed in § 170.4 and are properly sourced.

The Department developed the following CMMC-custom terms to enhance understanding of the requirements and elements of the CMMC Program and welcomes comments on these definitions as part of the proposed rule:

- Accreditation
- Accreditation Body
- Assessment
- Self-Assessment
- CMMC Level 2 Certification Assessment
- CMMC Level 3 Certification Assessment
- Assessment Findings Report
- Assessment Team
- Asset Categories
- Authorized
- CMMC Assessment and Certification Ecosystem
- CMMC Assessment Scope
- CMMC Assessor and Instructor Certification Organization (CAICO)
- CMMC instantiation of eMASS
- CMMC Level 1 Self-Assessment
- CMMC Level 2 Conditional Certification Assessment
- CMMC Level 2 Conditional Self-Assessment
- CMMC Level 2 Final Certification Assessment

- CMMC Level 2 Final Self-Assessment
- CMMC Level 3 Conditional Certification Assessment
- CMMC Level 3 Final Certification Assessment
- CMMC Third-Party Assessment Organization (C3PAO)
- Contractor Risk Managed Assets
- Controlled Unclassified Information (CUI) Assets
- External Service Provider (ESP)
- Federal Contract Information (FCI) Assets
- Organization-Defined
- Organization Seeking Assessment (OSA)
- Organization Seeking Certification (OSC)
- Out-of-Scope Assets
- Periodically
- Process, store, or transmit
- Restricted Information Systems
- Security Protection Assets
- Specialized Assets
- Test Equipment.

Section 170.5 Policy

Section 170.5 addresses the policy underlying the rule. The protection of FCI and CUI on defense contractor information systems is crucial to the continuity of the missions and functions of the DoD. To that end, this rule requires that contractors and subcontractors implement the specified security requirements for the applicable CMMC Level. For CMMC Level 3, safeguards defined in NIST SP 800–172 and DoD-specified parameters (see table 1 to § 170.14(c)(4)) may be required.

Program Managers and requiring activities identify the applicable CMMC Level. Factors used to determine which CMMC Level will be applied are included but not limited to the list found in § 170.5(b)(1–5). CMMC Program requirements will flow down to subcontractors, as applicable (see § 170.23). A DoD Service Acquisition Executive or a Component Acquisition Executive may elect to waive inclusion of CMMC Program requirements in a solicitation or contract.

Section 170.5 addresses that the CMMC Program does not alter the requirements imposed on contractors and subcontractors in FAR 52.204–21, DFARS subpart 204.73, or any other applicable safeguarding of information requirement. The CMMC Program verifies implementation of security requirements in FAR 52.204–21, NIST SP 800–171 Rev 2, and NIST SP 800–172, as applicable.

Section 170.6 CMMC PMO

Section 170.6 addresses the CMMC Program Management Office (PMO) functions that are performed within the

Department of Defense Chief Information Officer (DoD CIO).

Section 170.7 DCMA DIBCAC

Section 170.7 addresses how DCMA DIBCAC will support the CMMC Program by conducting CMMC Level 2 assessments of the Accreditation Body and C3PAOs; conducting CMMC Level 3 assessments for OSCs; and recording results, issuing certificates, tracking appeals, and retaining records as required.

Section 170.8 Accreditation Body

Section 170.8 addresses the roles and responsibilities of the Accreditation Body, as well as requirements that the Accreditation Body must meet. The Accreditation Body must be a member in good standing with the Inter-American Accreditation Cooperation (IAAC) and become an International Laboratory Accreditation Cooperation (ILAC) Mutual Recognition Arrangement (MRA) signatory, with a signatory status scope of ISO/IEC 17020:2012 and be compliant with ISO/IEC 17011:2017.¹³ There is only one Accreditation Body for the DoD CMMC Program at any given time, and its primary mission is to authorize and accredit the C3PAOs. Prior to the Accreditation Body being compliant with ISO/IEC 17011:2017 and completing a peer assessment of conformity with the IAAC in accordance with the ISO Committee on Conformity Assessment,¹⁴ the Accreditation Body may authorize but not accredit C3PAOs. After the Accreditation Body has achieved compliance with ISO/IEC 17011:2017 and completed a peer assessment of conformity with the IAAC in accordance with the ISO Committee on Conformity Assessment, the Accreditation Body may accredit C3PAOs.

The Accreditation Body also oversees the CAICO to ensure compliance with ISO/IEC 17024:2012¹⁵ and to ensure all training products, instruction, and testing materials are of high quality.

Section 170.8 addresses specific requirements for the Accreditation Body with regards to national security background checks, foreign ownership, reporting, information protection, and appeals. The Accreditation Body will also develop policies for Conflict of Interest (CoI), Code of Professional Conduct (CoPC), and Ethics that comply with all ISO/IEC 17011:2017 and DoD requirements. These policies will apply to the Accreditation Body as well as to

all other individuals, entities, and groups within the CMMC Ecosystem. The information systems used by the Accreditation Body to process CMMC information have to meet all of the security requirements for CMMC Level 2 and will be assessed by DCMA's Defense Industrial Base Cybersecurity Assessment Center (DIBCAC).

Section 170.9 CMMC Third-Party Assessment Organizations (C3PAOs)

Section 170.9 addresses the roles, responsibilities, and requirements for C3PAOs, which are the organizations that perform CMMC Level 2 Certification Assessments for OSCs. The C3PAOs will submit assessment data into the CMMC instantiation of government owned and operated system called eMASS,¹⁶ a CMMC instance of the Enterprise Mission Assurance Support Service. C3PAOs grant a certificate of assessment when all security requirements are met, in accordance with the requirements in § 170.17 of this part.

Section 170.9 addresses detailed requirements for C3PAOs with regards to national security background checks, foreign ownership, reporting, records management, information protection, quality assurance, and appeals. The information systems used by C3PAOs to process CMMC assessment information have to meet all of the security requirements for CMMC Level 2 and will be assessed by DCMA DIBCAC. C3PAOs need to comply with ISO/IEC 17020:2012, as well as with the Accreditation Body's policies for CoI, CoPC, and Ethics.

Prior to a C3PAO being compliant with ISO/IEC 17020:2012, the C3PAO may be authorized but not accredited. After a C3PAO is compliant with ISO/IEC 17020:2012, the C3PAO may be accredited.

Section 170.10 CMMC Assessor and Instructor Certification Organization (CAICO)

Section 170.10 addresses the roles, responsibilities, and requirements for the CAICO, the organization that trains, tests, authorizes, and certifies CMMC assessors, instructors, and related professionals. There is only one CAICO for the DoD CMMC Program at any given time. The CAICO must comply with ISO/IEC 17024:2012, as well as with the Accreditation Body's policies for CoI, CoPC, and Ethics. Section 170.10 addresses detailed requirements for the CAICO with regards to certification examinations, quality

assurance, appeals, records management, reporting, separation of duties, and information protection.

Section 170.11 CMMC Certified Assessor (CCA)

Section 170.11 addresses the roles and responsibilities of a CMMC Certified Assessor (CCA) who conduct Level 2 Certification Assessments. In order to be a CCA, a candidate must first be a CCP, must adhere to the requirements set forth in § 170.10, § 170.8(b)(17), and complete a Tier 3 background investigation or equivalent. The required cybersecurity experience for different CCA roles is addressed in § 170.11(b)(6) and (7). Section 170.11 addresses CCA requirements with respect to security breaches; completion of a Tier 3 background investigation or equivalent; reporting; sharing assessment information; and permitted use of C3PAO equipment, devices, and services.

Section 170.12 CMMC Certified Instructor (CCI)

Section 170.12 addresses the roles and responsibilities of a CMMC Certified Instructor (CCI) to teach CMMC assessor candidates. The CAICO trains and tests candidate CCIs per the requirements set forth in § 170.12(b). Candidate CCIs are provided with a list of requirements to obtain and maintain certification, compliance with Accreditation Body policies, work activity exclusions, confidentiality expectations, non-disclosure clause, non-public training related information, forbidden consulting services, and reporting requirements.

Section 170.13 CMMC Certified Professional (CCP)

Section 170.13 addresses the roles and responsibilities of a CMMC Certified Professional (CCP) required to provide advice, consulting, and recommendations to clients. The CAICO trains and tests candidate CCPs per the requirements set forth in § 170.13(b) with CCP certification issued upon successful completion. A CCP can participate on CMMC Level 2 Certification Assessments with CCA oversight, however CCAs are responsible for making final assessment determinations. A list of CCP requirements is provided for obtaining and maintaining certification, compliance with Accreditation Body policies, completion of a Tier 3 background investigation or equivalent, sharing assessment specific information, and reporting requirements.

¹³ <https://www.iso.org/standard/67198.html>.

¹⁴ <https://www.iso.org/committee/54998.html>.

¹⁵ <https://www.iso.org/standard/52993.html>.

¹⁶ This system is accessible only to authorized users.

Section 170.14 CMMC Model

Section 170.14 addresses the structure, security requirement contents, organization, sourcing, and numbering of the security requirements that comprise the CMMC Model. It also provides an overview of the assessment process. The CMMC Model consists of three (3) levels, each containing security requirements taken directly from existing regulations and guidelines. Firstly, § 170.14(2) defines CMMC Level 1 as the 15 requirements listed in the FAR clause 52.204–21(b)(1). Secondly, § 170.14(3) defines CMMC Level 2 as the 110 requirements from the NIST SP 800–171 Rev 2. Lastly, § 170.14(4) defines CMMC Level 3 as 24 selected requirements from the NIST SP 800–172.

The CMMC security requirements are organized into domains following the approach taken in NIST SP 800–171 Rev 2. The numbering of the CMMC security requirements, addressed in § 170.14(c)(1), is of the form DD.L#–REQ where the ‘DD’ is the two-letter domain abbreviation, the ‘L#’ is the CMMC Level, and the ‘REQ’ is based directly on the numbering in the source. Assessment criteria for these security requirements, as described in § 170.14(d), is based on security requirement assessment guidance provided in NIST SP 800–171A and NIST SP 800–172A.

Section 170.15 CMMC Level 1 Self-Assessment and Affirmation Requirements

Section 170.15 addresses how an OSA will achieve and maintain compliance with CMMC Level 1 Self-Assessment. The OSA must successfully implement the security requirements listed in § 170.14(c)(2) within their Level 1 CMMC Assessment Scope as described in § 170.19(b). Successful implementation requires meeting all objectives defined in NIST SP 800–171A for the corresponding CMMC Level 1 security requirements as outlined in the mapping table 1 to § 170.15(c)(1)(i).

After implementation, the OSA must perform a self-assessment to verify the implementation and score themselves using the scoring methodology provided in § 170.24. All objectives must be met in order for a security requirement to be considered fully implemented; no security requirements may be placed on a POA&M for Level 1. The OSA must then input their results into SPRS as described in § 170.15(a)(1)(i) and submit an affirmation as described in § 170.22.

In order to be eligible for a contract with a CMMC Level 1 Self-Assessment requirement, the OSA must have a Level

1 Self-Assessment and have submitted an affirmation. These activities must be completed annually.

Section 170.16 CMMC Level 2 Self-Assessment and Affirmation Requirements

Section 170.16 addresses how an OSA will achieve and maintain compliance with CMMC Level 2 Self-Assessment. The OSA must successfully implement the security requirements listed in § 170.14(c)(3) within its Level 2 CMMC Assessment Scope as described in § 170.19(c). Successful implementation requires meeting all objectives defined in NIST SP 800–171A for the corresponding CMMC Level 2 security requirements.

After implementation, the OSA must perform a self-assessment to verify the implementation and score themselves using the scoring methodology provided in § 170.24. All objectives must be met in order for a security requirement to be considered fully implemented; in some cases, if not all objectives are met, some security requirements may be placed on a POA&M as provided for in § 170.21. If the minimum score has been achieved and some security requirements are in a POA&M, the OSA has a Conditional Self-Assessment; if the minimum score has been achieved and no security requirements are in a POA&M, the OSA has a Final Self-Assessment. For Conditional Self-Assessments, a POA&M close-out must be conducted within 180 days as described in § 170.21(b).

After both Conditional Self-Assessment and Final Self-Assessment, the OSA must input their results into SPRS as described in § 170.16(a)(1)(i) and submit an affirmation as described in § 170.22.

In order to be eligible for a contract with a CMMC Level 2 Self-Assessment requirement, the OSA must have a Level 2 Conditional Self-Assessment or Level 2 Final Self-Assessment and have submitted an affirmation. The Level 2 Self-Assessment must be completed tri-annually and the affirmation must be completed annually.

Section 170.17 CMMC Level 2 Certification Assessment and Affirmation Requirements

Section 170.17 addresses how an OSC will achieve and maintain compliance with CMMC Level 2 Certification Assessment. The OSC must successfully implement the security requirements listed in § 170.14(c)(3) within its Level 2 CMMC Assessment Scope as described in § 170.19(c). Successful implementation requires meeting all objectives defined in NIST SP 800–171A

for the corresponding CMMC Level 2 security requirements.

After implementation, the OSC must hire a C3PAO to perform an assessment to verify the implementation. The C3PAO will score the OSC using the scoring methodology provided in § 170.24. All objectives must be met in order for a security requirement to be considered fully implemented; in some cases, if not all objectives are met, some security requirements may be placed on a POA&M as defined in § 170.21. If the minimum score has been achieved and some security requirements are in a POA&M, the OSC has a Conditional Certification Assessment; if the minimum score has been achieved and no security requirements are in a POA&M, the OSC has a Final Certification Assessment. For Conditional Certification Assessments, a POA&M close-out must be conducted within 180 days as described in § 170.21(b).

After both Conditional Certification Assessment and Final Certification Assessment, the C3PAO will input the OSC's results into the CMMC instantiation of eMASS as described in § 170.17(a)(1)(i). After both Conditional Certification Assessment and Final Certification Assessment, the OSC must submit an affirmation as described in § 170.22.

In order to be eligible for a contract with a CMMC Level 2 Certification Assessment requirement, the OSC must have a CMMC Level 2 Conditional Certification Assessment or CMMC Level 2 Final Certification Assessment and have submitted an affirmation. The CMMC Level 2 Certification Assessment must be completed tri-annually and the affirmation must be completed annually.

Section 170.18 CMMC Level 3 Certification Assessment and Affirmation Requirements

Section 170.18 addresses how an OSC will achieve and maintain compliance with CMMC Level 3 Certification Assessment. The OSC must have a CMMC Level 2 Final Certification Assessment based on its Level 3 CMMC Assessment Scope. The OSC must successfully implement the security requirements listed in § 170.14(c)(4) and table 1 to § 170.14(c)(4) within its Level 3 CMMC Assessment Scope as described in § 170.19(d). Successful implementation requires meeting all objectives defined in NIST SP 800–172A for the corresponding CMMC Level 3 security requirements.

After implementation, the OSC must contact DCMA DIBCAC to perform an assessment to verify the

implementation. DCMA DIBCAC will score the OSC using the scoring methodology provided in § 170.24. All objectives must be met in order for a security requirement to be considered fully implemented; in some cases, if not all objectives are met, some security requirements may be placed on a POA&M as defined in § 170.21. If the minimum score has been achieved and some security requirements are in a POA&M, the OSC has a Conditional Certification Assessment; if the minimum score has been achieved and no security requirements are in a POA&M, the OSC has a Final Certification Assessment. For Conditional Certification Assessments, a POA&M close-out must be conducted within 180 days as described in § 170.21(b).

After both Conditional Certification Assessment and Final Certification Assessment, DCMA DIBCAC will input the OSC's results into the CMMC instantiation of eMASS as described in § 170.18(a)(1)(i). After both Conditional Certification Assessment and Final Certification Assessment, the OSC must submit an affirmation as described in § 170.22.

In order to be eligible for a contract with a CMMC Level 3 Certification Assessment requirement, the OSC must have a CMMC Level 3 Conditional Certification Assessment or CMMC Level 3 Final Certification Assessment and have submitted an affirmation. The CMMC Level 3 Certification Assessment must be completed tri-annually and the affirmation must be completed annually.

Section 170.19 CMMC Scoping

Section 170.19 addresses the requirements for the scoping of each CMMC Level assessment. Scoping determines which assets are included in a given assessment and the degree to which each is assessed. The CMMC Assessment Scope is specified prior to any CMMC assessment, based on the CMMC Level being assessed. The Level 2 CMMC Assessment Scope may also be affected by any intent to achieve a CMMC Level 3 Certification Assessment, as detailed in § 170.19(e).

Scoping for CMMC Level 1, as detailed in § 170.19(b), consists of all assets that process, store, or transmit FCI. These assets are fully assessed against the applicable CMMC security requirements identified in § 170.14(c)(2) and following the procedures in § 170.15(c). All other assets are out of scope and are not considered in the assessment.

Scoping for CMMC Level 2, as detailed in § 170.19(c), consists of all

assets that process, store, or transmit CUI, and all assets that provide security protections for these assets. These assets are fully assessed against the applicable CMMC security requirements identified in § 170.14(c)(3) and following the CMMC Level 2 Self-Assessment procedures in § 170.16(c) or the CMMC Level 2 Certification Assessment procedures in § 170.17(c). In addition, Contractor Risk Managed Assets, which are assets that can, but are not intended to, process, store, or transmit CUI because of security policy, procedures, and practices in place, are documented and are subject to a limited check that may result in the identification of a deficiency, as addressed in table 1 to § 170.19(c)(1). Finally, Specialized Assets, which are assets that can process, store, or transmit CUI but are unable to be fully secured, including: Internet of Things (IoT) devices, Industrial Internet of Things (IIoT) devices, Operational Technology (OT), Government Furnished Equipment (GFE), Restricted Information Systems, and Test Equipment, are documented but are not assessed against other CMMC security requirements, as addressed in table 1 to § 170.19(c)(1). All other assets are out of scope and are not considered in the assessment.

Scoping for CMMC Level 3, as detailed in § 170.19(d), consists of all assets that can (whether intended to or not) or do process, store, or transmit CUI, and all assets that provide security protections for these assets. The CMMC Level 3 Assessment Scope also includes all Specialized Assets but allows an intermediary device to provide the capability for the Specialized Asset to meet one or more CMMC security requirements, as needed. These assets (or the applicable intermediary device, in the case of Specialized Assets) are fully assessed against the applicable CMMC security requirements identified in § 170.14(c)(4) and following the procedures in § 170.18(c). All other assets are out of scope and are not considered in the assessment.

If an OSA utilizes an ESP, other than a Cloud Service Provider (CSP), the ESP must have a CMMC certification level equal to or greater than the certification level the OSA is seeking. For example, if an OSA is seeking a CMMC Level 2 Certification Assessment the ESP must have either a CMMC Level 2 Certification Assessment or a CMMC Level 3 Certification Assessment.

Section 170.20 Standards Acceptance

Section 170.20 addresses how OSCs that, prior to the effective date of this rule, have achieved a perfect score on a DCMA DIBCAC High Assessment with

the same scope as a Level 2 CMMC Assessment Scope, are eligible for a CMMC Level 2 Certification Assessment.

Section 170.21 Plan of Action and Milestones Requirements

Section 170.21 addresses rules for having a POA&M for the purposes of a CMMC assessment and satisfying contract eligibility requirements for CMMC. All POA&Ms must be closed within 180 days of the initial assessment. To satisfy CMMC Level 1 requirements, a POA&M is not allowed. To satisfy CMMC Level 2 requirements, both self-assessment and certification assessment, a POA&M is allowed. Section 170.21 details the overall minimum score that must be achieved and identifies the Level 2 security requirements that cannot have a POA&M and must be fully met at the time of the assessment. To satisfy CMMC Level 3 requirements, a POA&M is allowed. Section 170.21 details the overall minimum score that must be achieved and identifies the Level 3 security requirements that cannot have a POA&M and must be fully met at the time of the assessment. Section 170.21 also established rules for closing POA&Ms.

Section 170.22 Affirmation

Section 170.22 addresses that the OSA's affirming official must affirm, in SPRS, compliance with the appropriate CMMC Self-Assessment or Certification Assessment: upon completion of any conditional or final assessment, annually following final assessment, and following a POA&M closeout assessment (as applicable).

Section 170.23 Application to Subcontractors

Section 170.23 addresses flow down of CMMC requirements from the prime contractor to the subcontractors in the supply chain. Prime contractors shall comply and shall require subcontractor compliance throughout the supply chain at all tiers with the applicable CMMC level for each subcontract as addressed in § 170.23(a).

Section 170.24 CMMC Scoring Methodology

Section 170.24 addresses the assessment finding types MET, NOT MET, and NOT APPLICABLE (N/A) in the context of CMMC assessments, and the CMMC Scoring Methodology used to measure the implementation status of security requirements for CMMC Level 2 and CMMC Level 3. Scoring is not calculated for CMMC Level 1 since all

requirements must be MET at the time of assessment.

For CMMC Level 2, the maximum score is the total number of requirements and is the starting value for assessment scoring. Any requirement that has one or more NOT MET objectives reduces the current score by the value of the specific requirement. Values for each CMMC Level 2 requirement are enumerated in § 170.24(c)(2)(i)(B).

For CMMC Level 3, the maximum score is the total number of requirements and is the starting value for assessment scoring. Any requirement that has one or more NOT MET objectives reduces the current score by the value of the specific requirement. CMMC Level 3 does not use varying values; the value for each requirement is one (1), as described in § 170.24(c)(3).

Appendix A to Part 170: Guidance

Appendix A lists the guidance documents that are available to support defense contractors and the CMMC Ecosystem in the implementation and assessment of CMMC requirements.

Discussion of Public Comments and Resulting Changes

As part of standing up version 1 of the CMMC Program, the Department of Defense published a DFARS interim final rule, “Assessing Contractor Implementation of Cybersecurity Requirements” in the **Federal Register** on September 29, 2020 (85 FR 61505). The Department received approximately 750 comments on the DFARS interim final rule pertaining to elements of the CMMC Program that are now being addressed in this rule. Those comments are summarized and addressed in the discussion and analysis.

In addition to comments on elements of the CMMC Program, DoD also received comments on the associated DFARS text, solicitation provisions, and contract clauses relating to the CMMC Program. The CMMC Program requirements proposed in this rule will be implemented in the DFARS, as needed, which may result in changes to current DoD solicitation provisions and contract clauses relating to DoD’s cybersecurity protection requirements, including DFARS clause 252.204–7021, CMMC Requirements. DoD will address comments regarding the DFARS clause 252.204–7021 in a separate 48 CFR rulemaking.

1. Service Providers

Comment: Multiple commenters asked about applicability of the CMMC Program to a variety of service providers. One commenter requested

clarification regarding how CUI controls apply to internet Service Providers and their globally sourced service support because of the prohibition of foreign dissemination for CUI. Two commenters suggested that common carrier telecommunications (often termed as Plain-Old-Telephone-Services (POTS)) and similar commercial services (cloud services, external service providers) should be treated as commercial off-the-shelf (COTS), and so excluded from CMMC certification requirements. One commenter expressed concerns about the impact of the rule on the telecom industry. One commenter recommended that, to limit the burden of CMMC implementation, contractors providing commercial services to support COTS items, such as technical support for software, should receive the same exceptions as other COTS contracts.

Response: The CMMC Program will result in cybersecurity protection and assessment requirements for defense contractors and subcontractors. CMMC Level requirements will apply only if a defense contractor or subcontractor handles FCI or CUI on its own contractor information systems. If so, then under CMMC, the contractor or subcontractor will be required to comply with the cybersecurity protection and assessment requirements associated with the appropriate Level. As such, CMMC Level requirements will not apply to internet Service Providers or other telecommunications service providers (*i.e.*, common carriers), unless those entities themselves are or intend to become defense contractors or subcontractors. In addition, there is no general prohibition of foreign dissemination for CUI, although certain CUI may be subject to export restrictions. Commercial item determinations per 48 CFR 15, to include those relating to common carrier telecommunications or cloud services, are not defined by CMMC. With respect to the CMMC Assessment Scope, although they provide connectivity for contractor systems, and the common carrier link is within the boundary of the contractor’s system, the common carrier’s information system is not within the contractor’s CMMC Assessment Scope as long as CUI is encrypted during transport across the common carrier’s information system.

2. Joint Ventures

Comment: Multiple commenters asked for clarification on how to handle joint ventures with respect to DFARS clause 252.204–7021.

Response: The CMMC Program requirements proposed in this rule will be implemented in the DFARS, as

needed, which may result in changes to current DoD solicitation provisions and contract clauses, including DFARS clause 252.204–7021. As such, DoD cannot address applicability of current DFARS clause 252.204–7021 at this time. With respect to joint ventures, CMMC Program requirements will apply to information systems associated with the contract efforts that process, store, or transmit FCI or CUI, and to any information system that provides security protections for such systems, or information systems not logically or physically isolated from all such systems.

3. Internet of Things/Operational Technology

Comment: Multiple commenters noted the applicability of the CMMC requirements to Internet of Things (IoT) and Operational Technology (OT) systems was unclear. Several commenters expressed concerns about the impact of the rule on factories and OT.

Response: CMMC security requirements apply to information systems associated with the contract efforts that process, store, or transmit FCI or CUI, and to any information system that provides security protections for such systems; or are not logically or physically isolated from all such systems. In accordance with § 170.19, an OSA’s IoT or OT systems located within its Level 1 or Level 2 CMMC Assessment Scope are not assessed; however, for CMMC Level 2 they are required to be documented in the System Security Plan (SSP). When a CMMC Level 2 Certification Assessment is performed as a precursor to a CMMC Level 3 Certification Assessment, the IOT and OT (and all other Specialized Assets) should be assessed against all CMMC Level 2 security requirements as described in § 170.18(a)(1). For CMMC Level 3, an OSC’s IoT or OT located within its CMMC Assessment Scope are assessed against all CMMC security requirements unless they are physically or logically isolated. However, for IoT and OT (and all other Specialized Assets), it is permissible to use intermediary devices to provide the capability for the specialized asset to meet CMMC Level 3 security requirements.

4. Government Furnished Equipment

Comment: One commenter questioned how the interim rule applies to Government Furnished Equipment (GFE) in a ‘test’ versus a ‘production environment.’

Response: As described in § 170.3, CMMC security requirements will apply

to any information system associated with the contract efforts that process, store, or transmit FCI or CUI, and to any information system that provides security protections for such systems; or information systems not logically or physically isolated from all such systems. This includes when a 'Test Environment' processes, stores, or transmits FCI or CUI; provides security protections for such systems; or is not logically or physically isolated from such systems. See § 170.19 and the response to public comment under the heading 3. Internet of Things/Operational Technology in the Discussion of Comments and Changes section of this preamble for additional details on defining the scope of CMMC assessments.

If GFE cannot be configured to meet all the NIST SP 800–171 Rev 2 requirements or must be maintained in a specified configuration which does not comply with NIST SP 800–171 Rev 2, additional protections such as physical or logical isolation may be used for risk mitigation in accordance with the treatment of Specialized Assets as defined in table 1 to § 170.19(c)(1) CMMC Level 2 Scoping.

5. Fundamental Research

Comment: Multiple commenters requested that DoD clarify the application of CMMC requirements to fundamental research. Commenters described adverse consequences of not explicitly exempting fundamental research from the CMMC requirements, noting that institutions of higher education will have to pull out of research agreements with the Department, may no longer accept DoD funds because the resource burden would be cost prohibitive to both the institution and its partners, and the burdens imposed by even CMMC Level 1 requirements would hinder the progress of fundamental research. These commenters also noted that restrictions on posting of public information would inhibit open collaboration and the exchange of ideas that is critical to the advancement of scientific discovery. Commenters also requested that the Department clarify that subcontracts scoped as fundamental research also be exempt from CMMC requirements.

Response: CMMC Program requirements are designed to provide increased assurance to the Department that defense contractors can adequately protect FCI and CUI, in accordance with already applicable regulations and standards. Fundamental research is defined by National Security Defense

Directive (NSDD)–189¹⁷ as 'basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons.' CMMC Program requirements apply only to defense contractors and subcontractors who handle FCI and CUI on an information system associated with a contract effort or any information system that provides security protections for such systems, or information systems not logically or physically isolated from all such systems. Fundamental research that is 'shared broadly within the scientific community' is not, by definition, FCI or CUI; however, other research-related information that is provided to or handled by contractors as part of contract performance may be FCI or CUI, thus may trigger application of CMMC Level requirements. If DoD determines the information handled by contractors pursuant to the fundamental research contract activities is or will become FCI or CUI, the information would be required to be processed, stored, or transmitted on an information system compliant with the appropriate CMMC Level.

6. International—Foreign DIB Partners/Non-U.S. Contractors

Comment: Multiple commenters asked if international subcontractors of a U.S. prime will require CMMC certification. Commenters also asked if there is a strategy for legally implementing CMMC requirements beyond the U.S. DIB, and if an enterprise-level resolution has been developed to address foreign DIB sovereignty. One commenter suggested that some foreign governments have issued guidance to their local companies directing them not to accept CMMC flow down requirements.

One commenter expressed concern regarding the impact of CMMC to existing bilateral/multilateral security agreements. Another commenter asked if the foreign DIB will be authorized to evaluate U.S. DIB and vice versa. One non-U.S. commenter suggested using the existing Facility Security Clearance process to ensure a company is compliant with CMMC in accordance with national legislation.

Response: Contractors are required to comply with all terms and conditions of

the contract, to include terms and conditions relating to cybersecurity protections and assessments. In addition, offerors will be required to comply with the pre-award CMMC requirement. This holds true when a contract clause is flowed down to subcontractors. The Facility Security Clearance process does not apply to unclassified information systems owned by, or operated on behalf of, a non-federal entity (e.g., contractors), and, therefore, does not apply to systems/networks that will be subject to CMMC requirements. This rule makes no distinction about which C3PAOs may assess which companies seeking certification. For more details on C3PAO requirements, see § 170.9.

7. CUI and FCI

a. Marking and Identifying CUI

Comment: Multiple commenters asked for clarification regarding definition, marking, and identification of CUI as related to CMMC requirements and DFARS clause 252.204–7021. One commenter asked if the definition of DoD CUI applies to the CUI required to be safeguarded under the CMMC clause. Another asked if DFARS clause 252.204–7021 includes information that requires protection under DFARS clause 252.204–7012.

One commenter requested that the Department confirm that, under CMMC, contractors will only be responsible for protecting CUI that is clearly marked upon receipt from the Department and created by contractors.

Response: If the contract includes a CMMC Level requirement, contractors will be required to protect FCI and CUI, as applicable, through fulfillment of the designated CMMC Level security requirements. CMMC does not in any way change the DoD requirements regarding the definition, marking, and protection of CUI.

If DFARS clause 252.204–7012 applies, contractors are required to safeguard covered defense information in accordance with the terms and conditions of the clause and contract, which includes information developed in support of the contract. CMMC does not change these requirements.

b. Relationship of FCI and CUI to the CMMC Requirements

Comment: One commenter suggested that the inclusion of FCI in CMMC needs significant clarification. Others asked if FCI references within the CMMC Model [1.0] and nonpublic DoD information references in Department of

¹⁷ <https://irp.fas.org/offdocs/nsdd/nsdd-189.htm>.

Defense Instruction (DoDI) 8582.01¹⁸ are the same type of information, and if DoDI 8582.01 is the definitive DoD policy for FCI and DoD standards regarding the requirements under FAR clause 52.204–21.

Response: The CMMC Program requirements for Level 1 will apply when the contract effort requires contractors to process, store, or transmit FCI on its unclassified information system. If CUI is processed, stored, or transmitted on a contractor information system, a higher level of CMMC compliance or certification is required. The CMMC Level required to protect CUI (*i.e.*, CMMC Level 2 Self-Assessment as described in § 170.16, CMMC Level 2 Certification Assessment as described in § 170.17, or CMMC Level 3 Certification Assessment as described in § 170.18) is determined by the Department based upon the sensitivity of the CUI and will be identified in the solicitation.

The CMMC Program uses the definitions of FCI from FAR 4.1901 and CUI from 32 CFR 2002, which are the definitive sources for these definitions. DoDI 8582.01, published on December 9, 2019, points to FAR clause 52.204–21 and DFARS clause 252.204–7012, both of which preceded it, to address the safeguarding requirements for FCI and CUI. CMMC builds from those requirements by requiring that defense contractors and subcontractors provide assurance, either with Self-Assessments, Third-Party Assessments, or Level 3 Assessments, as required, that they have implemented the required information protection requirements.

8. Small Business/Entities

a. Assistance/Support for Small Business

Comment: Several commenters suggested that in order to successfully implement cybersecurity requirements, contractors require support from the Department. One commenter suggested DoD should perform an analysis of each requirement and ensure that necessary support structures are in place and fully functioning prior to implementing this rule, and that access to tech support/solutions should be provided. Multiple commenters suggested that more support and guidance is needed for small businesses trying to comply with CMMC. One commenter suggested that DoD should relax affiliation rules (in conjunction with the Small Business Association (SBA)) to allow small companies to work together to meet

CMMC requirements while spreading the cost over a larger base and expand mentor-protégé agreements for larger businesses to help smaller companies with CMMC appraisals.

One commenter expressed concern for non-traditional, innovative companies that are coming in through the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) process and asked what DoD is doing to help them become compliant. Another noted that if CMMC Level 1 will be the minimum requirement for SBIRs and STTRs, regardless of whether they include FCI, it may significantly limit the number of universities that can partner with small businesses under these awards.

Response: DoD's Office of Small Business and Technology Partnerships (OSBTP) is working to provide SBIR/STTR programs with support for CMMC implementation through the use of Technical and Business Assistance. The SBA's affiliation rules are codified at 13 CFR 121.103, available at <https://www.ecfr.gov/current/title-13/chapter-I/part-121>. Any change to the SBA's affiliation rules is outside the scope of this rulemaking.

The CMMC Program is designed to increase assurance that defense contractors do in fact, comply with information protection requirements to adequately protect FCI and CUI. Additional information to assist contractors regarding DoD's current information security protection requirements may be found in Frequently Asked Questions (FAQs) Regarding the Implementation of DFARS subpart 204.73, published at <https://DoDprocurementtoolbox.com/>.

b. Impact of Cost

Comment: Multiple commenters commented on the cost impact of CMMC to small businesses, suggesting that the cost to become and remain compliant is too high. Several commenters added that small businesses limited by finances won't be able to compete, which could be detrimental to the supply chain and efforts to meet national defense goals, and that the rule fails to provide any consideration for the future loss of technology acquisition should small businesses be inadvertently precluded from participation. Other commenters suggested that the impact of CMMC will be a profound and significant obstacle to businesses due to their lack of resources as compared to their large business competitors, adding that the requirement to have the same measures in place for any company, regardless of size, incurs a higher percentage of

indirect cost for small businesses. Multiple commenters remarked on the limited or lack of options for a small business to recover costs.

Response: The estimated costs attributed to this rule do not include the costs associated with compliance with existing cybersecurity requirements under FAR clause 52.204–21 or associated with implementing NIST SP 800–171 requirements in accordance with DFARS clause 252.204–7012, *Safeguarding Covered Defense Information and Cyber Incident Reporting*. To the extent that defense contractors or subcontractors have already been awarded DoD contracts or subcontracts that include these clauses, and process, store, or transmit FCI or CUI in support of the performance of those contracts, costs for implementing those cybersecurity requirements should have already been incurred and are not attributed to this rule. Those costs are distinct from costs associated with undergoing a CMMC assessment to verify implementation of those security requirements. The CMMC Program does not levy additional information security protection requirements for CMMC Levels 1 and 2. The value of DoD's sensitive information (and impact of its loss to the Department) does not diminish when it moves to contractors—prime or sub, large or small.

A Regulatory Flexibility Analysis was conducted. In comparison to CMMC 1.0, DoD has now eliminated the requirement for organizations to hire a third-party assessment organization to comply with CMMC Level 1. The CMMC Program requirements further address cost concerns by permitting self-assessment at Level 1 and at Level 2 for some contracts that are not designated to require the added assurance of C3PAO assessment.

In addition, resources available through the DoD Office of Small Business Programs (OSBP) may help defray cybersecurity costs by helping companies stay up to date with the latest cybersecurity policies and best practices. The OSBP also partners with the NIST and its Manufacturing Extension Partnership (MEP) programs (<https://www.nist.gov/mep>), which operate across the U.S. to provide resource and funding assistance options.

The Department currently has no plans for separate reimbursement of costs to acquire cybersecurity capabilities or a required cybersecurity certification that may be incurred by an offeror on a DoD contract. Costs may be recouped via competitively set prices, as companies see fit.

¹⁸ <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/DoDI/858201p.pdf?ver=2019-12-09-143118-860>.

c. Alternative Implementation

Comment: Multiple commenters requested that the government give small businesses time for CMMC compliance post-contract award. One commenter recommended that DoD consider only requiring government assessment of NIST SP 800–171 compliance (vice private third party) for small businesses, even at lower CMMC assessment levels, thus offsetting a higher burden level to small businesses. Several commenters commented on the need to include exemptions for small businesses that do not possess CUI and have never been contracted by the government. One added that DoD should identify portions of contracts which won't require CMMC so that small businesses are afforded maximum practicable opportunity regardless of their CMMC status.

Response: The DoD has determined that the assessment of the ability of a prospective contractor to adequately protect FCI and CUI that will be processed, stored, or transmitted on information systems during contract performance is a requirement prior to award of any prime contract or subcontract. Failure to assess a prospective contractor's ability to comply with applicable information security protection requirements, such as NIST SP 800–171 Rev 2, risks significant performance delays if information cannot be shared immediately at contract award due to lack of compliance. As applicable, the awardee must be capable of processing, storing, and transmitting FCI and CUI at the start of the performance period, regardless of the business size of the awardee. The CMMC Program has simplified requirements for Level 1 and 2 assessments in some contracts. Specifically, although contractors must still implement and maintain the security requirements set forth in FAR 52.204–21 to protect FCI and set forth in the NIST SP 800–171 Rev 2 to protect CUI, the requirement to hire a third-party assessment organization for CMMC Level 1 was eliminated, and for some contracts, contractors may be permitted to self-assess compliance with CMMC Level 2. Annual affirmations are also required for CMMC Level 1 and 2.

Prospective contractors must make a business decision regarding the type of DoD business they wish to pursue and understand the implications for doing so. If an offeror or current DoD contractor or subcontractor has self-assessed then later decides to pursue a contract or subcontract requiring a certification at CMMC Level 2 or 3, it will need to factor in the time and

investment necessary to hire a third-party assessment organization and achieve certification as a condition of contract award.

Public comments received illustrate that some small businesses may be unaware of how to propose cybersecurity-related costs for cost-type contracts. This rule does not change existing contract cost principles or procedures. For firm-fixed priced efforts, market supply and demand dictates profitability and bid prices, and underlying costs are not itemized.

9. Disputes Regarding CMMC Assessments

Comment: Multiple commenters asked about the CMMC assessment dispute resolution process, with regard to which standards would be followed, how much time would be available to appeal findings, the types of complaints that could be raised, any limits to the costs or schedule required for dispute resolution, and roles and responsibilities of the DoD, C3PAOs, and the Accreditation Body. Commenters also wanted to know whether a tiered recourse process would be available to resolve contractor objections to the initial resolution. Two commenters expressed concerns regarding potential impacts of C3PAO assessment errors. Two commenters requested clarification regarding whether the CMMC Level required by the DoD or a prime contractor could be contested.

Response: The CMMC assessment appeal process (formerly referred to as dispute resolution) described in the DFARS Case 2019–D041 Supplementary Information has changed and is described in § 170.9(b)(20) and § 170.8(b)(16). The appeals process is derived from and consistent with ISO/IEC 17020:2012 and ISO/IEC 17011:2017. Each C3PAO is required to have a time-bound, internal appeals process to address disputes related to perceived assessor errors, malfeasance, and unethical conduct. Requests for appeals will be reviewed and approved by individual(s) within the C3PAO not involved in the original assessment activities in question. OSCs can request a copy of the process from their C3PAO. If a dispute regarding assessment findings cannot be resolved by the C3PAO, it will be escalated to the Accreditation Body. The decision by the Accreditation Body will be final.

A request for an appeal about an assessor's professional conduct that is not resolved with the C3PAO will be escalated and resolved by the Accreditation Body.

The issue of C3PAO liability is between an OSC and the C3PAO with which it contracts to do the assessment.

Any questions about the CMMC Level required by the solicitation should be directed to the contracting officer for the affected contractor.

10. Acceptance of Alternate Standards

a. NIST SP 800–171 Rev 2 DoD Assessments and CMMC Assessments

Comment: Multiple commenters asked for clarification on reciprocity between NIST SP 800–171 Rev 2 DoD Assessments and CMMC assessments.

Response: As stated in § 170.20(a), DoD intends to allow qualified standards acceptance of High confidence assessment using NIST SP 800–171 Rev 2 for CMMC Level 2. However, the CMMC Program requirements proposed in this rule will be implemented in the DFARS, as needed, which may result in changes to current DoD solicitation provisions and contract clauses relating to cybersecurity assessments.

b. Cloud Standards

Comment: Many commenters expressed concerns regarding CMMC recognition of Federal Risk and Authorization Management Program (FedRAMP) and requested guidance on which FedRAMP baselines, if any, would be granted standards acceptance at each CMMC Level. A few commenters sought assurance that DoD Cloud Computing Security Requirements Guide (SRG) Impact Levels 4 and 5 would not be applied to CMMC Level 3.

Response: CMMC does not offer comprehensive acceptance of FedRAMP. The CMMC Program allows the acceptance of FedRAMP environments in some cases to meet CMMC requirements in connection with use of a Cloud Service Provider (CSP). If an OSC uses an external CSP to process, store, or transmit CUI or to provide security protection for any such component, the OSC must ensure the CSP's product or service offering either (1) is authorized as FedRAMP Moderate or High on the FedRAMP Marketplace; or (2) meets the security requirements equivalent to those established by the Department for the FedRAMP Moderate or High baseline. The CSP will provide evidence that its product or service offering meets the security requirements equivalent to FedRAMP Moderate or High by providing a body of evidence (BOE) that attests to and describes how the CSP's product or service offering meets the FedRAMP baseline security requirements. Note that for any portion of the on-premises (internal) network

that interacts with the cloud service offering and is within the CMMC Assessment Scope, the OSC is required to meet all applicable CMMC requirements to achieve certification.

The DoD Cloud Computing SRG applies to DoD-provided cloud services and those provided by a contractor on behalf of the department, *i.e.*, a commercial cloud service provider or integrator. Cloud Computing SRG does not apply to CMMC.

c. Other Standards

Comment: Numerous commenters asked whether CMMC could leverage the results of other assessments, such as ISO/IEC 27001/27002, NIST SP 800–53, NIST SP 800–172, HITRUST, DoE Cybersecurity Capability Maturity Model, NIAP Common Criteria Testing Laboratory Services (CCEVS), Committee on National Security Systems (CNSS) Instruction No. 12533 (CNSSI 12533), ISA/IEC–62443, DoD’s Security Technical Implementation Guides (STIG), NIST Cyber Security Framework (CSF), NIST Risk Management Framework (RMF), the American Institute of CPAs Service and Organizational Controls, Service and Organization Controls (SOC) Trust Services Criteria (SOC 2), ISA/IEC–62443, ITAR, Criminal Justice Information Services (CJIS) security standards, and non-ISO/IEC standards used by foreign partners such as the Australian Cybersecurity Centre Essential Eight Maturity Model.

Response: The CMMC Program standards acceptance is defined in § 170.20 of this rule.

11. CMMC Assessment Scope

Comment: Multiple commenters requested details on assessment boundaries and what systems are in-scope for a CMMC assessment. Questions included how assessment boundaries are defined, how networks composed of federal components (including systems operated on behalf of the government) and non-federal components are addressed, how centralized security services are treated, and how “enduring exceptions” are handled.

Response: § 170.19 states that prior to a CMMC assessment, the OSA must define the CMMC Assessment Scope for the assessment, representing the boundary with which the CMMC assessment will be associated. This section includes detailed guidance on how to define the CMMC Assessment Scope, how different categories of equipment are defined to be in- or out-of-scope for an assessment, how the security of specialized equipment is

expected to be managed, External Service Providers considerations, and the incorporation of people, technology, and facilities into the boundary.

GFE, IoT, OT, and, as defined, Restricted Information Systems and Test Equipment are categorized as “Specialized Assets” in § 170.19. NIST SP 800–171 Rev 2 uses the term “enduring exceptions” to describe how to handle exceptions for Specialized Assets.

12. Applicability of Multiple CMMC Levels

Comment: Two commenters sought confirmation that it is acceptable for contractors with multiple business segments to have one or more CMMC assessments (*e.g.*, one segment at Level 1, another at Level 2). Commenters also wanted to know if systems within the scope of an assessment require multiple assessments if the systems are used to support tasks under multiple contracts. Another asked, if a company has multiple Commercial and Government Entity (CAGE) codes, whether a single assessment can cover all CAGE codes.

Response: Yes, it is possible to have different business segments or different enclaves assessed or certified at different CMMC Levels. A CMMC assessment can be restricted to a particular segment or enclave based on the defined CMMC Assessment Scope, and an OSA can define multiple CMMC Assessment Scopes. Thus, a business segment that only supports Level 1 (FCI) efforts can identify a boundary that is assessed against Level 1 requirements, and another segment that supports Level 2 (CUI) efforts can identify a different boundary that is assessed against Level 2. Offerors will be required to attain CMMC certification, when applicable, at or above the level required by the solicitation, by the time of award (or option period exercise) and must maintain their CMMC status throughout the life of the contract, task order, or delivery order.

13. CMMC Implementation Timeline and Pilot Program

a. CMMC Schedule

Comment: There were many comments requesting clarification or justification regarding the general roll-out schedule for DFARS clause 252.204–7021. Some commenters requested program acceleration and others advocated for delays. Two commenters were confused by statements in the **Federal Register** Notice that the timeline for implementation across the DoD contractor population would be seven

years, but that all contracts would include the CMMC clause in five years, at the end of the roll-out.

Response: The DoD is implementing a phased implementation for the CMMC Program and intends to introduce CMMC requirements in solicitations over a three-year period to provide appropriate ramp-up time. The Department anticipates it will take two years for companies with existing contracts to become CMMC certified.

In response to public comment, assessment requirements in CMMC have been simplified to three tiers, and DoD is developing policy to guide Program Managers through a time-phased introduction of CMMC requirements. From the effective date of the DFARS rule that will implement CMMC requirements, DoD will include CMMC self-assessment requirements in solicitations when warranted by the FCI and CUI categories associated with the planned effort. A similar requirement for CUI has been in place since publication of the September 2020 rule that implemented DFARS provision 252.204–7019, which requires offerors to submit NIST SP 800–171 Rev 2 self-assessment results in the SPRS as a condition of award. DoD intends to include CMMC requirements for Levels 1, 2, and 3 in all solicitations issued on or after October 1, 2026, when warranted by any FCI or CUI information protection requirements for the contract effort. In the intervening period, DoD Program Managers will have discretion to include CMMC requirements in accordance with DoD policies.

b. CMMC Pilot Program

Comment: Multiple commenters wanted more information about the roll-out of the CMMC pilot program, including transparency about which acquisition programs are being considered for inclusion prior to the release of a solicitation. Commenters requested details on the “provisional period,” whether there would be a break between the pilot program and the official launch of the CMMC Program, whether there would be an assessment on the effectiveness of the pilot, and if lessons learned from the pilot would be shared across the community.

Response: CMMC 1.0 did include a CMMC Pilot program; however, CMMC 2.0 does not include pilots. Instead, upon the effective date of the associated CMMC DFARS rule, the Department intends to begin including CMMC self-assessment requirements when applicable, for protection of FCI and CUI.

c. Communicating CMMC Requirements

Comment: Two commenters requested that, during the phased rollout of CMMC, defense contractors be forewarned of DoD plans to include a CMMC requirement in an upcoming solicitation. They asked for transparency with respect to which contracts were being considered for CMMC requirements.

Response: Offerors and contractors will be informed of CMMC requirements in solicitations through (1) the specification of a required CMMC Level, and (2) inclusion of the appropriate DFARS provisions or clauses. There is no plan to advertise a list of solicitations that will or may include CMMC requirements. The implementation plan described in § 170.3(e) addresses phase-in of CMMC requirements.

d. Market Capacity for Assessments

Comment: Multiple commenters wanted details about assessor availability and were concerned that a lack of assessors would impact the schedule for including CMMC requirements in solicitations and contractor planning to attain CMMC certification to meet those requirements.

Response: The phased implementation plan described in § 170.3(e) is intended to address ramp-up issues, provide time to train the necessary number of assessors, and allow companies the time needed to understand and implement CMMC requirements. An extension of the implementation period or other solutions may be considered in the future to mitigate any C3PAO capacity issues, but the Department has no such plans at this time. If changes to the implementation plan occur, DoD policies that govern requirements definition in the acquisition process will be modified.

e. Certification Sustainment During Validity Period

Comment: Three commenters asked about sustainment of CMMC certification during the three-year certificate validity period. They wanted to know how sustainment will be monitored and whether demonstrating continuous monitoring capabilities would be considered in lieu of a strict three-year recertification period. There were also questions about what the criteria or triggers would be that would lead to a loss of accreditation during this period, including what happens when a company with a certification is acquired by another company, and whether contractors are required to notify the DoD if systems fall out of compliance with CMMC requirements.

Response: The validity period is one (1) year for CMMC Level 1 and three (3) years for CMMC Levels 2 and 3. Contractors must continue to meet CMMC requirements during the period of performance of the contract. Under CMMC, contractors must submit affirmations into SPRS for each assessment, attesting that they have met the CMMC requirements and will maintain the applicable information systems at the required CMMC level as specified in § 170.22. Monitoring contractor compliance with the terms of the contract is the responsibility of the contractor, with the government contracting officer. DoD is not utilizing a continuous monitoring capability in lieu of compliance requirements. DoD understands that information systems operating in a CMMC Assessment Scope will require upgrades and maintenance. For systems certified at CMMC Level 2 or above, a plan for addressing deficiencies is defined in § 170.21.

It is possible for an organization to need a new assessment during the validity period. CMMC self-assessments and certifications are valid for a defined CMMC Assessment Scope. If the CMMC Assessment Scope changes due to infrastructure modifications or expansion of the CMMC Assessment Scope due to new acquisition, a new assessment may be required. The original CMMC certification remains valid for the original CMMC Assessment Scope. The information system(s) in the new CMMC Assessment Scope may not be used to process, store, or transmit CUI for any contract until it is validated via a new CMMC assessment. The same applies to the annual affirmations. During the annual affirmation process, a senior organization official affirms that the organization is satisfying and will maintain the requirements of the specified CMMC level (e.g., CMMC Level 2 Self-Assessment). The affirmation applies to the CMMC Assessment Scope. At the time of a new self-assessment or certification, a new affirmation is submitted into SPRS affirming that the organization meets the CMMC requirements and will maintain the applicable information system (within the CMMC Assessment Scope) at the required CMMC level. For CMMC Levels 2 and 3, an affirmation is required to be submitted in SPRS annually for the duration of the triennial validity period and at the conclusion of any POA&M closeout assessments. Affirmation requirements are set forth in § 170.22.

14. CMMC Assessment Timeline

Comment: Several comments requested details about CMMC

assessment timelines, including how long an assessment would take, how long after an assessment was completed would the assessment report be ready, and when SPRS content would be updated. One commenter wanted to know how soon after a failed assessment a subsequent assessment could be scheduled. One commenter wanted details about the remediation period.

Response: The actual length of time it takes for an OSA to prepare for, and assessors to conduct an assessment and prepare the assessment report depends on many factors, including the number of systems and networks in the CMMC Assessment Scope, the level of assessment being conducted, staff preparedness for assessor questions, and the number of assessors conducting the assessment.

For CMMC assessments, C3PAOs will upload the results of the assessment and the signed CMMC certificate into the CMMC instantiation of eMASS. Certification is automatically posted to SPRS. There is no minimum time to wait after a failed assessment before scheduling another assessment.

A NOT MET requirement may be re-evaluated during the course of the assessment and for 10 business days following the active assessment period under certain conditions, as set forth in § 170.17(c)(2) and § 170.18(c)(2). A Level 2 or Level 3 conditional assessment and associated POA&M must be closed out within 180 days.

15. Assessment Delays and Award Impact

Comment: Several commenters expressed concerns about the impact that delays in the assessment process would have on contract award. For example, if an assessment is held up, by no fault of the contractor, such that the results will not be available until after the award date, will the contractor be ineligible to receive the award or is there a process for delaying the award? Would the answer be the same for a reassessment of a contractor whose three-year assessment or certificate is expiring? On a related issue, one comment asked about the timing of reassessment/recertification and whether work on an existing contract can continue after an assessment/certificate has expired if the reassessment is scheduled but delayed.

Response: The CMMC Program rule does not provide mitigations for assessment delays that may impact timeliness of certification or recertification with regard to the closing date of a particular solicitation. Offerors will be required to attain CMMC certification, when applicable, at or

above the level in the solicitation, by the time of award (or option period exercise) and must maintain their CMMC status throughout the life of the contract, task order, or delivery order. The three-year validity period should provide adequate time to prepare for and schedule subsequent assessments for certification. Timelines for meeting CMMC requirements for Level 1 or 2 self-assessment are within the control of the contractor.

16. Defense Contractor and Subcontractor Engagement

Comment: Several commenters suggested that defense contractors and subcontractors should be more engaged in the formulation of the rule and better informed in how the rule will be applied. They indicated that guidance is unclear, ad hoc, and inconsistent, and requested an authoritative source of information, such as FAQs, that are kept up to date and provide reliable responses to questions. They also expressed a desire for more transparency in how ambiguities are being resolved in early assessments.

Response: In September 2019, the CMMC PMO released the first draft publication of the CMMC Model v 0.4. The CMMC PMO received over 2,000 comments from individuals and industry associations. These comments informed changes included in CMMC Model 1.0 released in January 2020. In addition, DFARS Case 2019–D041 generated over 750 additional public comments that informed changes to the rule text and influenced the transition to CMMC 2.0. The Office of the Under Secretary of Defense for Acquisition and Sustainment (OUSD(A&S)) held over 100 industry listening sessions in 2020 and 2021, engaged with the DIB through briefings and discussions with defense industry trade associations, academia, and government-based organizations with industry members (e.g., National Industrial Security Program Policy Advisory Committee). Many sessions were recorded and shared with the public on the internet in social media, news releases, and the CMMC PMO website (<https://DoDcio.defense.gov/CMMC/>), which was completely updated in 2021 and contains new information, FAQs, and allows the public direct contact with the CMMC PMO. As always, FAQs are to clarify content only, and do not interpret, define, or otherwise change the meaning of the regulatory text. The CMMC PMO continues to communicate with defense contractors and subcontractors, to include small businesses, and other members of the public.

The official website of the DoD CMMC Program is <https://DoDcio.defense.gov/CMMC/>. This website contains links to CMMC documents including, but not limited to, the CMMC Model Overview, CMMC Scoping Guidance (by level), CMMC Level 1 Self-Assessment Guide, CMMC Level 2 Assessment Guide, and the CMMC Glossary.

17. C3PAO Consistency

Comment: One commenter expressed concerns that C3PAOs would not conduct CMMC assessments in a uniform manner, leading to inconsistent results.

Response: C3PAOs use only certified CMMC assessors to perform CMMC assessments. To ensure assessments are conducted in a uniform manner, assessors are trained by certified instructors and required to pass CMMC assessor tests before becoming certified. The accredited CAICO manage and oversee the training, testing, authorizing, and certifying of candidate assessors and instructors. A CAICO must meet the DoD requirements set forth in § 170.10 and achieve compliance with ISO/IEC 17024:2012, Conformity Assessment—General Requirements for Bodies Operating Certification of Persons Conformity Assessment.

18. CMMC Cost Impacts

a. CMMC Cost Assumptions and Estimates

Comment: Several commenters questioned or refuted the cost estimates and/or the assumptions and mathematical approach upon which the cost estimates were based. Several commenters requested clarification around the cited difference in both cost and hours between the CMMC certification process and the DoD Assessment process, the accounting for completion of NIST SP 800–171 Rev 2 requirements, and cost distinction between enterprise and enclave assessments. Two commenters stated that the estimated number of subcontractors was low, and one commenter suggested that the \$5 million threshold for small businesses excluded a large number of small businesses from the calculations. One commenter asked whether duplication of assessments was considered for small businesses who support many prime contractors. Additional commenters believed costs were absent from the calculations, to include the cost of completing POA&M, management costs for small companies to achieve maturity, and costs for international

suppliers. A number of comments requested additional estimates based on adjustments to labor rates for benefits and taxes, each of the assessment levels, and small, medium, and large companies. One commenter asked for clarification on the calculations used to estimate public savings. One commenter questioned why North American Industry Classification System (NAICS) code 54715 pertaining to sensitive CUI was not included in the calculations.

Response: The cost estimates and assumptions referenced by the commenters pertain to CMMC 1.0 and are not reflective of the changes in CMMC, though public comment feedback has been incorporated into the cost estimation process for the CMMC Program where appropriate. The Department limited estimates for CMMC to those costs associated with preparing for, attaining, and publishing results of: (a) CMMC compliance via self-assessment for CMMC Levels 1 and 2, and (b) certification at CMMC Level 2 through a C3PAO and Level 3 through the DoD. Costs for companies to implement information security protections to comply with the existing FAR subpart 4.19 to achieve CMMC Level 1, and DFARS subpart 204.73 to achieve CMMC Level 2, are distinct from costs associated with CMMC assessment processes to verify and attest to the corresponding implementation of existing rules. Cost estimates were developed for companies to implement security requirements for CMMC Level 3. CMMC Level 3 security requirements are defined in table 1 to § 170.14(c)(4) CMMC Level 3 Requirements. For the vast majority of the DIB, CMMC does not levy additional information security protection requirements but is designed to provide increased assurance that defense contractors are contract compliant and can adequately protect FCI and CUI at a level commensurate with risk, accounting for information flow down to its subcontractors in a multi-tier supply chain. There is no recognized duplication of assessments for small companies that support many primes, because once assessed, an organization need only provide evidence of compliance or certification to prospective primes in order to satisfy the CMMC requirement in a solicitation. When information system or network boundaries differ, an additional assessment may apply.

b. CMMC Cost Burden

Comment: Several commenters suggested that costs were underestimated, particularly for small businesses who were perceived to be at risk of decreased participation in the

marketplace due to the cost prohibitive nature of the CMMC requirement. Multiple commenters requested additional strategies to mitigate costs, including the promotion of new technologies.

Response: CMMC Levels 1 and 2, which represent the majority of the anticipated requirements, does not levy any additional information security protection requirements. To address assessment cost concerns, CMMC eliminates the third-party assessment requirement at CMMC Level 1 and permits self-assessment for certain contracts containing a CMMC Level 2 requirement. The DoD Office of Small Business Programs, available at <https://business.defense.gov/>, has informational resources that may help defray cybersecurity implementation costs by helping organizations stay up-to-date with the latest cybersecurity compliance and policy best practices.

c. CMMC Cost Effectiveness and Alternatives

Comment: Two commenters requested that the DoD measure the impact of implementing the additional security requirements. One commenter suggested an alternative strategy to protect CUI when generated.

Response: CMMC does not require implementation of any additional security protection requirements beyond those identified in current FAR clause 52.204-21 and in NIST SP 800-171 Rev 2 for CMMC Levels 1 and Level 2, respectively. CMMC Level 3 requirements are new and based upon NIST SP 800-172.

19. CMMC Model

a. CMMC Level Requirement Selection

Comment: Multiple commenters requested clarification about who selects the CMMC Level that is specified in a solicitation and the criteria used. Commenters also wanted to know if the contractor's CMMC Level flows-down directly to subcontracts and if so, whether that level carries down to lower tier subcontracts. Numerous questions asked if the government or a contractor is responsible for determining the appropriate CMMC Level to include in a subcontract and, if it is the contractor's responsibility, what criteria is used to identify the appropriate level to flow-down. To that end, commenters requested guidance for identifying CUI and information sensitivity. One commenter asked for clarification on whether different CMMC Level requirements could be identified within a single Statement of Work (SOW).

Response: The solicitation will specify the required CMMC Level, and the level itself will be identified by the requiring activity. The requiring activity knows the type and sensitivity of information that will be shared with or developed by the awarded contractor and selects the CMMC Level required to protect the information according to DoD guidance. Contractors must have achieved this level, or higher, to be awarded the resultant contract. For subcontracts, the prime contractor will identify for its subcontractor the required CMMC Level in accordance with § 170.23 if it is not already defined in the solicitation. If a prime contractor is uncertain about the appropriate CMMC Level to assign when creating a subcontract solicitation, it should consult with the government program office to determine what type of certification or assessment will be required given the information that will flow down. Policies for identification and clear marking of CUI materials are provided in CUI program materials and 32 CFR part 2002, when applicable. A solicitation may contain requirements for multiple CMMC Levels if, in support of the contract, different enclaves are expected to process, store, or transmit information that needs different levels of security.

b. Model Standard, CMMC Levels, and Model Updates

Comment: One commenter stated that the CMMC Model is not a configuration-controlled standard managed by a recognized standards body.

Response: This rule codifies the CMMC Program, elements of which are reflected in the CMMC Model. All CMMC Model requirements are derived from FAR 52.204-21, NIST SP 800-171 Rev 2, and NIST SP 800-172, which are configuration-controlled guidelines managed by NIST. As a result of the alignment of CMMC to NIST guidelines, the Department's requirements will continue to evolve as changes are made to the underlying NIST SP 800-171 Rev 2 and NIST SP 800-172 security requirements. Additional rulemaking may be necessary in the future to conform CMMC requirements described in this rule to any changes to the underlying information protection requirements defined in the foundational NIST guidelines.

Comment: Many comments were received requesting changes to CMMC Model 1.0. Several commenters requested changes to CMMC Level requirements and others had questions about the content and handling of CMMC Model updates. A few commenters made suggestions for

restricting the current implementation, such as using only NIST SP 800-171 Rev 2 for the CMMC 1.0 implementation of Level 1-3 requirements and supplementing with additional requirements only in Levels 4 and 5. Similar comments recommended using NIST SP 800-171 Rev 2 for the initial CMMC rollout and later expanding to include additional CMMC requirements. A number of comments questioned the purpose and use of the CMMC 1.0 implementation of CMMC Level 2. Other comments requested information on updating CMMC requirements as new technology and threats emerge and new versions of NIST SP 800-171 Rev 2 and NIST SP 800-53 are released. Multiple comments were received on CMMC 1.0 Levels 4 and 5. Several commenters believed there to be a significant disconnect between NIST SP 800-171B/172 and CMMC 1.0 Levels 4 and 5, and issues with implementation of these levels. Many comments requested that Levels 4 and 5 be updated to allow for flexibility in implementation rather than require all the requirements as written. Reasons cited for allowing flexibility include reducing cost and assessment complexity as well as allowing for the ability to adapt based on architectural environments and dynamic threat models.

Response: Changes were made in this rule to requirements in the former CMMC model based in part upon receipt of informal public comment. The CMMC Model was streamlined to three-tiers, which align to the protection requirements set forth in FAR 52.204-21, NIST SP 800-171 Rev 2, and NIST SP 800-172, and all CMMC-unique requirements and process maturity elements have been removed.

The CMMC Model and program requirements will be evaluated as new technology and threats emerge and revised as appropriate.

Comment: One comment included a request to identify instances where contractors would be better off using a classified environment, rather than CMMC version 1.0 Level 4 or 5, to protect the information.

Response: The CMMC Program is designed to enforce protection of unclassified information, to include FCI and CUI, not intended for public release that is shared by the Department with its contractors and subcontractors. The program provides the Department increased assurance that contractors and subcontractors are meeting the cybersecurity requirements that apply to acquisition programs and systems that process federal contract information and controlled unclassified information.

Any discussion regarding the use of classified networks is outside of the scope of the CMMC Program.

20. CMMC Requirements

Comment: There were multiple comments suggesting additions, deletions, or changes to model requirements. One commenter noted multiple instances of CMMC requirements with the term ‘information system’ rather than ‘system’ used in NIST SP 800–171 Rev 2, asking if CMMC meant to change the intent by inserting ‘information’ in these requirements. Multiple commenters questioned the intent, clarity, or interpretation of several CMMC requirements/NIST SP 800–171 Rev 2 requirements, recommending clarification regarding vulnerability management, protection of mobile devices, review of audit logs, disabling of identifiers, FIPS validated encryption, and malicious code scans. One comment suggested that CMMC 1.0 requirements RM.2.141 and RM.3.144 are redundant and recommended incorporating RM 3.146 into CA.2.159, justifying that a plan of action is essentially a risk management plan. Two commenters noted that two CMMC 1.0 requirements (RE.2.137 and RE.3.139) are unclear as they do not specify what data requires backup, or the meaning of resilient backup. One commenter said that CMMC 1.0 requirement MA.2.114 removed the qualifier of “maintenance” when describing personnel requiring supervision of maintenance activities, asking if this is an insignificant change to the NIST SP 800–171 Rev 2 security requirement, or whether there is some rationale or message that the CMMC specification is trying to adjust by deviating from the NIST SP 800–171 Rev 2. Two commenters stated that CMMC 1.0 requirement MP.1.1.18 requires only FCI be sanitized, but, for CMMC 1.0 Level 3 (CMMC Level 2 under CMMC 2.0) assessments, there is no requirement to sanitize CUI. One commenter wanted to know which CMMC requirement requires a medium assurance certificate for reporting cyber incidents.

Response: In CMMC 1.0, there was no intent to change the meaning of NIST requirements except those referenced as “modified.” These minor discrepancies are now resolved as all FCI requirements use the exact FAR language and all CUI requirements use the exact language from the relevant NIST guidelines. The requirements in CMMC Level 3 are derived from NIST SP 800–172 with DoD-approved parameters. Commenters requesting

revisions to NIST guidelines should respond to the NIST public comment periods. There is no CMMC-specific cyber incident reporting requirement or need for associated medium assurance certificate.

Comment: Several comments sought clarification on the alignment and relative authority or precedence of the CMMC requirements to Federal, Legislative, Statutory, Regulatory, or DoD Organizational policy, DoD instructions, and FAQs.

Response: The CMMC Program requirements will be required once implemented in the DFARS and will have the same relative authority of any other DoD contract requirement. The CMMC Program relates to and incorporates elements of the following authorities: Executive Order No. 13556, Controlled Unclassified Information, 75 FR 68675 (November 4, 2010), which establishes “an open and uniform program for managing [unclassified] information that requires safeguarding or dissemination controls;” 32 CFR part 2002, which describes the executive branch’s Controlled Unclassified Information Program and establishes policy for designating, handling, safeguarding, and decontrolling information that qualifies as CUI when processed, stored, or transmitted on a federal or non-federal information system; FAR clause 52.204–21, Basic Safeguarding of Covered Contractor Information Systems, which, as applicable, requires contractors to apply certain basic safeguarding procedures on covered contractor information systems that process, store, or transmit FCI; and DFARS clause 252.204–7012, *Safeguarding Covered Defense Information and Cyber Incident Reporting*, which, as applicable, requires defense contractors to implement NIST SP 800–171 Rev 2 requirements on unclassified covered contractor information systems that process, store, or transmit covered defense information. Additional DoD instructions and manuals address DoD information security policy, including DoDI 5200.48 CUI which establishes policy, assigns responsibilities, and prescribes procedures for CUI throughout the DoD for federal and on non-federal information systems to include the implementation of NIST SP 800–171 Rev 2. A requirement for CMMC assessments provides DoD assurance that contractors have implemented required cybersecurity protections. The requirements of this rule will be implemented in an associated 48 CFR acquisition rule regarding CMMC.

21. CMMC Assessment

Comment: Multiple commenters pointed out that the rule does not specify an authoritative source for obtaining a CMMC certificate, leaving the pedigree of certificates in question. Two comments inquired about the security of record [data] collection and retention and whether the assessors’ platforms would need to be CMMC Level 3 compliant to protect sensitive data used for the assessment/certification process.

Response: The processes for achieving compliance with a CMMC level are described in § 170.15 through § 170.18. CMMC Level 2 Certification Assessments are conducted by C3PAOs authorized by the CMMC Accreditation Body. C3PAOs grant CMMC Level 2 certificates of assessment. The DoD conducts CMMC Level 3 Certification Assessments and grants Level 3 certificates of assessment. A C3PAO’s IT infrastructure must achieve at least a CMMC Level 2 Certification Assessment. Certified CMMC Assessors working at their place of business or from home must use their C3PAO’s IT infrastructure. Assessment data and results are securely uploaded by the C3PAO into the CMMC instantiation of eMASS. The CMMC instantiation of eMASS automatically feeds compliance data into SPRS. Both eMASS and SPRS are Department owned and operated systems.

Comment: A few commenters requested resources for understanding CMMC requirements. There were also many comments related to the purpose, status, schedule, or content of the CMMC Assessment Guides. Additional comments requested clarification on the evaluation criteria and evidence described in the current Assessment Guides.

Response: CMMC Assessment Guides are optional resources to aid in understanding CMMC requirements and are largely derived from NIST documentation, to include NIST SP 800–171 Rev 2 and NIST SP 800–172. The CMMC assessment process is defined in § 170.15 through § 170.18, and the CMMC Scoring Methodology is defined in § 170.24. The evaluation criteria (*i.e.*, assessment procedures) and evidence (*i.e.*, potential assessment methods and objects) required are taken directly from the NIST documentation, and revisions to NIST documentation are outside the scope of this rule. The CMMC Assessment Guides provide supplementary information, further discussion, examples, and references for assessors and contractors preparing for assessments. The guides do not identify

specific solutions or baselines. These documents are available at: <https://DoDcio.defense.gov/CMMC/>. Updated CMMC Assessment Guides and associated CMMC documents were posted on the OUSD(A&S) CMMC website after the public comment period for DFARS Case 2019–D041 closed on November 30, 2020. These documents reflected changes based on review of public comments. Future updates to CMMC guidance documentation will be made as needed.

Comment: One comment suggested that audit standards be determined for CMMC assessments. Two comments asked for clarification regarding references provided in the model, whether all references must be reviewed, and if the requirements within the references must also be achieved.

Response: The Department has reviewed definitions of audit and assessments and determined “assessment” best meets the goals of the CMMC Program. The cybersecurity standard requirements for the different CMMC Levels are set forth in § 170.14 and clarify references for the security requirements.

Comment: Many commenters were concerned about the lack of waivers or POA&Ms. Several commenters commented that not allowing waivers is impractical and will impact the ability of businesses to qualify for contract award. Commenters asked for clarification on the differences between POA&M that are not allowed by CMMC and the plans of action as required in the CMMC Level 3 control (now CMMC Level 2 under CMMC 2.0), CA.2.159 (now CA.L2–3.12.2 under CMMC 2.0). Many noted that POA&Ms are necessary when managing activities like system upgrades, vendor changes, and company acquisitions to avoid temporarily falling out of compliance.

Response: Under certain circumstances, the CMMC Program does permit contract award to organizations that have an approved and time limited POA&M. See § 170.21 for additional information on POA&Ms. There is no process for organizations to request waiver of CMMC solicitation requirements. DoD internal policies, procedures, and approval requirements will govern the process for DoD to waive inclusion of the CMMC requirement in the solicitation.

22. The Accreditation Body and C3PAOs

Comment: Many commenters had questions and concerns about the management of the Accreditation Body and C3PAOs. A few commenters

suggested using a government entity instead of the Accreditation Body construct to manage assessments. Commenters asked about the governance, resourcing, and oversight of the Accreditation Body with respect to CMMC training and assessments. Commenters expressed concerns such as who would make final decisions about CMMC issues, the lack of clearly defined roles and responsibilities for CMMC governance, and the long-term effectiveness of the Accreditation Body staffed by an all-volunteer workforce. One comment asked how the Accreditation Body can legally license training when CMMC Program information is available for free.

Response: The decision to use a non-governmental Accreditation Body was made because the DoD determined that there was insufficient capacity within the DoD to manage assessor training and assessments for all defense contractors who need to comply with CUI protection policies. The DoD CMMC PMO provides oversight of the Accreditation Body and is also responsible for developing, updating, maintaining, and publishing the CMMC Model, CMMC Assessment Guides, and policies for implementation of the CMMC Program.

Roles and responsibilities of the CMMC PMO, the Accreditation Body, and its organizations are described in SUBPART C of this rule. The Accreditation Body accredits C3PAOs and the CAICO. The Accreditation Body authorizes the CAICO to certify CMMC assessors and instructors and the C3PAOs to conduct assessments using CAICO-certified assessors.

Comment: Many commenters expressed concerns about how to ensure the necessary independence, quality assurance, integrity, and rigor of, and protection against potential conflicts of interest within the Accreditation Body and C3PAOs. Numerous commenters recommended the use of ISO/IEC standards to address these issues. Additionally, one commenter was concerned about high costs for assessments that could result if there is a lack of oversight for charging fees.

Response: The Accreditation Body is required to become compliant with the ISO/IEC 17011:2017 standard (the international benchmark used in demonstrating an accreditation body’s impartiality, technical competency, and resources) and the requirements set forth in § 170.8. Additionally, the C3PAOs and CAICO must comply with requirements as specified in § 170.9 and § 170.10, respectively, including the specified ISO/IEC standards.

Comment: To address a perceived shortage of CMMC C3PAO assessors, two commenters suggested authorizing the use of other ISO/IEC-compliant accreditation bodies to increase the numbers of assessors. Another commenter wanted to know how a company could become an accreditation body.

Response: Consistency in training is imperative due to the unique qualifications needed to understand requirements. Additionally, ISO/IEC 17024:2012 Conformity Assessment requirements are levied against the CAICO and may not be required by other entities. The number and level of assessors needed is relative to the number of companies seeking CMMC assessment. The demand level is influenced, but not solely determined by, the number of solicitations that include CMMC requirements, the CMMC Levels specified, and the estimated number of subcontractors that will also need to meet CMMC requirements, when flowed down by the prime contractor. To facilitate a smooth and orderly transition to CMMC, the Department will issue policy guidance to government Program Managers to govern the rate at which CMMC requirements are levied in new solicitations. The implementation phases are described in § 170.3(e). The CMMC PMO has visibility into the Accreditation Body’s assessor training activities, tracks the anticipated number of trained assessors, and will use this information to inform policies that guide government Program Managers in identifying CMMC requirements in new solicitations.

23. Relationship to Existing Regulations

Comment: Several commenters asked about the implications of having DFARS clauses 252.204–7012 and 252.204–7021 coexist in contracts and wanted to know if all the 252.204–7012 requirements, including the requirements for “adequate security,” incident reporting, and flow-down, apply in the presence of 252.204–7021. Others were concerned about a perceived conflict on the protection of CUI between NIST SP 800–171 Rev 2, which specifies the minimum requirements to provide “adequate security” for CUI on nonfederal systems and DFARS clause 252.204–7021 based on the CMMC Program. Multiple commenters wanted to know if the 252.204–7021 clause and the CMMC requirements override contractor responsibility to comply with other applicable clauses of the contract, or other applicable U.S. Government statutory or regulatory requirements. Others were concerned about a

continued proliferation of security requirements.

Response: CMMC Program requirements proposed in this rule will be implemented in the DFARS, as needed, which may result in changes to current DoD solicitation provisions and contract, including DFARS clause 252.204–7021. As such, DoD cannot address applicability of or changes to current DFARS clause 252.204–7021 or other current DFARS cybersecurity provisions or clauses at this time.

DoD does not intend to impose duplicative cybersecurity protection or assessment requirements. There is no conflict between the CMMC cybersecurity protection requirements described in this rule and DoD's current information safeguarding requirements, including those set forth in DFARS clause 252.204–7012. This CMMC rule adds new requirements for the assessment of contractor implementation of underlying information security standards and guidelines, as applicable, such as those set forth in FAR clause 52.204–21 and in the NIST SP 800–171 Rev 2. This rule also prescribes additional information security protection and assessment requirements for CMMC Level 3, derived from NIST SP 800–172, for certain limited scenarios.

As new cyber threats emerge, security requirements will continue to evolve to support efforts to protect information important to U.S. national security. However, alternate standards will continue to be reviewed, as described in § 170.20, to minimize the burden of new requirements.

24. Phase-Out of Existing Cybersecurity Requirements

Comment: Several commenters asked whether DFARS clause 252.204–7012, DFARS provision 252.204–7019 and 252.204–7020 will be phased out since DFARS clause 252.204–7021 is now a requirement.

Response: The CMMC Program requirements proposed in this rule will be implemented in the DFARS, as needed, which may result in changes to current DoD solicitation provisions and contract clauses, including DFARS clause 252.204–7021. As such, DoD cannot address applicability of or changes to current DFARS clause 252.204–7021 or other current DFARS cybersecurity provisions or clauses at this time.

The information safeguarding requirements and cyber incident reporting requirements set forth in DFARS clause 252.204–7012 will not be phased out as a result of this rule. CMMC Program requirements provide

DoD with verification, through self or third-party assessment, that defense contractors have, in fact, implemented DoD's cybersecurity protection requirements.

In addition, the requirements of this rule will not be fully implemented (and will not appear in all DoD contracts) until 2026 or later. As such, DoD will continue to require the current cybersecurity protections as reflected in the identified DFARS provisions and clauses for contracts that do not include a CMMC requirements.

Applicability

The CMMC Program will require DoD to identify CMMC Level 1, 2, or 3 as a solicitation requirement for any effort that will cause a contractor or subcontractor to process, store, or transmit FCI or CUI on its unclassified information system(s). Once CMMC is implemented in 48 CFR, DoD will specify the required CMMC Level in the solicitation and the resulting contract.

Summary of Program Changes: DFARS Case 2019–D041 implemented DoD's original model for assessing contractor information security protections, which is referred to as “CMMC 1.0.” CMMC 1.0 was comprised of five progressively advanced levels of cybersecurity standards and required defense contractors and subcontractors to undergo a certification process to demonstrate compliance with the cybersecurity standards associated with a given CMMC Level.

In March 2021, the Department initiated an internal review of CMMC's implementation that engaged DoD's cybersecurity and acquisition leaders to refine policy and program implementation, focusing on the need to reduce costs for small businesses and align cybersecurity requirements to other federal standards and guidelines. This review resulted in CMMC 2.0, which streamlines assessment and certification requirements and improves implementation of the CMMC Program. These changes include:

- Eliminating Levels 2 and 4, and renaming the remaining three CMMC Levels as follows:
 - Level 1 will remain the same as CMMC 1.0 Level 1;
 - Level 2 will be similar to CMMC 1.0 Level 3;
 - Level 3 will be similar to CMMC 1.0 Level 5.
- Removing CMMC-unique requirements and maturity processes from all levels;
- For CMMC Level 1, allowing annual self-assessments with an annual affirmation by company leadership;

- Allowing a subset of companies at Level 2 to demonstrate compliance through self-assessment rather than C3PAO assessment.

- For CMMC Level 3, requiring Department-conducted assessments; and
- Developing a time-bound and enforceable POA&M process.

The CMMC Program will be implemented through publication of rules for both title 32 CFR and title 48 CFR. Both rules will have public comment periods.

Background

A. Statement of Need for This Rule

The Department of Defense (DoD) requires defense contractors to protect sensitive unclassified information in accordance with requirements for FCI and CUI. To verify contractor and subcontractor implementation of DoD's cybersecurity information protection requirements, the Department developed the Cybersecurity Maturity Model Certification (CMMC) Program as a means of assessing and verifying adequate protection of contractor information systems that process, store, or transmit either FCI or CUI.

The CMMC Program is intended to: (1) align cybersecurity requirements to the sensitivity of unclassified information to be protected, (2) add a self-assessment element to affirm implementation of applicable cybersecurity requirements, (3) add a certification element to verify implementation of cybersecurity requirements, and (4) add an affirmation to attest to continued compliance with assessed requirements. As part of the program, DoD also intends to provide supporting resources and training to the DIB, to help support companies who are working to achieve the required CMMC level. The CMMC Program provides for assessment at three levels, starting with basic safeguarding of FCI at CMMC Level 1, moving to the broad protection of CUI at CMMC Level 2, and culminating with higher-level protection of CUI against risk from Advanced Persistent Threats (APTs) at CMMC Level 3.

The CMMC Program addresses DoD's need to protect its sensitive unclassified information during the acquisition and sustainment of products and services from the DIB. This effort is instrumental in establishing cybersecurity as a foundation for DoD acquisitions.

Although DoD contract requirements to provide adequate security for covered defense information (reflected in DFARS clause 252.204–7012) predate CMMC by many years, a certification requirement for the handling of CUI to

assess a contractor or subcontractor's implementation of those required information security controls is new with the CMMC Program.

The theft of intellectual property and sensitive information from all U.S. industrial sectors from malicious cyber activity threatens economic security and national security. The Council of Economic Advisers estimates that malicious cyber activity cost the U.S. economy between \$57 billion and \$109 billion in 2016.¹⁹ The Center for Strategic and International Studies estimates that the total global cost of cybercrime was as high as \$600 billion in 2017.²⁰

Malicious cyber actors have targeted and continue to target defense contractors and the DoD supply chain. These attacks not only focus on the large prime contractors, but also target subcontractors that make up the lower tiers of the DoD supply chain. Many of these subcontractors are small entities that provide critical support and innovation. Overall, the DIB sector consists of over 220,000 companies²¹ that process, store, or transmit CUI or FCI in support the warfighter and contribute towards the research, engineering, development, acquisition, production, delivery, sustainment, and operations of DoD systems, networks, installations, capabilities, and services. The aggregate loss of intellectual property and controlled unclassified information from the DoD supply chain can undercut U.S. technical advantages and innovation, as well as significantly increase the risk to national security. As part of multiple lines of effort focused on the security and resiliency of the DIB, the Department is working with industry to enhance the protection of FCI and CUI within the DoD supply chain. Toward this end, DoD has developed the CMMC Program.

Cybersecurity Maturity Model Certification Program

The CMMC Program provides a comprehensive and scalable certification approach to verify the implementation of requirements associated with the achievement of a cybersecurity level. CMMC is designed

to provide increased assurance to the Department that defense contractors can adequately protect FCI and CUI at a level commensurate with the risk, accounting for information flow down to its subcontractors in a multi-tier supply chain. Defense contractors can achieve a specific CMMC Level for its entire enterprise network or an enclave(s), depending upon where the information to be protected is processed, stored, or transmitted.

The CMMC Program assesses implementation of cybersecurity requirements. The CMMC requirements for safeguarding and security are the same as those required by FAR Subpart 4.19 and DFARS Subpart 204.73, as well as selected NIST SP 800–172 requirements. CMMC Level 1 requires implementation of the safeguarding requirements set forth in FAR clause 52.204–21. CMMC Level 2 requires implementation of the security requirements in NIST SP 800–171 Rev 2. CMMC Level 3 requires implementation of the security requirements in NIST SP 800–171 Rev 2 as well as selected NIST SP 800–172 requirements, with DoD specified parameters. The CMMC requirements for all three Levels are provided in § 170.14. In general, CMMC assessments do not duplicate efforts from existing DoD assessments. In rare circumstances a re-assessment may be necessary when cybersecurity risks, threats, or awareness have changed.

Under the CMMC Program, CMMC contract requirements include self-assessments and third-party assessments for CMMC Level 2, predicated on program criticality, information sensitivity, and the severity of cyber threat. Based on the type and sensitivity of the information to be protected, a defense contractor must achieve the appropriate CMMC Level and demonstrate implementation of the associated set of information protection requirements.

If CMMC Level 1 or Level 2 Self-Assessment is a contract requirement, the defense contractor will be required to self-assess its compliance with the CMMC Level 1 or Level 2 requirements and submit the assessment results and an affirmation of conformance in SPRS. CMMC Level 1 self-assessment and associated affirmation is required annually. CMMC Level 2 Self-Assessment is required triennially with an affirmation following self-assessment and annually thereafter.

If CMMC Level 2 Certification Assessment is a contract requirement, CMMC assessments must be performed by an authorized or accredited CMMC Third Party Assessment Organization

(C3PAO). When CMMC Level 3 Certification Assessment is a contract requirement, an assessment by DoD is required following a CMMC Level 2 Final Certification Assessment. Upon completion of a CMMC Level 2 or 3 Certification Assessment, the offeror may be granted a certification of assessment based on the results of the assessment at the appropriate CMMC Level (as described in the CMMC Model). The assessment results are documented in SPRS to enable contracting officers to verify the validity status of an offeror's certification level and currency (*i.e.*, not more than three years old) prior to contract award. The offeror must also submit an affirmation of conformance in SPRS following the assessment and annually thereafter.

CMMC allows the use of a Plan of Action and Milestones (POA&Ms) for specified CMMC Level 2 and 3 security requirements. Each POA&M must be closed, *i.e.*, all requirements completed, within 180 days of the initial assessment.

The details of the requirements for self-assessment, third-party assessment, and affirmation for each CMMC Level, are provided in § 170.15 through § 170.18. POA&M requirements, including which requirements are allowed to be on a POA&M and POA&M closeout requirements, in addition to requirements for provision of an affirmation at closeout, contract eligibility, and continuation are provided in § 170.21 and § 170.22.

DoD's phased implementation of CMMC requirements is described in § 170.3(e). Once CMMC requirements have been implemented in the DFARS, the solicitation will identify the specific CMMC Level required for that procurement. To implement a phased transition, selection of a CMMC Level will be based upon careful consideration of market research and the likelihood of a robust competitive market of prospective offerors capable of meeting the requirement. In some scenarios, DoD may elect to waive application of CMMC third party assessment requirements to a particular procurement. In such cases, the solicitation will not include a CMMC assessment requirement. Such waivers may be requested and approved by the Department in accordance with DoD's internal policies and procedures. For a DoD solicitation or contract that does include CMMC requirements, including those for the acquisition of commercial items (except those exclusively COTS items) valued at greater than the micro-purchase threshold, contracting officers will not make award, or exercise an option on a contract, if the offeror or

¹⁹ Based on information from the Council of Economic Advisors report: The Cost of Malicious Cyber Activity to the U.S. Economy, 2018.

²⁰ Based on information from the Center for Strategic and International Studies report on the Economic Impact of Cybercrime; <https://www.csis.org/analysis/economic-impact-cybercrime>.

²¹ Based on information from the Federal Procurement Data System, the average number of unique prime contractors is approximately 212,650 and the number of known unique subcontractors is approximately 8,300. (FPDS from FY18–FY21).

contractor does not meet the requirements for the required CMMC Level. Furthermore, CMMC requirements are required to flow down to subcontractors as prescribed in the solicitation at all tiers, commensurate with the sensitivity of the unclassified information flowed down to each subcontractor.

B. Legal Authority

5 U.S.C. 301 authorizes the head of an Executive department or military department to prescribe regulations for the government of his or her department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. (<https://www.govinfo.gov/content/pkg/USCODE-2009-title5/pdf/USCODE-2009-title5-partI-chap3-sec301.pdf>).

Section 1648 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92)²² directs the Secretary of Defense to develop a consistent, comprehensive framework to enhance cybersecurity for the U.S. Defense Industrial Base (DIB). The CMMC Program is an important part of this framework.

C. Community Impact

This rule impacts all prospective and actual DoD contractors and subcontractors that are handling or will handle DoD information that meets the standards for FCI or CUI on a contractor information system during performance of the DoD contract or subcontract. This rule also impacts all companies who are performing or will perform accreditation, training, certification, or assessment functions in connection with implementation of the CMMC Program.

D. Regulatory History

The CMMC Program verifies defense contractor compliance with DoD's cybersecurity information protection requirements. It is designed to protect sensitive unclassified information that is shared by the Department with or generated by its contractors and subcontractors. The cybersecurity standards required by the program are the same as those set forth in FAR clause 52.204–21 (CMMC Level 1), the NIST SP 800–171 Rev 2 guidelines, which is presently required by DFARS clause 252.204–7012 (CMMC Level 2), and additional selected requirements from the NIST SP 800–172 guidelines (CMMC Level 3). The program adds a

robust assessment element and provides the Department increased assurance that contractors and subcontractors are meeting these requirements.

In September 2020, the DoD published an interim rule to the DFARS in the **Federal Register** (DFARS Case 2019–D041), which implemented the DoD's initial vision for the CMMC Program (“CMMC 1.0”) and outlined the basic features of the program (tiered model, required assessments, and implementation through contracts). The interim rule became effective on November 30, 2020, establishing a five-year phase-in period.

In March 2021, the Department initiated an internal review of CMMC's implementation, informed by more than 750 CMMC-related public comments in response to the interim DFARS rule. This comprehensive, programmatic assessment engaged cybersecurity and acquisition leaders within DoD to refine policy and program implementation.

In November 2021, the Department announced CMMC 2.0, which incorporates an updated program structure and requirements designed to achieve the primary goals of an internal DoD review of the CMMC Program. With the implementation of the CMMC Program, the Department introduced several key changes that build on and refine the original program requirements. These include:

- Streamlining the model from five to three certification levels;
- Allowing all companies at Level 1 and a subset of companies at Level 2 to demonstrate compliance through self-assessments;
- Increased oversight of professional and ethical standards of third-party assessors; and
- Allowing companies, under certain limited circumstances, to make POA&Ms to achieve certification.

The CMMC requirements established pursuant to DFARS Case 2019–D041 have not been revised as of the date of publication of this rule. However, the CMMC Program requirements proposed in this rule will be implemented in the DFARS, as needed, which may result in changes to the current DFARS text, solicitation provisions, and contract clauses relating to DoD's cybersecurity protection requirements, including DFARS subpart 204.75 and DFARS clause 252.204–7021, Cybersecurity Maturity Model Certification (CMMC) Requirements.

Regulatory Impact Analysis

FAR Subpart 4.19 and DFARS Subpart 204.73 address safeguarding of FCI and CUI in contractor information systems and prescribe contract clauses

requiring protection of FCI and CUI within the supply chain. The FAR and DFARS requirements for safeguarding FCI and CUI predate the CMMC Program by many years, and baseline costs for their implementation are assumed to vary widely based on factors including, but not limited to, company size and complexity of the information systems to be secured. FAR 52.204–21, Basic Safeguarding of Covered Contractor Information Systems, is prescribed at FAR section 4.1903 for use in solicitations and contracts when the contractor or subcontractor at any tier may have FCI residing in or transiting through its information system. This clause requires contractors and subcontractors to apply basic safeguarding requirements and procedures to protect applicable contractor information systems that process, store, or transmit FCI. In addition, DFARS clause 252.204–7012, *Safeguarding Covered Defense Information and Cyber Incident Reporting*, is prescribed at DFARS section 204.7304(c) for use in DoD in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, except for solicitations and contracts solely for the acquisition of commercially available off-the-shelf items. This clause applies when a contractor information system processes, stores, or transmits covered defense information and requires contractors and subcontractors to provide “adequate security” to safeguard that information when it resides on or transits through a contractor information system, and to report cyber incidents that affect that system or network. The clause states that to provide adequate security, the contractor shall implement, at a minimum, the security requirements in National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171 Rev 2, Protecting CUI in Nonfederal Systems and Organizations. Contractors are also required to flow down DFARS clause 252.204–7012 to all subcontracts for operationally critical support or for which subcontractor performance will involve covered defense information.

However, neither FAR clause 52.204–21 nor DFARS clause 252.204–7012 provide for DoD assessment of a contractor's implementation of the information protection requirements required by those clauses. The Department developed the CMMC Program to verify implementation of cybersecurity requirements in DoD contracts and subcontracts, by assessing

²² <https://www.govinfo.gov/content/pkg/PLAW-116publ92/pdf/PLAW-116publ92.pdf>.

adequacy of contractor information system security compliance prior to award and during performance of the contract. With limited exceptions, the Department intends to require compliance with CMMC as a condition of contract award. Once CMMC is implemented, the required CMMC Level for contractors and subcontractors will be specified in the solicitation and Requests for Information (RFIs), if utilized.

There are three different levels of CMMC assessment, starting with basic safeguarding of FCI at Level 1, moving to the broad protection of CUI at Level 2, and culminating with higher level protection of CUI against risk from Advanced Persistent Threats (APTs) at Level 3. The benefits and costs associated with implementing this rule, as well as alternative approaches considered, are as follows:

Costs

A Regulatory Impact Analysis (RIA) that includes a detailed discussion and explanation about the assumptions and methodology used to estimate the cost of this regulatory action follows and is available at <https://www.regulations.gov> (search for “DoD–2023–OS–0063” click “Open Docket” and view “Supporting Documents”).

Background

The Department of Defense (DoD or Department) requires a secure and resilient supply chain to ensure the development, production, and sustainment of capabilities critical to national security. The DoD supply chain is targeted by adversaries with increasing frequency and sophistication, and to devastating effect. Therefore, implementation of cybersecurity standards and enforcement mechanisms are critically important. Executive Order (E.O.) 14028, “Improving the Nation’s Cybersecurity,” emphasizes the need to strengthen cybersecurity protections for both the Federal Government and the private sector.

Nation-state adversaries attack the U.S. supply chain for a myriad of reasons, including exfiltration of valuable technical data (a form of industrial espionage); disruption to control systems used for critical infrastructure, manufacturing, and weapons systems; corruption of quality and assurance across a broad range of product types and categories; and manipulation of software to achieve unauthorized access to connected systems and to degrade the integrity of system operations. For example, since September 2020, major cyber-attacks

such as the SolarWinds,²³ Colonial Pipeline, Hafnium,²⁴ and Kaseya²⁵ attacks, have been spearheaded or influenced by nation-state actors²⁶ and resulted in significant failures and disruption. In context of this threat, the size and complexity of defense procurement activities provide numerous pathways for adversaries to access DoD’s sensitive systems and information. Moreover, adversaries continue to evolve their tactics, techniques, and procedures. For example, on April 28, 2022, CISA and the FBI issued an advisory on destructive “wiperware,” a form of malware which can destroy valuable information.²⁷ Protection of DoD’s sensitive unclassified information is critically important, and the DoD needs assurance that contractor information systems are adequately secured to protect such information when it resides on or transits those systems.

The Department is committed to working with defense contractors to protect DoD and defense contractor sensitive unclassified information in accordance with requirements for FCI and CUI.

- *Federal Contract Information (FCI)*: As defined in section 4.1901 of the FAR, FCI means information, not intended for public release, that is provided by or generated for the Government under a contract to develop or deliver a product or service to the Government, but not including information provided by the Government to the public, such as that on public websites, or simple transactional information, such as that necessary to process payments.

- *Controlled Unclassified Information (CUI)*: 32 CFR 2002.4(h) defines CUI, in part, as information the Government creates or possesses, or that an entity creates or possesses for or on behalf of the Government, that a law, regulation, or Government-wide policy requires or permits an agency to handle using safeguarding or dissemination controls, including FCI.

In September 2020, the DoD published DFARS interim rule (Case 2019–D041), which implemented DoD’s initial vision for the Cybersecurity Maturity Model Certification (CMMC) Program (“CMMC 1.0”) and outlined

basic program features, to include: 5-level tiered model, CMMC Certified Third Party Assessment Organization (C3PAO) assessments in support of contractor and subcontractor certification, with no allowance for a Plan of Action and Milestones, and implementation of all security requirements by the time of a contract award. A total of 750 comments were received on the CMMC Program during the public comment period that ended on November 30, 2020. These comments highlighted a variety of industry concerns including concerns relating to the costs for a C3PAO certification, and the costs and burden associated with implementing, prior to award, the required process maturity and 20 additional cybersecurity practices that were included in CMMC 1.0. The Small Business Administration Office of Advocacy also raised similar concerns on the impact the rule would have on small businesses in the DIB.

Pursuant to DFARS clause 252.204–7012, DoD has required certain defense contractors and subcontractors to implement the security protections set forth in the National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171 Rev 2 to provide adequate security for sensitive unclassified DoD information that is processed, stored, or transmitted on contractor information systems and to document their implementation status, including any plans of action for any NIST SP 800–171 Rev 2 requirement not yet implemented, in a System Security Plan. The CMMC Program provides the Department the mechanism needed to verify that a defense contractor or subcontractor has implemented the security requirements at each CMMC Level and is maintaining that status across the contract period of performance, as required.

In calendar year (CY) 2021 DoD passed the planned CMMC rollout to conduct an internal review of the CMMC Program. The internal review resulted in a refined and streamlined set of requirements that addressed many of the concerns identified in the public comments received relating to CMMC 1.0. These changes have been incorporated into the CMMC Program structure and policies, now referred to as “CMMC 2.0.” In July 2022, the CMMC PMO met with the Office of Advocacy for the United States Small Business Administration (SBA) to address the revisions planned in CMMC 2.0 that are responsive to prior SBA concerns.

The CMMC Program will enhance the ability of the DoD to safely share sensitive unclassified information with

²³ <https://www.gao.gov/assets/gao-22-104746.pdf>.

²⁴ <https://www.ic3.gov/Media/News/2021/210310.pdf>.

²⁵ <https://www.cisa.gov/uscert/ncas/current-activity/2021/07/04/cisa-fbi-guidance-msps-and-their-customers-affected-kaseya-vsa>.

²⁶ <https://www.mitre.org/sites/default/files/publications/pr-18-2417-deliver-uncompromised-MITRE-study-26AUG2019.pdf>.

²⁷ <https://www.cisa.gov/uscert/ncas/alerts/aa22-057a>.

defense contractors and know the information will be suitably safeguarded. Once fully implemented, CMMC will incorporate a set of cybersecurity requirements into acquisition contracts to provide verification that applicable cyber protections have been implemented. Under the CMMC Program, defense contractors and subcontractors will be required to implement certain cybersecurity protection requirements tied to a designated CMMC level and either perform a self-assessment or obtain an independent assessment from either a third-party or DoD as a condition of a DoD contract award. CMMC is designed to validate the protection of sensitive unclassified information that is shared with and generated by the Department's contractors and subcontractors. Through protection of information by adherence to the requirements verified in CMMC 2.0, the Department and its contractors will prevent disruption in service and the loss of intellectual property and assets, and thwart access to sensitive unclassified information by the nation's adversaries.

The CMMC Program is intended to: (1) align cybersecurity requirements to the sensitivity of unclassified information to be protected, and (2) add a certification element, where appropriate, to verify implementation of cybersecurity requirements. As part of the program, DoD also intends to provide supporting resources and training to defense contractors to help support companies who are working to achieve the required CMMC level. The CMMC Program provides for assessment at three levels: basic safeguarding of FCI at CMMC Level 1, broad protection of CUI at CMMC Level 2, and enhanced protection of CUI against risk from Advanced Persistent Threats (APTs) at CMMC Level 3. The CMMC Program is designed to provide increased assurance to the Department that a defense contractor can adequately protect sensitive unclassified information (*i.e.*, FCI and CUI) in accordance with prescribed security requirements, accounting for information flow down to its subcontractors in a multi-tier supply chain.

The CMMC Program addresses DoD's need to protect its sensitive unclassified information during the acquisition and sustainment of products and services from the DIB. This effort is instrumental in establishing cybersecurity as a foundation for future DoD acquisition.

Although DoD contract requirements to provide adequate security for covered defense information (reflected in DFARS 252.204–7012) predate CMMC

by many years, a certification requirement for the handling of CUI to assess a contractor or subcontractor's compliance of those required information security controls is new with the CMMC Program. Findings from DoD Inspector General report²⁸ indicate that DoD contractors did not consistently implement mandated system security requirements for safeguarding CUI and recommended that DoD take steps to assess a contractor's ability to protect this information. The report emphasizes that malicious actors can exploit the vulnerabilities of contractors' networks and systems and exfiltrate information related to some of the Nation's most valuable advanced defense technologies.

Currently, the FAR and DFARS prescribe contract clauses intended to protect FCI and CUI. Specifically, the clause at FAR 52.204–21, Basic Safeguarding of Covered Contractor Information Systems, is prescribed at FAR 4.1903 for use in Government solicitations and contracts when the contractor or a subcontractor at any tier may have FCI residing in or transiting through its information system(s). This clause requires contractors and subcontractors to implement basic safeguarding requirements and procedures to protect FCI being processed, stored, or transmitted on contractor information systems. In addition, DFARS clause 252.204–7012, *Safeguarding Covered Defense Information and Cyber Incident Reporting*, is prescribed at DFARS 204.7304(c) for use in all solicitations and contracts except for solicitations and contracts solely for the acquisition of commercially available off-the-shelf (COTS) items. This clause requires contractors and subcontractors to provide “adequate security” to process, store or transmit covered defense information when it resides on or transits a contractor information system, and to report cyber incidents that affect that system or network. The clause states that to provide adequate security, the contractor shall implement, at a minimum, the security requirements in NIST Special Publication (SP) 800–171 Rev 2, Protecting CUI in Nonfederal Systems and Organizations. Contractors are also required to flow down DFARS clause 252.204–7012 to all subcontracts that require processing, storing, or transmitting of covered defense information.

However, neither FAR clause 52.204–21 nor DFARS clause 252.204–7012 provide for DoD verification of a

contractor's implementation of the basic safeguarding requirements specified in FAR 52.204–21 nor the security requirements specified in NIST SP 800–171 Rev 2, implementation of which is required by DFARS clause 252.204–7012, prior to contract award. As part of multiple lines of effort focused on the security and resilience of the DIB, the Department is working with industry to enhance the protection of FCI and CUI within the DoD supply chain. Toward this end, DoD has developed the CMMC Program.

CMMC 2.0 Requirements

The CMMC Program requirements will be implemented through the DoD acquisition and contracting process. With limited exceptions, the Department intends to require compliance with CMMC as a condition of contract award. Once CMMC is implemented, the required CMMC level for contractors will be specified in the solicitation. In accordance with the implementation plan described in 32 CFR 170.3(e), CMMC compliance or certification requirements will apply to new DoD solicitations and contracts, and shall flow down to subcontractors, based on the sensitivity of the FCI and CUI to be processed, stored or transmitted to or by the subcontractor. Before contract award, the offeror must achieve the specified CMMC level for the contractor information system (*e.g.*, enterprise network, network enclave) that will process, store, or transmit the information to be protected. The contractor or subcontractor will also submit affirmations in the Supplier Performance Risk System (SPRS). An overview of requirements at each level is shown:

CMMC Level 1 Self-Assessment

- CMMC Level 1 Self-Assessment requires compliance with basic safeguarding requirements to protect FCI are set forth in FAR clause 52.204–21. CMMC Level 1 does not add any additional security requirements to those identified in FAR 52.204–21.

- Organizations Seeking Assessment (OSAs) will submit the following information in SPRS prior to award of any prime contract or subcontract and annually thereafter:

1. the results of a self-assessment of the OSA's implementation of the basic safeguarding requirements set forth in 32 CFR 170.15 associated with the contractor information system(s) used in performance of the contract; and
2. an initial affirmation of compliance, and then annually thereafter, an affirmation of continued

²⁸ DODIG–2019–105 “Audit of Protection of DoD CUI on Contractor-Owned Networks and Systems”

compliance as set forth in 32 CFR 170.22.

3. the Level 1 Self-Assessment cost burden will be addressed as part of the 48 CFR acquisition rule.

CMMC Level 2 Self-Assessment

- CMMC Level 2 Self-Assessment requires compliance with the security requirements set forth in NIST SP 800–171 Rev 2 to protect CUI. CMMC Level 2 does not add any additional security requirements to those identified in NIST SP 800–171 Rev 2.

- OSAs will submit the following information in SPRS prior to award of any prime contract or subcontract:

1. the results of a self-assessment of the OSA's implementation of the NIST SP 800–171 Rev 2 requirements set forth in 32 CFR 170.16 associated with the covered contractor information system(s) used in performance of the applicable contract.

2. an initial affirmation of compliance, and, if applicable, a POA&M closeout affirmation, and then annually thereafter, an affirmation of continued compliance set forth in 32 CFR 170.22.

3. the Level 2 Self-Assessment cost burden will be addressed as part of the 48 CFR acquisition rule.

CMMC Level 2 Certification Assessment

- CMMC Level 2 Certification requires compliance with the security requirements set forth in 32 CFR 170.17 to protect CUI. CMMC Level 2 does not add any additional security requirements to those identified in NIST SP 800–171 Rev 2.

- A CMMC Level 2 Certification Assessment of the applicable contractor information system(s) provided by an authorized or accredited C3PAO is required to validate implementation of the NIST SP 800–171 Rev 2 security requirements prior to award of any prime contract or subcontract and exercise of option.

- The C3PAO will upload the CMMC Level 2 results in eMASS which will feed the information into SPRS.

- OSCs will submit in SPRS an initial affirmation of compliance, and, if necessary, a POA&M closeout affirmation, and then annually thereafter, an affirmation of continued compliance as set forth in 32 CFR 170.22.

The Level 2 Certification Assessment cost burdens are included in this part with the exception of the requirement for the OSC to upload the affirmation in SPRS that is included in the Title 48 acquisition rule and an update to DFARS collection approved under OMB

Control Number 0750–0004, *Assessing Contractor Implementation of Cybersecurity Requirements*.

Additionally, the information collection reporting requirements for the CMMC instantiation of eMASS are included in a separate ICR for this part and cover only those requirements pertaining to the CMMC process.

CMMC Level 3 Certification Assessment

- CMMC Level 3 Certification Assessment requires a CMMC Level 2 Final Certification Assessment and compliance with the security requirements set forth in 32 CFR 170.18 to protect CUI. CMMC Level 3 adds additional security requirements to those required by existing acquisition regulations as specified in this rule.

- A CMMC Level 3 Certification Assessment of the applicable contractor information system(s) provided by the DCMA Defense Industrial Base Cybersecurity Assessment Center (DIBCAC) is required to validate implementation of the DoD-defined selected security requirements set forth in NIST SP 800–172. A CMMC Level 2 Final Certification is a prerequisite to schedule a DIBCAC assessment for CMMC Level 3.

- DCMA DIBCAC will upload the CMMC Level 3 results into the CMMC instantiation of eMASS, which will feed the information into SPRS.

- OSCs will submit in SPRS an initial affirmation of compliance, and, if necessary, a POA&M closeout affirmation, and then annually thereafter, an affirmation of continued compliance as set forth in 32 CFR 170.22.

The Level 3 Certification Assessment cost burdens are included in this part with the exception of the requirement for the OSC to upload the affirmation in SPRS that is included in the Title 48 acquisition rule and an update to DFARS collection approved under OMB Control Number 0750–0004, *Assessing Contractor Implementation of Cybersecurity Requirements*. Additionally, the information collection reporting requirements for the CMMC instantiation of eMASS are included in a separate ICR for this part and cover only those requirements pertaining to the CMMC process. As described, the CMMC Program couples an affirmation of compliance with certification assessment requirements to verify OSA implementation of cybersecurity requirements, as applicable.

The CMMC Program addresses DoD's need to protect its sensitive unclassified information during the acquisition and sustainment of products and services

from the DIB. This effort is instrumental in ensuring cybersecurity is the foundation of future DoD acquisitions.

Policy Problems Addressed by CMMC 2.0

Implementation of the CMMC Program is intended to solve the following policy problems:

Verifies the Contractor Cybersecurity Requirements

Neither FAR clause 52.204–21 nor DFARS clause 252.204–7012 provide for DoD assessment of a defense contractor or subcontractor's implementation of the information protection requirements within those clauses. Defense contractors represent that they will implement the requirements in NIST SP 800–171 Rev 2 upon submission of their offer. Findings from DoD Inspector General report (DODIG–2019–105 “Audit of Protection of DoD Controlled Unclassified Information on Contractor-Owned Networks and Systems”) indicate that DoD contractors did not consistently implement mandated system security requirements for safeguarding CUI and recommended that DoD take steps to assess a contractor's ability to protect this information. CMMC adds new assessment requirements for contractor implementation of underlying information security requirements, to allow DoD to assess a defense contractor's cybersecurity posture using authorized or accredited C3PAOs. The contractor and subcontractor must achieve the required CMMC Level as a condition of contract award.

Implementation of Cybersecurity Requirements

Under DFARS clause 252.204–7012, defense contractors and subcontractors must document implementation of the security requirements in NIST SP 800–171 Rev 2 in a system security plan and may use a Plan of Action Milestones to describe how and when any unimplemented security requirements will be met. For the CMMC Program, the solicitation, will specify the required CMMC level, which will be determined considering program criticality, information sensitivity, and severity of cyber threat. Although the security requirements in NIST SP 800–171 Rev 2 address a range of threats, additional requirements are needed to significantly reduce the risk posed by APTs. An APT is an adversary that possesses sophisticated levels of expertise and significant resources that allow it to create opportunities to achieve its objectives by using multiple attack vectors (e.g., cyber, physical, and

deception). CMMC Level 3 requires implementation of selected security requirements from NIST SP 800–172 to reduce the risk of APT threats.

The CMMC Program will require prime contractors to flow the appropriate CMMC requirement down throughout the entire supply chain relevant to a particular contract. Defense contractors or subcontractors that handle FCI, must meet the requirements for CMMC Level 1. Defense contractors that handle CUI must meet the requirements for CMMC Level 2 or higher, depending on the sensitivity of the information associated with a program or technology being developed.

Scale and Depth

Today, DoD prime contractors must include DFARS clause 252.204–7012 in subcontracts for which performance will involve covered defense information, but this does not provide the Department with sufficient insights with respect to the cybersecurity posture of all members of a multi-tier supply chain for any given program or technology development effort. CMMC 2.0 requires prime contractors to flow down appropriate CMMC Level requirements, as applicable, to subcontractors throughout their supply chain(s).

Given the size and scale of the DIB, the Department cannot scale its existing cybersecurity assessment capability to conduct on-site assessments of approximately 220,000 DoD contractors and subcontractors every three years. The Department's existing assessment capability is best suited for conducting targeted assessments for the relatively small subset of DoD contractors and subcontractors that support designated high-priority programs involving CUI.

CMMC addresses the Department's scaling challenges by utilizing a private-sector accreditation structure. A DoD-authorized Accreditation Body will authorize, accredit, and provide oversight of C3PAOs which in turn will conduct CMMC Level 2 Certification Assessments of actual and prospective DoD contractors and subcontractors. Defense contractors will directly contract with an authorized or accredited C3PAO to obtain a CMMC Certification Assessment. The cost of CMMC Level 2 activities is driven by multiple factors, including market forces that govern availability of C3PAOs and the size and complexity of the enterprise or enclave under assessment. The Government will perform CMMC Level 3 Certification Assessments. Government resource limitations may affect schedule availability.

Reduces Duplicate or Respective Assessments of Our Industry Partners

CMMC assessment results will be posted in SPRS, DoD's authoritative source for supplier and product performance information. Posting CMMC assessment results in SPRS precludes the need to validate CMMC implementation on a contract-by-contract basis. This enables DoD to identify whether the CMMC requirements have been met for relevant contractor information systems, avoids duplicative assessments, and eliminates the need for program level assessments, all of which decreases costs to both DoD and industry.

CMMC 2.0 Implementation

The DoD is implementing a phased implementation for CMMC 2.0 and intends to introduce CMMC requirements in solicitations over a three-year period to provide appropriate ramp-up time. This phased implementation is intended to minimize the financial impacts to defense contractors, especially small businesses, and disruption to the existing DoD supply chain. After CMMC is implemented in acquisition regulation, DoD will include CMMC self-assessment requirements in solicitations when warranted by the type of information that will be handled by the contractor of subcontractor(s). CMMC requirements for Levels 1, 2, and 3 will be included in solicitations issued after the phase-in period when warranted by any FCI and/or CUI information protection requirements for the contract effort. In the intervening period, Government Program Managers will have discretion to include CMMC requirements or exclude them and rely upon existing DFARS Clause 252.204–7012 requirements, in accordance with DoD policy. As stated in 32 CFR 170.20(a), there is qualified standards acceptance between DCMA DIBCAC High Assessment and CMMC Level 2, which will result in staggering of the dates for new CMMC Level 2 assessments. The implementation period will consist of four (4) phases as set forth in 32 CFR 170.3(e), during which time the Government will include CMMC requirements in certain solicitations and contracts. During the CMMC phase-in period, program managers and requiring activities will be required to include CMMC requirements in certain solicitations and contracts and will have discretion to include in others.

A purpose of the phased implementation is to ensure adequate availability of authorized or accredited

C3PAOs and assessors to meet the demand.

CMMC 2.0 Flow Down

CMMC Level requirements will be flowed down to subcontractors at all tiers as set forth in 32 CFR 170.23; however, the specific CMMC Level required for a subcontractor will be based on the type of unclassified information and the priority of the acquisition program and/or technology being developed.

Key Changes Incorporated in the CMMC 2.0 Program

In November 2021, the Department announced “CMMC 2.0,” which is an updated program structure with revised requirements. In CMMC 2.0, the Department has introduced several key changes that build on and refine the original program requirements. These include:

- Streamlining the model from five levels to three levels.
- Exclusively implementing National Institute of Standards and Technology (NIST) cybersecurity standards and guidelines.
- Allowing all companies subject to Level 1, and a subset of companies subject to Level 2 to demonstrate compliance through self-assessments.
- Increased oversight of professional and ethical standards of CMMC third-party assessors.
- Allowing Plans of Action & Milestones (POA&M) under limited circumstances to achieve conditional certification.

As a result of the alignment of CMMC 2.0 to NIST guidelines, the Department's requirements will continue to evolve as changes are made to the underlying NIST SP 800–171 Rev 2 and NIST SP 800–172 requirements.

CMMC Assessment

Assessment Criteria

CMMC requires that defense contractors and subcontractors entrusted with FCI and CUI implement cybersecurity standards at progressively more secure levels, depending on the type and sensitivity of the information.

CMMC Level 1 Self-Assessment

An annual CMMC Level 1 Self-Assessment and annual affirmation asserts that an OSA has implemented all the Basic Safeguarding requirements to protect FCI as set forth in 32 CFR 170.14(c)(2).

An OSA can choose to perform the annual self-assessment internally or engage a third-party to assist with evaluating its Level 1 compliance. Use of a third party to assist with the

assessment process is still considered a self-assessment and does not result in a CMMC certification. An OSA can be compliant with CMMC Level 1 requirements for an entire enterprise network or for a particular enclave(s), depending upon where the FCI is or will be processed, stored, or transmitted.

CMMC Level 2 Self-Assessment

A CMMC Level 2 Self-Assessment and triennial affirmation attests that an OSA has implemented all the security requirements to protect CUI as specified in 32 CFR 170.14(c)(3).

CMMC Level 2 Certification Assessment

A CMMC Level 2 Certification Assessment, conducted by a C3PAO, verifies that an OSC is conforming to the security requirements to protect CUI as specified in 32 CFR 170.14(c)(3). A CMMC Level 2 assessment must be conducted for each OSC information system that will be used in the execution of the contract that will process, store, or transmit CUI.

CMMC Level 3 Certification Assessment

Receipt of a CMMC Level 2 Final Certification Assessment for information

systems within the Level 3 CMMC Assessment Scope is a prerequisite for a CMMC Level 3 Certification Assessment. A CMMC Level 3 Certification Assessment, conducted by DCMA Defense Industrial Base Cybersecurity Assessment Center (DIBCAC), verifies that an OSC has implemented the CMMC Level 3 security requirements to protect CUI as specified in 32 CFR 170.14(c)(4). A CMMC Level 3 Certification Assessment must be conducted for each OSC information system that will be used in the execution of the contract that will process, store, or transmit CUI.

Impact and Cost Analysis of CMMC 2.0

Summary of Impact

Public comment feedback on CMMC 1.0 indicated that cost estimates were too low. CMMC 2.0 cost estimates account for that feedback with the following improvements:

- Allowance for outsourced IT services
- Increased total time for the contractor to prepare for the assessment, including limited time for learning the reporting and affirmation processes

- Allowance for use of consulting firms to assist with the assessment process
- Time for a senior level manager to review the assessment and affirmation before submitting the results in SPRS
- Updated government and contractor labor rates that include applicable burden costs

As a result, some CMMC 2.0 costs may be higher than those included in CMMC 1.0.

The CMMC 2.0 impact analysis includes estimated costs for implementation of CMMC 2.0 requirements across Level 1, Level 2, and Level 3 for the Public (small and other than small entities, including the CMMC Ecosystem as set forth in 32 CFR Subpart C) and the Government. In summary, the total estimated Public and Government costs associated with this rule, calculated for a 20-year horizon in 2023 dollars at a 7 percent discount rate and a 3 percent discount rate are provided as follows:

Table 1 - Total Estimated Costs of CMMC Requirements for the Public and the Government
(7 percent discount)

Total cost	Public	Government	Total
Annualized Costs	\$3,989,182,374	\$9,508,593	\$3,998,690,967
Present Value Costs	\$42,261,454,899	\$100,734,168	\$42,362,189,067

Table 2 - Total Estimated Costs of CMMC Requirements for the Public and the Government
(3 percent discount)

Total cost	Public	Government	Total
Annualized Costs	\$4,219,513,555	\$9,953,205	\$4,229,466,760
Present Value Costs	\$62,775,706,830	\$148,078,564	\$62,923,785,394

Estimating the number of CMMC assessments for unique entities per level per year is complicated by the fact that companies may serve as a prime contractor on one effort but a subcontractor on others, and may also enter into subcontract agreements with more than one prime contractor for various opportunities.

In addition, the CMMC Program relies upon free market influences of supply and demand to propel implementation. Specifically, the Department does not

control which defense contractors aspire to compete for which business opportunities, nor does it control access to the assessment services offered by C3PAOs. OSAs may elect to complete a self-assessment or pursue a certification assessment at any time after issuance of the rule, in an effort to distinguish themselves as competitive for efforts that require an ability to adequately protect CUI. For that reason, the number of CMMC assessments for unique entities per level per year may vary

significantly from the assumptions used in generating the cost estimate. The estimates represent the best estimates at this time based on internal expertise and public feedback.

DoD utilized historical metrics gathered for the CMMC 1.0 Program and subject matter expertise from Defense Pricing and Contracting (DPC) and DCMA DIBCAC to estimate the number of entities by type and by assessment level for this analysis. The following

table summarizes the estimated profile used in this analysis.

Table 3 - Estimated Number of Entities by Type and Level

Assessment Level	Small	Other than Small	Total	Percent
Level 1 Self-Assessment	103,010	36,191	139,201	63%
Level 2 Self-Assessment	2,961	1,039	4,000	2%
Level 2 Certification Assessment	56,689	19,909	76,598	35%
Level 3 Certification Assessment	1,327	160	1,487	1%
Total	163,987	57,299	221,286	100%
Percent	74%	26%	100%	

DoD is planning for a phased roll-out of each assessment level across 7 years with the entity numbers reaching a maximum by Year 4 as shown in the tables. The target of Year 4 was selected based on the projected capacity of the

CMMC Ecosystem to grow to efficiently support the entities in the pipeline. For modeling efficiency, a similar roll-out is assumed regardless of entity size or assessment level. It is assumed that by year 7 the maximum number of entities

is reached. Beyond year 7, the number of entities entering and exiting are expected to net to zero. The following tables reflect the number of new entities in each year and for each level.

Table 4 - *Number of Small Entities Over Phase-In Period

	Level 1	Level 2	Level 2	Level 3	
Yr	Self-Assess	Self-Assess	Certification	Certification	Total
1	699	20	382	3	1,104
2	3,493	101	1,926	45	5,565
3	11,654	335	6,414	151	18,554
4	22,336	642	12,293	289	35,560
5	22,333	642	12,289	289	35,553
6	22,333	642	12,289	289	35,553
7	20,162	579	11,096	261	32,098
Tot	103,010	2,961	56,689	1,327	163,987

Table 5 - *Number of Other than Small Entities Over Phase-In Period

	Level 1	Level 2	Level 2	Level 3	
Yr	Self-Assess	Self-Assess	Certification	Certification	Total
1	246	7	135	1	389
2	1,227	35	673	5	1,940
3	4,094	118	2,252	18	6,482
4	7,848	225	4,317	34	12,424
5	7,846	225	4,317	34	12,422
6	7,846	225	4,317	34	12,422
7	7,084	204	3,898	34	11,220
Tot	36,191	1,039	19,909	160	57,299

Table 6 - *Number of Total Entities Over Phase-In Period

	Level 1	Level 2	Level 2	Level 3	
Yr	Self-Assess	Self-Assess	Certification	Certification	Total
1	945	27	517	4	1,493
2	4,720	136	2,599	50	7,505
3	15,748	453	8,666	169	25,036
4	30,184	867	16,610	323	47,984
5	30,179	867	16,606	323	47,975
6	30,179	867	16,606	323	47,975
7	27,246	783	14,994	295	43,318
Tot	139,201	4,000	76,598	1,487	221,286

Public Costs

Summary of Impacted Awardee Entities

According to data available in the Electronic Data Access system for fiscal years (FYs) 2019, 2020, and 2021, DoD awards an average of 1,366,262

contracts and orders per year that contain DFARS clause 252.204-7012, to 31,338 unique awardees, of which 683,718 awards (50%) are made to 23,475 small entities (75%).²⁹

Public Cost Analysis

The following is a summary of the estimated Public costs CMMC 2.0 for other than small³⁰ entities, per assessment of a contractor information system, at the required periodicity for each CMMC level.

Table 7 - Other Than Small Entities (per Assessment)

Assessment Phase (\$)	Level 1 Self-Assessment ³¹	Level 2 Self-Assessment ³¹	Level 2 Certification	Level 3 Certification
Periodicity	Annual	Triennial	Triennial	Triennial
Plan and Prepare the Assessment	\$1,146	\$18,015	\$26,264	\$7,066
Conduct the Assessment	\$1,728	\$19,964	\$80,656	\$23,136
Report Assessment Results	\$584	\$2,712	\$2,712	\$2,712
Annual Affirmation(s)	\$584	*\$8,136	*\$8,136	*\$8,136
Subtotal	<u>\$4,042</u>	<u>\$48,827</u>	<u>\$117,768</u>	<u>\$41,050</u>
** POA&M	\$0	\$0	\$0	\$3,394
Total (across 3 years)	<u>\$4,042</u>	<u>\$48,827</u>	<u>\$117,768</u>	<u>\$44,444</u>

*Reflects the 3-year cost to match the periodicity.

**Requirements NOT MET (if needed and when allowed) will be documented in a Plan of Action and Milestones.

The following is a summary of the estimated Public costs CMMC 2.0 for Small Entities, per assessment of each

contractor information system, estimated at one per entity, at the

required periodicity for each CMMC level.

²⁹ The number of unique awardees impacted each year is 1/3 of the average number of annual awardees according to the Electronic Data Access system (31,338/3 = 10,446). This estimate does not address new entrants or awardees who discontinue doing business with DoD.

³⁰ Includes all businesses with the exception of those defined under the small business criteria and size standards provided in 13 CFR 121.201 (See FAR Part 19.102)

³¹ The Level 1 and Level 2 Self-Assessment information collection reporting and recordkeeping

requirements will be included in a modification of an existing DFARS collection approved under OMB Control Number 0750-0004, Assessing Contractor Implementation of Cybersecurity Requirements. Modifications to this DFARS collection will be addressed as part of the 48 CFR acquisition rule.

Table 8 - Small Entities (per Assessment)

Assessment Phase (\$)	Level 1 Self-Assessment ³²	Level 2 Self-Assessment ³²	Level 2 Certification Assessment	Level 3 Certification Assessment
Periodicity	Annual	Triennial	Triennial	Triennial
Plan and Prepare the Assessment	\$1,803	\$14,426	\$20,699	\$1,905
Conduct the Assessment	\$2,705	\$15,542	\$76,743	\$1,524
Report Assessment Results	\$909	\$2,851	\$2,851	\$1,876
Affirmations	\$560	*\$4,377	*\$4,377	*\$5,628
Subtotal	<u>\$5,977</u>	<u>\$37,196</u>	<u>\$104,670</u>	<u>\$10,933</u>
**POA&M	\$0	\$0	\$0	\$1,869
Total	<u>\$5,977</u>	<u>\$37,196</u>	<u>\$104,670</u>	<u>\$12,802</u>

*Reflects the 3-year cost to match the periodicity.

**Requirements “NOT MET” (if needed and when allowed) will be documented in a Plan of Action and Milestones.

The total estimated Public (large and small entities) costs associated with this

rule, calculated for a 20-year horizon in 2023 dollars at a 7 percent and 3 percent

discount rate, per OMB guidance, is provided as follows:

Table 9 - Total Estimated Costs of CMMC Requirements for Large and Small Entities

Public Costs	7% Discount	3% Discount
Annualized Costs	\$3,989,182,374	\$4,219,513,555
Present Value Costs	\$42,261,454,899	\$62,775,706,830

Assumptions

In estimating the Public costs, DoD considered applicable nonrecurring engineering costs, recurring engineering costs,³³ assessment costs, and affirmation costs for each CMMC Level. For CMMC Levels 1 and 2, the cost estimates are based only upon the assessment, certification, and affirmation activities that a defense contractor, subcontractor, or ecosystem member must take to allow DoD to verify implementation of the relevant underlying security requirements, *i.e.*, for CMMC Level 1, the security requirements set forth in FAR clause 52.204–21, and for CMMC Level 2, the security requirements set forth in NIST SP 800–171 Rev 2. DoD did not consider the cost of implementing the security requirements themselves because implementation is already required by FAR clause 52.204–21, effective June 15, 2016, and by DFARS clause 252.204–7012, requiring implementation by Dec. 31, 2017, respectively; therefore, the costs of implementing the security

requirements for CMMC Levels 1 and 2 should already have been incurred and are not attributed to this rule. As such, the nonrecurring engineering and recurring engineering costs to implement the security requirements defined for CMMC Level 1 and Level 2 are not included in this economic analysis. However, cost estimates to implement CMMC Level 3, are included, as that CMMC level will require defense contractors and subcontractors, as applicable, to implement a DoD-defined subset of the security requirements set forth in NIST SP 800–172, a new addition to current security protection requirements.

In estimating the public cost for a defense contractor small entity to comply with CMMC Program requirements for each CMMC level, DoD considered non-recurring engineering costs, recurring engineering costs, assessment costs, and affirmation costs for each CMMC Level. These costs include labor and consulting.

Estimates include size and complexity assumptions to account for typical organizational differences between small entities and other than small entities with respect to the handling of Information Technology (IT) and cybersecurity:

- small entities are likely to have a less complex, less expansive operating environment and IT/Cybersecurity infrastructure compared to larger defense contractors
- small entities are likely to outsource IT and cybersecurity to an External Service Provider (ESP)
- entities (small and other than small) pursuing CMMC Level 2 Self-Assessment are likely to seek consulting or implementation assistance from an ESP to either help them prepare for the assessment technically or participate in the assessment with the C3PAOs.

Estimates do not include the cost to implement (Non-recurring Engineering Costs (NRE)) or maintenance costs (Recurring Engineering (RE)) the

³² The Level 1 and Level 2 Self-Assessment information collection reporting and recordkeeping requirements will be included in a modification of an existing DFARS collection approved under OMB

Control Number 0750–0004, Assessing Contractor Implementation of Cybersecurity Requirements. Modifications to this DFARS collection will be addressed as part of the 48 CFR acquisition rule.

³³ The terms nonrecurring engineering costs and recurring engineering costs are terms of art and do not only encompass actual engineering costs.

security requirements prescribed in current regulations.

For CMMC Levels 1 and 2, cost estimates are based upon assessment, reporting and affirmation activities that a contractor or subcontractor will need to take to verify implementation of existing cybersecurity requirements set forth in FAR clause 52.204–21, effective June 15, 2016, to protect FCI, and DFARS clause 252.204–7012 which required implementation of NIST SP 800–171 Rev 2 not later than December 31, 2017, to protect CUI. As such, cost estimates are not included for an entity to implement the CMMC Level 1 or 2 security requirements, maintain implementation of these existing security requirements, or remediate a Plan of Action for unimplemented requirements.

For CMMC Level 3, the cost estimates factor in the assessment, reporting, and affirmation activities in addition to estimates for NRE and RE to implement and maintain CMMC Level 3 security requirements. In addition to implementing the CMMC Level 2 security requirements, CMMC Level 3 requires implementing selected security requirement set forth in NIST SP 800–172 as described in 32 CFR 170.14(c)(4) which are not currently required through other regulations. CMMC Level 3 is expected to apply only to a small subset of defense contractors and subcontractors.

The Cost Categories used for each CMMC Level are described:

1. Nonrecurring Engineering Costs: Estimates consist of hardware, software, and the associated labor to implement the same. Costs associated with implementing the requirements set forth in FAR 52.204–21 and NIST SP 800–171 Rev 2 are assumed to have been already implemented and, therefore, are not accounted for in this cost estimate. As

such, these costs only appear in CMMC Level 3. If nonrecurring engineering costs are referenced, they are only accounted for as a one-time occurrence and are reflected in the year of the initial assessment.

2. Recurring Engineering Costs: Estimates consist of annually recurring fees and associated labor for technology refresh. Costs associated with implementing the requirements set forth in FAR 52.204–21 and NIST SP 800–171 Rev 2 are assumed to have been already implemented and, therefore, are not accounted for in this cost estimate. As such, these costs only appear in CMMC Level 3.

3. Assessment Costs: Estimates consist of activities for pre-assessment preparations (which includes gathering and/or developing evidence that the assessment objectives for each requirement have been satisfied), conducting and/or participating in the actual assessment, and completion of any post-assessment work. Assessment costs are represented by notional phases. Assessment costs assume the OSA passes the assessment on the first attempt (conditional—with an allowable POA&M or final). Each phase includes an estimate of hours to conduct the assessment activities including:

(a) Labor hour estimates for a company (and any ESP support) to prepare for and participate in the assessment.

(b) C3PAO cost estimates for companies pursuing a certification

- labor hour estimates for authorized or certified assessors to work with the business to conduct the actual assessment
- Assessment Costs broken down into phases:
- *Phase 1:* Planning and preparing for the assessment

- *Phase 2:* Conducting the assessment (self or C3PAO)
- *Phase 3:* Reporting of Assessment Results
- *Phase 4:* POA&M Closeout (for CMMC Level 3 only, if applicable and allowed)
- CMMC allows a limited open Plan of Action and Milestones (POA&M) for a period of 180 days to remediate the POA&M, see 32 CFR 170.21.

4. Affirmations: Estimates consist of costs for an OSA to submit to SPRS an initial and, as applicable, any subsequent affirmations of compliance that the contractor information system is compliant with and will maintain compliance with the security requirements of the applicable CMMC Level. If POA&Ms are allowed, an affirmation must be submitted with the POA&M closeout. With the exception of Small Entities for Level 1 and Level 2, it is assumed the task requires the same labor categories and estimated hours as the final reporting phase of the assessment.

The categories and rates used for estimating purposes were compiled by subject matter experts based on current data available from within the DoD contractor database for comparable labor categories. A factor estimate of 30 percent was added to the labor rate per hour to include but are not limited to company-sponsored benefits (fringe) and limited employee-related expenses such as training and certifications. This estimate is based on labor performed by indirect personnel (*i.e.*, personnel who are part of overhead expense); therefore, the 30 percent factor represents an estimate for fringe expense and G&A expenses versus full overhead expense. The categories and rates inclusive of the labor cost plus the additional factor are defined in the table.

Table 10 - Other than Small Entities - Labor Rates Used for Estimate

Code ³⁴	Rate per Hour ³⁵	Description	Background / Years' Experience ³⁶	With Master's Degree ³⁶
IT5	\$ 116.87	Senior Staff IT Specialist	Cyber Background, 10 + years	
IT4	\$ 97.49	Staff IT Specialist	Cyber Background, 7-10 years	5-7 years
IT3	\$ 81.96	Senior IT Specialist	Cyber Background, 5-7 years	2-5 years
IT2	\$ 54.27	IT Specialist	Cyber Background, 2-5 years	0-2 years
IT1	\$ 36.32	Associate IT Specialist	Cyber Background, 0-2 years	
MGMT5	\$ 190.52	Director	Chief Info. Systems Officer/ Chief Info. Officer	
MGMT4	\$ 143.50	Staff Manager	Vice President	
MGMT3	\$ 128.64	Senior Manager	Program Manager	
MGMT2	\$ 95.96	Manager	5-7 years	
MGMT1	\$ 82.75	Associate Manager	1-5 years	
C3PAO ³⁷	\$ 260.28	Cyber Subject Matter Expert	4 years	

Table 11 - Small Entities – Labor Rates Used for Estimate

Code ³⁴	Rate per Hour ³⁵	Description	Background / Years' Experience ³⁶	Master's Degree ³⁶
MGMT5	\$ 190.52	Director	Chief Info. Systems Officer / Chief Info. Officer	
IT4-SB	\$ 86.24	Staff IT Specialist	Cyber Background, 7-10 years	5-7 years
ESP / C3PAO ³⁷	\$ 260.28	Cyber Subject Matter Expert	4 years	

CMMC Level 1 Self-Assessment and Affirmation Costs

Other Than Small Entities

• *Nonrecurring and recurring engineering costs:* There are no nonrecurring or recurring engineering costs associated with CMMC Level 1, since it is assumed that the contractor or subcontractor has already

implemented the applicable security requirements.³⁸

• *Assessments Costs:* It is estimated that the cost to support a CMMC Level 1 self-assessment and affirmation is *\$4,042 (as summarized in 4.1.2, Table 1). A Level I Self-Assessment is conducted annually, and is based on the assumptions detailed:

- *Phase 1: Planning and preparing for the assessment: \$1,146*
 - A director (MGMT5) for 4 hours (\$190.52/hr × 4hrs = \$762)
 - A manager (MGMT2) for 4 hours (\$95.96/hr × 4hrs = \$384)
- *Phase 2: Conducting the self-assessment: \$1,728*
 - A director (MGMT5) for 6 hours

(\$190.52/hr × 6hrs = \$1,143)

- A staff IT specialist (IT4) for 6 hours (\$97.49/hr × 6hrs = \$585)
- *Phase 3: Reporting of assessment results into SPRS: \$584*
 - A director (MGMT5) for 2 hours (\$190.52/hr × 2hrs = \$381)
 - A staff IT specialist (IT4) for 2.08 hours (\$97.49/hr × 2.08hrs = \$203)
- *Affirmations:* It is estimated that the costs to perform an initial and annual affirmation of compliance with CMMC Level 1 for an “other than small” entity is \$584
 - A director (MGMT5) for 2 hours (\$190.52/hr × 2hrs = \$381)
 - A staff IT specialist (IT4) for 2.08 hours (\$97.49/hr × 2.08hrs = \$203)

• The Level 1 Self-Assessment and Affirmations cost burden will be addressed as part of the 48 CFR acquisition rule.

• *Summary:* The following is the annual other than small entities total cost summary for CMMC Level 1 self-

³⁴ IT = Information Technology, MGMT = Management.

³⁵ IT and MGMT rates represent an estimate for in-house labor and includes the labor rate plus fringe and employee-related expenses.

³⁶ Background assumes a Bachelor's degree as the minimum education level, additional requirements are noted including required years of experience. A Master's degree may reduce the required years of experience as noted.

³⁷ The ESP/C3PAO rate represents an estimate for outsourced labor and includes the labor rate, overhead expense, G&A expense, and profit.

³⁸ CMMC Level 1 consists of the same 15 basic safeguarding requirements specified in FAR clause 52.204–21. This cost analysis assumes that defense contractors and subcontractors already have contracts with FAR clause 52.204–21 and, therefore, have already implemented the 15 basic safeguarding requirements.

assessments and affirmations over a ten-year period: (Example calculation, Year 1: *\$4,042 per entity × 246 entities (cumulative) = \$994,233).

Table 12 – Level 1: Self-Assessment for Other Than Small Entities

Year	Other than Small Entities Per Year	Cumulative Other Than Small Entities	Annual Total Cost (self-assess, affirm)
1	246	246	\$994,233
2	1,227	1,473	\$5,953,271
3	4,094	5,567	\$22,499,565
4	7,848	13,415	\$54,218,010
5	7,846	21,261	\$85,928,372
6	7,846	29,107	\$117,638,733
7	7,084	36,191	\$146,269,399
8		36,191	\$146,269,399
9		36,191	\$146,269,399
10		36,191	\$146,269,399
Total	36,191		\$872,309,779

Small Entities

• *Nonrecurring and recurring engineering costs:* There are no nonrecurring or recurring engineering costs associated with CMMC Level 1 since it is assumed the contractor or subcontractor has implemented the applicable security requirements.³⁹

• *Assessment Costs and Initial Affirmation Costs:* It is estimated that the cost to support a CMMC Level 1 assessment and affirmation is *\$5,977 (as summarized in 4.1.2, Table 2). A Level I Self-Assessment is conducted annually, and is based on the assumptions detailed:

- *Phase 1: Planning and preparing for the assessment:* \$1,803
 - A director (MGMT5) for 4 hours (\$190.52/hr × 4hrs = \$762)
 - An external service provider (ESP)

for 4 hours (\$260.28 × 4hrs = \$1,041)

- *Phase 2: Conducting the self-assessment:* \$2,705
 - A director (MGMT5) for 6 hours (\$190.52/hr × 6hrs = \$1,143)
 - An external service provider (ESP) for 6 hours (\$260.28 × 6hrs = \$1,562)
- *Phase 3: Reporting of assessment results into SPRS:* \$909
 - A director (MGMT5) for 2 hours (\$190.52/hr × 2hrs = \$381)
 - An external service provider (ESP) for 2 hours (\$260.28/hr × 2hrs = \$521)
 - A staff IT specialist (IT4–SB) for 0.08 hours⁴⁰ (\$86.24/hr × 0.08hrs = \$7)
- *Affirmation:* initial affirmation post assessment: \$ 560

- *Reaffirmations:* It is estimated that the costs to reaffirm a CMMC Level I annually for a small entity is \$560

- A director (MGMT5) for 2 hours (\$190.52/hr × 2hrs = \$381)
- A staff IT specialist (IT4–SB) for 2.08 hours (\$86.24/hr × 2.08hrs = \$179)

• The Level 1 Self-Assessment and Affirmations cost burden will be addressed as part of the 48 CFR acquisition rule.

• *Summary:* The following is the annual small entities total cost summary for CMMC Level 1 self-assessments and affirmations over a ten-year period: (Example calculation, Year 1: *\$5,977 per entity × 699 entities (cumulative) = \$4,177,845).

³⁹ Again, it is assumed that that defense contractors and subcontractors have already

implemented the 15 basic safeguarding requirements in FAR clause 52.204–21.

⁴⁰ A person needs to enter the information into SPRS, which should only take five minutes.

Table 13 – Level 1: Self-Assessment for Small Entities

Year	Small Entities Per Year	Cumulative Small Entities	Annual Total Cost (self-assess, affirm)
1	699	699	\$4,177,845
2	3,493	4,192	\$25,055,116
3	11,654	15,846	\$94,709,771
4	22,336	38,182	\$228,209,547
5	22,333	60,515	\$361,691,392
6	22,333	82,848	\$495,173,237
7	20,162	103,010	\$615,679,258
8		103,010	\$615,679,258
9		103,010	\$615,679,258
10		103,010	\$615,679,258
Total	103,010		\$3,671,733,942

All Entities Summary

The following is a summary of the combined costs for both small and other

than small entities for CMMC Level 1 Self-Assessments and Affirmations over a ten-year period:

Table 14 – Level 1: Self-Assessment for All Entities

Year	Entities Per Year	Cumulative Entities	Total Cost (Self-Assess and Affirmation)
1	945	945	\$5,172,077
2	4,720	5,665	\$31,008,386
3	15,748	21,413	\$117,209,336
4	30,184	51,597	\$282,427,557
5	30,179	81,776	\$447,619,764
6	30,179	111,955	\$612,811,971
7	27,246	139,201	\$761,948,657
8	0	139,201	\$761,948,657
9	0	139,201	\$761,948,657
10	0	139,201	\$761,948,657
Total	139,201		4,544,043,721

CMMC Level 2 Self-Assessment and Affirmation Costs*Other Than Small Entities*

• *Nonrecurring and Recurring Engineering Costs:* There are no nonrecurring or recurring engineering costs associated with CMMC Level 2 Self-Assessment since it is assumed the contractor or subcontractor has implemented the NIST SP 800–171 Rev 2 security requirements.

• *Self-Assessment Costs and Initial Affirmation Costs:* It is estimated that the cost to support a CMMC Level 2 self-assessment and affirmation is *\$43,403. The three-year cost is \$48,827 (as summarized in 4.1.2, Table 1), which includes the triennial assessment + affirmation, and two additional annual affirmations (\$43,403 + \$2,712 + \$2,712).

- *Phase 1: Planning and preparing for the assessment:* \$18,015
- A director (MGMT5) for 30 hours

- (\$190.52/hr × 30hrs = \$5,716)
- A manager (MGMT2) for 40 hours (\$95.96/hr × 40hrs = \$3,838)
- A staff IT specialist (IT4) for 46 hours (\$97.49/hr × 46hrs = \$4,485)
- A senior IT specialist (IT3) for 26 hours (\$81.96/hr × 26hrs = \$2,131)
- An IT specialist (IT2) for 34 hours (\$54.27/hr × 34hrs = \$1,845)
- *Phase 2: Conducting the self-assessment:* \$19,964
- A director (MGMT5) for 24 hours (\$190.52/hr × 24hrs = \$4,572)
- A manager (MGMT2) for 24 hours

- (\$95.96/hr × 24hrs = \$2,303)
- A staff IT specialist (IT4) for 56 hours (\$97.49/hr × 56hrs = \$5,460)
- A senior IT specialist (IT3) for 56 hours (\$81.96/hr × 56hrs = \$4,590)
- An IT specialist (IT2) for 56 hours (\$54.27/hr × 56hrs = \$3,039)
- *Phase 3: Reporting of Assessment Results into SPRS: \$2,712*
- A director (MGMT5) for 4 hours (\$190.52/hr × 4hrs = \$762)
- A manager (MGMT2) for 4 hours (\$95.96/hr × 4hrs = \$384)
- A staff IT specialist (IT4) for 16 hours (\$97.49/hr × 16hrs = \$1,560)
- A senior IT specialist (IT3) for 0.08 hours (\$81.96/hr × 0.08hrs = \$7)
- *Affirmation: initial affirmation post assessment: \$2,712*
- *Reaffirmations: It is estimated that the cost to perform an annual affirmation for CMMC Level 2 Self-Assessment is \$2,712 (three-year cost is \$8,136, or \$2,712 × 3):*
- A director (MGMT5) for 4 hours (\$190.52/hr × 4hrs = \$762)
- A manager (MGMT2) for 4 hours (\$95.96/hr × 4hrs = \$384)
- A staff IT specialist (IT4) for 16 hours (\$97.49/hr × 16hrs = \$1,560)
- A senior IT specialist (IT3) for 0.08 hours (\$81.96/hr × 0.08hrs = \$7)
- The Level 2 Self-Assessment and Affirmations cost burden will be addressed as part of the 48 CFR acquisition rule.
- *Summary: The following is the annual other than small entities total cost summary for CMMC Level 2 Self-Assessments and Affirmations over a ten-year period: (Example calculation, Year 2: (*\$43,403 assessment per entity × 35 entities) + (\$2,712 annual affirmation per entity × 7 entities) = \$1,538,092.*

Table 15 - Level 2: Self-Assessment for Other Than Small Entities

Year	Entities Performing Triennial Self-Assessments including initial affirmation	Entities Performing Annual Affirmation Actions Only	Total Cost
1	7	0	\$303,821
2	35	7	\$1,538,092
3	118	42	\$5,235,473
4	232	153	\$10,484,485
5	260	350	\$12,234,099
6	343	492	\$16,221,701
7	436	603	\$20,559,249
8	260	779	\$13,397,691
9	343	696	\$16,775,017
10	436	603	\$20,559,249
Total	2,470	3,725	\$117,308,877

Small Entities

• *Nonrecurring and recurring engineering costs:* There are no nonrecurring or recurring engineering costs associated with CMMC Level 2 Self-Assessment since it is assumed the contractor or subcontractor has implemented the NIST SP 800–171 Rev 2 security requirements.

• *Self-Assessment Costs and Initial Affirmation Costs:* It is estimated that the cost to support a CMMC Level 2 self-assessment and affirmation for a small entity is *\$34,277. The three-year cost is \$37,196 (as summarized in 4.1.2, Table 2), which includes the triennial assessment + affirmation, plus two additional annual affirmations (\$34,277 + \$1,459 + \$1,459).

- *Phase 1: Planning and preparing for the assessment: \$14,426*
- A director (MGMT5) for 32 hours

- (\$190.52/hr × * 32hrs = \$6,097)
- An external service provider (ESP) for 32 hours (\$260.28/hr × 32hrs = \$8,329)
- *Phase 2: Conducting the self-assessment: \$15,542*
- A director (MGMT5) for 16 hours (\$190.52/hr × 16hrs = \$3,048)
- An external service provider (ESP) for 48 hours (\$260.28/hr × 48hrs = \$12,493)
- *Phase 3: Reporting of Assessment Results into SPRS: \$2,851*
- A director (MGMT5) for 4 hours (\$190.52/hr × 4hrs = \$762)
- An external service provider (ESP) for 8 hours (\$260.28/hr × 8hrs = \$2,082)
- A staff IT specialist (IT4–SB) for 0.08 hours (\$86.24/hr × 0.08hrs = \$7)
- *Affirmation: initial affirmation post assessment: \$1,459*

- *Reaffirmations:* It is estimated that the costs to reaffirm a CMMC Level 2 Self-Assessment annually is \$1,459 (three-year costs to reaffirm a CMMC Level 2 Self-Assessment annually is \$4,377, or \$1,459 × 3):
- A director (MGMT5) for 4 hours (\$190.52/hr × 4hrs = \$762)
- A staff IT specialist (IT4–SB) for 8.08 hours (\$86.24/hr × 8.08hrs = \$697)
- The Level 2 Self-Assessment and Affirmations cost burden will be addressed as part of the 48 CFR acquisition rule.
- *Summary: The following is the annual small entities total cost summary for CMMC Level 2 Self-Assessments and Affirmations over a ten-year period: (Example calculation, Year 2: (*\$34,277 self-assessment per entity × 101 entities)*

+ (\$1,459 annual affirmation per entity
× 20 entities) = \$3,491,193).

Table 16 - Level 2: Self-Assessment for Small Entities

Year	Entities Performing Triennial Self-Assessments including initial affirmation	Entities Performing Annual Affirmation Actions Only	Total Cost
1	20	0	\$685,547
2	101	20	\$3,491,193
3	335	121	\$11,659,448
4	662	436	\$23,327,706
5	743	997	\$26,922,622
6	977	1,405	\$35,538,762
7	1,241	1,720	\$45,047,546
8	743	2,218	\$28,703,951
9	977	1,984	\$36,383,471
10	1,241	1,720	\$45,047,546
Total	7,040	10,621	\$256,807,792

All Entities Summary

The following is a summary of the cost to all entities regardless of size for

CMMC Level 2 Self-Assessments and affirmations over a ten-year period:

Table 17 - Level 2: Self-Assessment for All Entities

Year	Entities Performing Triennial Self-Assessments and initial affirmation	Entities Performing Annual Reaffirmations Actions Only	Total Cost
1	27	0	\$989,369
2	136	27	\$5,029,285
3	453	163	\$16,894,921
4	894	589	\$33,812,191
5	1,003	1,347	\$39,156,721
6	1,320	1,897	\$51,760,463
7	1,677	2,323	\$65,606,795
8	1,003	2,997	\$42,101,642
9	1,320	2,680	\$53,158,488
10	1,677	2,323	\$65,606,795
Total	9,510	14,346	\$374,116,669

CMMC Level 2 Certification Assessment and Affirmation Costs

Other Than Small Entities

• *Nonrecurring and recurring engineering costs:* There are no nonrecurring or recurring engineering costs associated with CMMC Level 2

Certification Assessment since it is assumed the contractor or subcontractor has implemented the NIST SP 800–171 Rev 2 security requirements.

• *Assessment and Initial Affirmation Costs:* It is estimated that the cost to support a CMMC Level 2 Certification

Assessment and annual affirmation for an “other than small” entity is *\$112,345. The three-year cost is \$117,768 (as summarized in 4.1.2, Table 1), and includes a triennial assessment + affirmation, plus two additional annual affirmations (\$112,345 + \$2,712

+ \$2,712, with a minor rounding difference.)

- *Phase 1: Planning and preparing for the assessment: \$26,264*
 - A director (MGMT5) for 32 hours (\$190.52/hr × 32hrs = \$6,097)
 - A manager (MGMT2) for 64 hours (\$95.96/hr × 64hrs = \$6,141)
 - A staff IT specialist (IT4) for 72 hours (\$97.49/hr × 72hrs = \$7,019)
 - A senior IT specialist (IT3) for 40 hours (\$81.96/hr × 40hrs = \$3,278)
 - An IT specialist (IT2) for 58 hours (\$54.27/hr × 58hrs = \$3,148)
 - An associate IT specialist (IT1) for 16 hours (\$36.32/hr × 16hrs = \$581)
- *Phase 2: Conducting the assessment: \$28,600*
 - A director (MGMT5) for 32 hours (\$190.52/hr × 32hrs = \$6,097)
 - A manager (MGMT2) for 32 hours (\$95.96/hr × 32hrs = \$3,071)
 - A staff IT specialist (IT4) for 72

- hours (\$97.49/hr × 72hrs = \$7,019)
- A senior IT specialist (IT3) for 72 hours (\$81.96/hr × 72hrs = \$5,901)
- An IT specialist (IT2) for 120 hours (\$54.27/hr × 120hrs = \$6,512)
- *Phase 3: Reporting of Assessment Results: \$2,712*
 - A director (MGMT5) for 4 hours (\$190.52/hr × 4hrs = \$762)
 - A manager (MGMT2) for 4 hours (\$95.96/hr × 4hrs = \$384)
 - A staff IT specialist (IT4) for 16 hours (\$97.49/hr × 16hrs = \$1,560)
 - A senior IT specialist (IT3) for 0.08 hours (\$81.96/hr × 0.08hrs = \$7)
- *Affirmations: initial affirmation post assessment: \$2,712*
- *C3PAO Costs: C3PAO engagement inclusive of Phases 1, 2, and 3 (5-person team) for 200 hours (\$260.28/hr × 200hrs = \$52,056)*
- *Reaffirmations: It is estimated that the costs to reaffirm a CMMC Level 2 Certification Assessment annually*

- is \$2,712 (three-year cost is \$8,136 or \$2,712 × 3)
- A director (MGMT5) for 4 hours (\$190.52/hr × 4hrs = \$762)
- A manager (MGMT2) for 4 hours (\$95.96/hr × 4hrs = \$384)
- A staff IT specialist (IT4) for 8 hours (\$97.49/hr × 8hrs = \$1,560)
- A senior IT specialist (IT3) for 0.08 hours (\$81.96/hr × 0.08hrs = \$7)
- The Level 2 Affirmations cost burden will be addressed as part of the 48 CFR acquisition rule.
- *Summary: The following is the annual other than small entities total cost summary for CMMC Level 2 Certifications and Affirmations over a ten-year period: (Example calculation, Year 2: (*\$112,345 assessment per entity × 673 entities) + (\$2,712 annual affirmation per entity × 135 entities) = \$75,974,425).*

Table 18 - Level 2: Certification for Other Than Small Entities

Year	Entities Performing Triennial Certifications and initial affirmation	Entities Performing Annual Reaffirmation Actions Only	Total Cost
1	135	0	\$15,166,590
2	673	135	\$75,974,425
3	2,252	808	\$255,192,758
4	4,452	2,925	\$508,094,016
5	4,990	6,704	\$578,785,599
6	6,569	9,442	\$763,604,903
7	8,350	11,559	\$969,433,559
8	4,990	14,919	\$601,067,429
9	6,569	13,340	\$774,177,583
10	8,350	11,559	\$969,433,559
Total	47,330	71,391	\$5,510,930,421

Small Entities

• *Nonrecurring or recurring engineering costs:* There are no nonrecurring or recurring engineering costs associated with CMMC Level 2 Certification Assessment since it is assumed the contractor or subcontractor has implemented the NIST SP 800-171 Rev 2 security requirements.

• *Assessment Costs and Initial Affirmation Costs:* It is estimated that the cost to support a CMMC Level 2 Certification Assessment and affirmation for a small entity is *\$101,752. The three-year cost is \$104,670 (as summarized in 4.1.2, Table 2), and includes the triennial

assessment + affirmation plus two additional annual affirmations (\$101,752 + \$1,459 + \$1,459).

- *Phase 1: Planning and preparing for the assessment: \$20,699*
 - A director (MGMT5) for 54 hours (\$190.52/hr × 54hrs = \$10,288)
 - An external service provider (ESP) for 40 hours (\$260.28/hr × 40hrs = \$10,411)
- *Phase 2: Conducting the C3PAO-assessment: \$45,509*
 - A director (MGMT5) for 64 hours (\$190.52/hr × 64hrs = \$12,193)
 - An external service provider (ESP) for 128 hours (\$260.28/hr × 128hrs = \$33,316)

- *Phase 3: Reporting of Assessment Results: \$2,851*
 - A director (MGMT5) for 4 hours (\$190.52/hr × 4hrs = \$762)
 - An ESP for 8 hours (\$260.28/hr × 8hrs = \$2,082)
 - A staff IT specialist (IT4-SB) for 0.08 hours (\$86.24/hr × 0.08hrs = \$7)
- *Affirmations: cost to post initial affirmation \$1,459*
- *C3PAO Costs: C3PAO engagement inclusive of Phases 1, 2, and 3 (3-person team) for 120 hours (\$260.28/hr × 120hrs = \$31,234)*
- *Reaffirmations: It is estimated that the costs to reaffirm a CMMC Level 2*

Certification Assessment annually is \$1,459 (three-year cost is \$4,377, or $\$1,459 \times 3$)

- A director (MGMT5) for 4 hours ($\$190.52/\text{hr} \times 4\text{hrs} = \$762$)
- A staff IT specialist (IT4–SB) for 8.08 hours ($\$86.24/\text{hr} \times 8.08\text{hrs} =$

\$697)

- The Level 2 Affirmations cost burden will be addressed as part of the 48 CFR acquisition rule.

- *Summary:* The following is the annual small entities total cost summary

for CMMC Level 2 Certifications and Affirmations over a ten-year period: (Example calculation, Year 2: ($\$101,752$ assessment per entity $\times$ 1,926 entities) + ($\$1,459$ annual affirmation per entity $\times$ 382 entities) = \$196,531,451).

Table 19 - Level 2: Certification for Small Entities

Year	Entities Performing Triennial Certifications and initial affirmation	Entities Performing Annual Reaffirmation Actions Only	Total Cost
1	382	0	\$38,869,223
2	1,926	382	\$196,531,451
3	6,414	2,308	\$656,003,811
4	12,675	8,340	\$1,301,872,564
5	14,215	19,089	\$1,474,252,306
6	18,703	26,890	\$1,942,295,763
7	23,771	32,918	\$2,466,768,671
8	14,215	42,474	\$1,508,368,920
9	18,703	37,986	\$1,958,483,830
10	23,771	32,918	\$2,466,768,671
Total	134,775	203,305	\$14,010,215,209

All Entities Summary

The following is a summary of the cost to all entities regardless of size for

CMMC Level 2 Certification and Affirmation costs over a ten-year period:

Table 20 - Level 2: Certification for All Entities

Year	Entities Performing Triennial Certifications and initial affirmation	Entities Performing Reaffirmation Actions Only	Total Cost
1	517	0	\$54,035,813
2	2,599	517	\$272,505,876
3	8,666	3,116	\$911,196,569
4	17,127	11,265	\$1,809,966,579
5	19,205	25,793	\$2,053,037,904
6	25,272	36,332	\$2,705,900,665
7	32,121	44,477	\$3,436,202,230
8	19,205	57,393	\$2,109,436,349
9	25,272	51,326	\$2,732,661,414
10	32,121	44,477	\$3,436,202,230
Total	182,105	274,696	\$19,521,145,630

CMMC Level 3 Certification Assessment and Affirmation Costs

An OSC pursuing Level 3 Certification must have a CMMC Level 2 Final Certification Assessment, and also must demonstrate compliance with CMMC Level 3, which includes implementation of selected security requirements from NIST SP 800–172 not required in prior rules. Therefore, the Nonrecurring Engineering and Recurring Engineering cost estimates have been included for the initial implementation and maintenance of the required selected NIST SP 800–172 requirements. The cost estimates account for time for an OSC to implement these security requirements and prepare for, support, participate in, and closeout a CMMC Level 3 Certification Assessment conducted by DCMA DIBCAC. The OSC should keep in mind that the total cost of a CMMC Level 3 Certification Assessment includes the cost of a Level 2 Certification Assessment as well as the costs to implement and assess the security requirements specific to Level 3. CMMC Level 3 is expected to affect a small subset of the DIB.

Other Than Small Entities, Per Entity

- *Nonrecurring Engineering Costs:* \$21,100,000.⁴¹
- *Recurring Engineering Costs:* \$4,120,000.
- *Assessment Costs and Initial Affirmation Costs:* It is estimated that the cost to support a CMMC Level 3 Certification and affirmation for an other than small entity is *\$39,021. The three-year cost is \$44,445 (as summarized in 4.1.2, Table 1), and

includes the triennial assessment + affirmation, plus two additional annual affirmations (\$39,021 + \$2,712 + \$2,712).

- *Phase 1: Planning and preparing for the assessment: \$7,066*
 - A director (MGMT5) for 12 hours (\$190.52/hr × 12hrs = \$2,286)
 - A manager (MGMT2) for 12 hours (\$95.96/hr × 12hrs = \$1,152)
 - A staff IT specialist (IT4) for 16 hours (\$97.49/hr × 16hrs = \$1,560)
 - A senior IT specialist (IT3) for 12 hours (\$81.96/hr × 12hrs = \$984)
 - An IT specialist (IT2) for 20 hours (\$54.27/hr × 20hrs = \$1,085)
- *Phase 2: Conducting the assessment: \$23,136*
 - A director (MGMT5) for 24 hours (\$190.52/hr × 24hrs = \$4,572)
 - A manager (MGMT2) for 24 hours (\$95.96/hr × 24hrs = \$2,303)
 - A staff IT specialist (IT4) for 64 hours (\$97.49/hr × 64hrs = \$6,239)
 - A senior IT specialist (IT3) for 64 hours (\$81.96/hr × 64hrs = \$5,245)
 - An IT specialist (IT2) for 88 hours (\$54.27/hr × 88hrs = \$4,776)
- *Phase 3: Reporting of assessment results: \$2,712*
 - A director (MGMT5) for 4 hours (\$190.52/hr × 4hrs = \$762)
 - A manager (MGMT2) for 4 hours (\$95.96/hr × 4hrs = \$384)
 - A staff IT specialist (IT4) for 16 hours (\$97.49/hr × 16hrs = \$1,560)
 - A senior IT specialist (IT3) for 0.08 hours (\$81.96/hr × 0.08hrs = \$7)
- *Phase 4: Closing out POA&Ms⁴² (for CMMC Level 3 if necessary and allowed): \$3,394*

⁴² Costs for closing out POA&Ms are included at Level 3 because the requirement to implement a subset of NIST SP 800–172 security requirements is new with the CMMC rule. These costs are not included at Level 2 because the implementation of all NIST SP 800–171 Rev 2 security requirements are already required.

- A director (MGMT5) for 8 hours (\$190.52/hr × 8hrs = \$1,524)
- A senior staff IT specialist (IT5) for 16 hours (\$116.87/hr × 16hrs = \$1,870)
- *Affirmations:* initial affirmation post assessment: \$2,712
- *Reaffirmations:* It is estimated that the costs to reaffirm a CMMC Level 3 Certification Assessment annually is \$2,712 (three-year cost is \$8,136, or \$2,712 × 3)
- A director (MGMT5) for 4 hours (\$190.52/hr × 4hrs = \$762)
- A manager (MGMT2) for 4 hours (\$95.96/hr × 4hrs = \$384)
- A staff IT specialist (IT4) for 16 hours (\$97.49/hr × 16hrs = \$1,560)
- A senior IT specialist (IT3) for 0.08 hours (\$81.96/hr × 0.08hrs = \$7)

The Level 3 Affirmations cost burden will be addressed as part of the 48 CFR acquisition rule.

- *Summary:* The following is the annual other than small entities total cost summary for CMMC Level 3 Certifications and Affirmations over a ten-year period. Example calculation, Year 2 (reference per entity amounts shown):

- *(\$39,021 Certification per entity × 5 entities) + (\$2,712 Annual Affirmation per entity × 1 entity) = \$197,818, and
- \$105,500,000 Nonrecurring Engineering cost (\$21,100,000 per entity × 5 entities being certified), and
- \$24,720,000 Recurring Engineering cost (\$4,120,000 per entity × 5 entities being certified) + (\$4,120,000 per entity × 1 entity performing affirmations)
- \$130,417,818 Total Cost = Certification and Affirmation Cost (\$197,818) + Nonrecurring Engineering cost (\$105,500,000) + Recurring Engineering cost (\$24,720,000), or \$145,432,897.

⁴¹ DoD utilized subject matter expertise from Defense Pricing and Contracting (DPC) and DCMA DIBCAC to estimate the Nonrecurring and Recurring Engineering Costs.

Table 21 - Level 3 Certification for Other Than Small Entities

Yr	Entities Performing Triennial Certification Including Initial Affirmation	Entities Performing Re-affirmation Actions Only	Triennial Certification and Affirmations Total Cost	Nonrecurring Engineering Cost	Recurring Engineering Cost	Total Cost
1	1	0	\$39,021	\$21,100,000	\$4,120,000	\$25,259,021
2	5	1	\$197,818	\$105,500,000	\$24,720,000	\$130,417,818
3	18	6	\$718,654	\$379,800,000	\$98,880,000	\$479,398,654
4	35	23	\$1,428,123	\$717,400,000	\$238,960,000	\$957,788,123
5	39	53	\$1,665,578	\$717,400,000	\$379,040,000	\$1,098,105,578
6	52	74	\$2,229,811	\$717,400,000	\$519,120,000	\$1,238,749,811
7	69	91	\$2,939,280	\$717,400,000	\$659,200,000	\$1,379,539,280
8	39	121	\$1,850,016		\$659,200,000	\$661,050,016
9	52	108	\$2,322,031		\$659,200,000	\$661,522,031
10	69	91	\$2,939,280		\$659,200,000	\$662,139,280
Tot	379	568	\$16,329,613	\$3,376,000,000	\$3,901,640,000	\$7,293,969,613

Small Entities

• *Nonrecurring Engineering Costs:* \$2,700,000.

• *Recurring Engineering Costs:* \$490,000.

• *Assessment Costs and Initial Affirmation Costs:* It is estimated that the cost to support a CMMC Level 3 Certification Assessment for a small entity is *\$9,050. The three-year cost is \$12,802 (summarized in 4.1.2, Table 2), and includes the triennial assessment + affirmation, plus two additional annual affirmations (\$9,050 + \$1,876 + \$1,876):

- *Phase 1: Planning and preparing for the assessment:* \$1,905
 - A director (MGMT5) for 10 hours (\$190.52/hr × 10hrs = \$1,905)
- *Phase 2: Conducting the assessment:* \$1,524
 - A director (MGMT5) for 8 hours (\$190.52/hr × 8hrs = \$1,524)
- *Phase 3: Reporting of Assessment Results:* \$1,876
 - A director (MGMT5) for 8 hours

((\$190.52/hr × 8hrs = \$1,524)

- A staff IT specialist (IT4–SB) for 4.08 hours (\$86.24/hr × 4.08hrs = \$352)
- *Phase 4: Closing out POA&Ms⁴³ (for CMMC Level 3 if necessary and allowed):* \$1,869
 - A director (MGMT5) for 8 hours (\$190.52/hr × 8hrs = \$1,524)
 - A staff IT specialist (IT4–SB) for 48 hours (\$86.24/hr × 48hrs = \$345)
- *Reaffirmations:* It is estimated that the costs to reaffirm a CMMC Level 3 Certification Assessment annually is \$1,876 (three-year cost is \$5,628, or \$1,876 × 3)
 - A director (MGMT5) for 8 hours (\$190.52/hr × 8hrs = \$1,524)
 - A staff IT specialist (IT4–SB) for 4.08 hours (\$86.24/hr × 4.08hrs = \$352)
- The Level 3 Affirmations cost burden will be addressed as part of the 48 CFR acquisition rule.

Summary: The following is the annual small entities total cost summary for CMMC Level 3 Certifications and Affirmations over a ten-year period. Example calculation, Year 2 (reference per entity amounts shown):

- *(\$9,050 Certification per entity × 45 entities) + (\$1,876 Annual Affirmation per entity × 3 entities) = \$412,897, and
- \$121,500,000 Nonrecurring Engineering cost (\$2,700,000 per entity × 45 entities being certified), and
- \$23,520,000 Recurring Engineering cost (\$490,000 per entity × 45 entities being certified) + (\$490,000 per entity × 3 entities performing affirmations)
- \$145,432,897 Total Cost = Certification and Affirmation Cost (\$412,897) + Nonrecurring Engineering cost (\$121,500,000) + Recurring Engineering cost (\$23,520,000), or \$145,432,897.

⁴³ Costs for closing out POA&Ms are included at Level 3 because the requirement to implement a subset of NIST SP 800–172 security requirements is

new with the CMMC rule. These costs are not included at Level 2 because the implementation of

all NIST SP 800–171 Rev 2 security requirements are already required.

Table 22 - Level 3 Certification for Small Entities

Yr	Entities Performing Triennial Certification Including Initial Affirmation	Entities Performing Re-affirmation Actions Only	Triennial Certification and Affirmations Total Cost	Nonrecurring Engineering Cost	Recurring Engineering Cost	Total Cost
1	3	0	\$27,151	\$8,100,000	\$1,470,000	\$9,597,151
2	45	3	\$412,897	\$121,500,000	\$23,520,000	\$145,432,897
3	151	48	\$1,456,663	\$407,700,000	\$97,510,000	\$506,666,663
4	292	196	\$3,010,423	\$780,300,000	\$239,120,000	\$1,022,430,423
5	334	443	\$3,853,914	\$780,300,000	\$380,730,000	\$1,164,883,914
6	440	626	\$5,156,569	\$780,300,000	\$522,340,000	\$1,307,796,569
7	553	774	\$6,456,917	\$704,700,000	\$650,230,000	\$1,361,386,917
8	334	993	\$4,885,718		\$650,230,000	\$655,115,718
9	440	887	\$5,646,207		\$650,230,000	\$655,876,207
10	553	774	\$6,456,917		\$650,230,000	\$656,686,917
Tot	3,145	4,744	\$37,363,377	\$3,582,900,000	\$3,865,610,000	\$7,485,873,377

All Entities Summary

The following is a summary of the cost to all entities regardless of size for

Level 3 CMMC Certification

Assessments and affirmations over a ten-year period:

Table 23 - Level 3 Certification for All Entities

Yr	Entities Performing Triennial Certification Including Initial Affirmation	Entities Performing Re-affirmation Actions Only	Triennial Certs and Affirmation Total Cost	Nonrecurring Engineering Cost	Recurring Engineering Cost	Total Cost
1	4	0	\$66,172	\$29,200,000	\$5,590,000	\$34,856,172
2	50	4	\$610,715	\$227,000,000	\$48,240,000	\$275,850,715
3	169	54	\$2,175,317	\$787,500,000	\$196,390,000	\$986,065,317
4	327	219	\$4,438,546	\$1,497,700,000	\$478,080,000	\$1,980,218,546
5	373	496	\$5,519,492	\$1,497,700,000	\$759,770,000	\$2,262,989,492
6	492	700	\$7,386,381	\$1,497,700,000	\$1,041,460,000	\$2,546,546,381
7	622	865	\$9,396,197	\$1,422,100,000	\$1,309,430,000	\$2,740,926,197
8	373	1,114	\$6,735,735	\$-	\$1,309,430,000	\$1,316,165,735
9	492	995	\$7,968,238	\$-	\$1,309,430,000	\$1,317,398,238
10	622	865	\$9,396,197	\$-	\$1,309,430,000	\$1,318,826,197
Tot	3,524	5,312	\$53,692,990	\$6,958,900,000	\$7,767,250,000	\$14,779,842,990

**Government Costs
Summary of Impact**

The following is a summary of the estimated Government costs calculated

for a 20-year horizon in 2023 dollars at a 7 percent and 3 percent discount rate. The Government costs include conducting Level 3 Certification

Assessments, uploading results into the CMMC instantiation of eMASS, and the CMMC PMO costs.

Table 24 – Total Estimated Government Costs of CMMC Requirements for All Entities

Government Costs	7% Discount	3% Discount
Annualized Costs	\$9,508,593	\$9,953,205
Present Value Costs	\$100,734,168	\$148,078,564

Government Costs (All Levels)

The estimated Government costs utilize the entity numbers and phased roll-out detailed in the Public cost section. The DIBCAC estimated the detailed hours for all activities and other costs in a manner similar to the details shown in the Public cost section. Labor efforts for the Government are focused in Level 3. For purposes of the cost estimate, Government labor is based on the average of step one, five, and ten for GS–11 through GS–15 labor elements for the Washington, DC area. The cost of labor was increased by a factor of approximately 51 percent which includes an estimated fringe factor (fringe factor includes estimated average insurance and pension benefits) plus overhead (overhead factor represents supervision and management of the labor) to arrive at the estimated

labor rates. The Government labor in this estimate is performed by DCMA, which is a labor-intensive agency with limited overhead expenses. Therefore, the overall added factor of 51 percent is appropriate versus a typical full overhead factor of 100 percent.

CMMC Database Infrastructure Costs

The Government will develop the operational CMMC instantiation of eMASS. The cost analysis assumes that the nonrecurring engineering (NRE) cost includes the requirements development, architecture design, security, prototyping and testing, and approvals or certifications.⁴⁴ Nonrecurring engineering costs is a one-time fee of \$4,631,213 and is reflected here as incurred in the initial year of the estimate. The Year 1 amount is based on the actual cost incurred in FY2020 with

adjustment for inflation to arrive at base year (BY) 1 dollars (2023).

The recurring engineering (RE) cost includes database management, data analysis, cybersecurity, storage and backups, licensing, and infrastructure.⁴⁵

The cost for recurring engineering in Year 1 (\$2,336,038) and Year 2 (\$1,804,480) are based on historical amounts incurred for FY 2020 and FY 2021 with adjustment for inflation to arrive at base year 1 and Year 2 dollars (2023 and 2024). The estimated recurring engineering for Year 3 forward is calculated as the average of the Year 1 and Year 2 amounts $((\$2,336,038 + \$1,804,480)/2 = \$2,070,259)$.

The table summarizes the nonrecurring engineering (NRE) and recurring engineering (RE) costs for Year 1 through Year 5:

Table 25 - Government Costs for CMMC Database Infrastructure (BY23\$)

	NRE	RE	Sub-Total Per Year
Year 1	\$4,631,213	\$2,336,038.92	\$6,967,252
Year 2	0	\$1,804,480	\$1,804,480
Year 3	0	\$2,070,259	\$2,070,259
Year 4	0	\$2,070,259	\$2,070,259
Year 5	0	\$2,070,259	\$2,070,259
Total	\$4,631,213	\$10,351,296	\$14,982,509

Total Government Costs

The following is a summary of the total Government costs over a ten-year period:

⁴⁴ Nonrecurring engineering costs were first incurred in FY20. The cost has inflation applied to put the value in 2023 base year (BY) dollars.

⁴⁵ The cost for the recurring engineering cost is based on the costs incurred in FY20 and FY21. The values for Year 1 (FY20) and Year 2 (FY21) are actual historic values that have inflation applied to

them to put them in base year 2023 dollars. Every proceeding years' recurring engineering cost is based on the average of the two historic actual values.

Table 26 – Estimated CMMC Costs – Government (BY23\$)

Year	Government Costs (All Levels**)	CMMC Database Infrastructure (CMMC Instantiation of eMASS)	Total
1	\$79,698	\$6,967,252	\$7,046,950
2	\$826,063	\$1,804,480	\$2,630,543
3	\$2,871,167	\$2,070,259	\$4,941,426
4	\$5,713,930	\$2,070,259	\$7,784,189
5	\$6,830,268	\$2,070,259	\$8,900,527
6	\$9,083,729	\$2,070,259	\$11,153,988
7	\$11,533,002	\$2,070,259	\$13,603,261
8	\$7,670,055	\$2,070,259	\$9,740,314
9	\$9,486,082	\$2,070,259	\$11,556,342
10	\$11,533,002	\$2,070,259	\$13,603,261

**Government activities associated with all Government costs associated with the CMMC Program.

Total Public and Government Costs

The following is a summary of the total estimated annual Public and

Government cost associated with implementation of the CMMC Program over a ten-year period:

Table 27 - Estimated CMMC Costs – Public and Government (BY23\$)

Year	Public	Government	Total
1	\$95,053,432	\$7,046,950	\$102,100,382
2	\$584,394,262	\$2,630,543	\$587,024,805
3	\$2,031,366,143	\$4,941,427	\$2,036,307,570
4	\$4,106,424,873	\$7,784,189	\$4,114,209,062
5	\$4,802,803,881	\$8,900,527	\$4,811,704,408
6	\$5,917,019,480	\$11,153,988	\$5,928,173,468
7	\$7,004,683,879	\$13,603,261	\$7,018,287,140
8	\$4,229,652,383	\$9,740,314	\$4,239,392,697
9	\$4,865,166,797	\$11,556,342	\$4,876,723,139
10	\$5,582,583,879	\$13,603,261	\$5,596,187,140

Alternatives

DoD considered and adopted several alternatives during the development of this rule that reduce the burden on defense contractors and still meet the objectives of the rule. These alternatives include: (1) maintaining status quo and leveraging only the current requirements implemented in DFARS provision 252.204–7019 and DFARS clause 252.204–7020 requiring defense contractors and offerors to self-assess utilizing the DoD Assessment

Methodology and entering a Basic Summary Score; (2) revising CMMC to reduce the burden for small businesses and contractors who do not process, store, or transmit critical CUI by eliminating the requirement to hire a C3PAO and instead allow self-assessment with affirmation to maintain compliance at CMMC Level 1, and allowing triennial self-assessment with an annual affirmation to maintain compliance for some CMMC Level 2 programs; (3) exempting contracts and

orders exclusively for the acquisition of commercially available off-the-shelf items; and (4) implementing a phased implementation for CMMC.

In addition, the Department took into consideration the timing of the requirement to achieve a specified CMMC level: (1) at time of proposal or offer submission, (2) after contract award, (3) at the time of contract award, or (4) permitting government Program Managers to seek approval to waive inclusion of CMMC requirements in solicitations that involve disclosure or

creation of FCI or CUI as part of the contract effort. Such waivers will be requested and approved by DoD in accordance with internal policies, procedures, and approval requirements. The Department ultimately adopted alternatives 3 and 4. The drawback of alternative 1 (at time of proposal or offer submission) is the increased risk for contractors since they may not have sufficient time to achieve the required CMMC level after the release of the solicitation. The drawback of alternative 2 (after contract award) is the increased risk to the Department with respect to the costs, program schedule, and uncertainty in the event the contractor is unable to achieve the required CMMC level in a reasonable amount of time given their current cybersecurity posture. This potential delay would apply to the entire supply chain and prevent the appropriate flow of CUI and FCI. The Department seeks public comment on the requirement to achieve a specified CMMC level by the time of contract award.

Benefits

The Department of Defense expects this proposed rule to protect DoD and industry from the loss of FCI and CUI, including intellectual property. The theft of intellectual property and sensitive unclassified information due to malicious cyber activity threatens U.S. economic security and national security. In 2010, the Commander of the U.S. Cyber Command and Director of the National Security Agency estimated the value of U.S. intellectual property to be \$5 trillion and that \$300 billion is stolen over networks annually⁴⁶. The 2013 Intellectual Property Commission Report provided concurrence and noted that the ongoing theft represents “the greatest transfer of wealth in history.” The report also highlighted the challenges of generating an exact figure because Government and private studies tend to understate the impacts due to inadequate data or scope, which is evidenced in subsequent analyses.⁴⁷

The responsibility of federal agencies to protect FCI or CUI does not change when such information is shared with defense contractors. A comparable level of protection is needed when FCI or CUI is processed, stored, or transmitted on contractor information systems.⁴⁸ The protection of FCI, CUI, and intellectual property on defense contractor systems can directly impact the ability of the

federal government to successfully conduct its essential missions and functions.⁴⁹

Malicious cyber actors have targeted and continue to target the DIB sector that consists of approximately 220,000 small-to-large sized entities that support the warfighter. In particular, actors ranging from cyber criminals to nation-states continue to attack companies and organizations that comprise the Department’s multi-tier supply chain including smaller entities at the lower tiers. From at least January 2020, through February 2022, the Federal Bureau of Investigation (FBI), National Security Agency (NSA), and Cybersecurity and Infrastructure Security Agency (CISA) observed regular targeting of U.S. cleared defense contractors (CDCs) by Russian state-sponsored cyber actors. The actors have targeted sensitive, unclassified information, as well as proprietary and export-controlled technology. The acquired information provides significant insight into U.S. weapons platforms development and deployment timelines, vehicle specifications, and plans for communications infrastructure and IT. By acquiring proprietary internal documents and email communications, adversaries may be able to adjust their own military plans and priorities, hasten technological development efforts, inform foreign policymakers of U.S. intentions, and target potential sources for recruitment.⁵⁰

In addition to stealing intellectual property for military gains, Russia may conduct cyber-attacks against the U.S. for retaliatory purposes. On March 21, 2022, that the Biden-Harris Administration stated intelligence indicates that the Russian Government and Russian-aligned cybercrime groups have threatened to conduct cyber operations in retaliation for perceived cyber offensives against the Russian Government or the Russian people.⁵¹

The aggregate loss of intellectual property and CUI from the DoD supply chain severely undercuts U.S. technical advantage, limits, and disrupts business opportunities associated with technological superiority, and ultimately threatens our national defenses and economy. By incorporating heightened cybersecurity into

acquisition programs, the CMMC Program provides the Department assurance that contractors and subcontractors are meeting DoD’s cybersecurity requirements and provides a key mechanism to adapt to an evolving threat landscape. This is critically important to the Department because defense contractors are the target of increasingly frequent and complex cyberattacks by adversaries and non-state actors. Dynamically enhancing DIB cybersecurity to meet these evolving threats and safeguarding the information that supports and enables our warfighters is a top priority for the Department. The CMMC Program is a key component of the Department’s DIB cybersecurity effort.

CMMC provides uniform and improved DoD cybersecurity requirements in three (3) levels, using the security requirements in NIST SP 800–171 and NIST SP 800–172. With this rule, the Department is publishing supplemental guidance documents to assist the public and in particular, small businesses, with CMMC implementation, increasing the likelihood of successful implementation and strengthening cybersecurity across the DIB. CMMC decreases the burden and cost on companies protecting FCI by allowing all companies at Level 1, and a subset of companies at Level 2, to demonstrate compliance through self-assessments. CMMC allows companies, under certain limited circumstances, to make a Plan of Action & Milestones (POA&M) to provide additional time to achieve final certification assessment. These key updates to CMMC benefit the DoD and our national interest by providing:

- improved safeguarding of competitive advantages through requirements flow-down to the defense contractor supply chain and protections for proprietary information and capabilities, and
- increased efficiency in the economy and private markets as a result of the streamlining of cybersecurity requirements, the resulting improvements in cybersecurity, and accountability across the supply chain.

In summary, the CMMC Program enforces and validates implementation of DoD’s required cyber protection standards for companies in the DIB, preserving U.S. technical advantage. In addition, CMMC increases security for the most sensitive unclassified information by applying additional requirements. Implementation of CMMC will help protect DoD’s sensitive unclassified information upon which DoD systems and critical infrastructure rely, making it vital to national security.

⁴⁶ <https://www.govinfo.gov/content/pkg/CHRG-113hhrg86391/html/CHRG-113hhrg86391.htm>.

⁴⁷ <https://www.nbr.org/program/commission-on-the-theft-of-intellectual-property/>.

⁴⁸ <https://www.cybernc.us/fci-cui/>.

⁴⁹ GAO Report to Congress, Defense Contractor Cybersecurity Stakeholder Communication and Performance Goals Could Improve Certification Framework, Dec. 2021.

⁵⁰ <https://www.cisa.gov/news-events/cybersecurity-advisories/aa22-047a>.

⁵¹ <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/21/statement-by-president-biden-on-our-nations-cybersecurity/>.

CMMC is focused on securing the Department's supply chain, including the smallest, most vulnerable innovative companies. The security risks that result from the significant loss of FCI and CUI, including intellectual property and proprietary data, make implementation of the CMMC Program vital, practical, and in the public interest.

III. Regulatory Compliance Analysis

A. Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"

These Executive Orders direct agencies to assess all costs, benefits, and available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, safety effects, distributive impacts, and equity). These Executive Orders emphasize the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget (OMB) has determined this proposed rule is significant as defined by Section 3(f)(1) for purposes of Executive Order 12866.

B. Congressional Review Act (5 U.S.C. 801 et seq.)

As defined by 5 U.S.C. 804(2), a major rule is a rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(a) an annual effect on the economy of \$100,000,000 or more; (b) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. This rule has been designated a major rule as it is expected to have annual effect on the economy of \$100M dollars or more.

C. Public Law 96–354, "Regulatory Flexibility Act" (5 U.S.C. 601)

The Department of Defense Chief Information Officer certified that this rule is subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would, if promulgated, have a significant economic impact on a substantial number of small entities.

DoD has considered previous comments from Small Business

Administration (SBA) regarding the impact and cost to small businesses to implement CMMC. In July 2022, the CMMC PMO met with the Office of Advocacy for the U.S. SBA to address the revisions planned in CMMC that are responsive to prior SBA concerns, with which the SBA was satisfied.

An Initial Regulatory Flexibility Analysis that includes a detailed discussion and explanation about the assumptions and methodology used to estimate the cost of this regulatory action on small entities follows and is available at <https://www.regulations.gov> (search for "DoD–2023–OS–0063" click "Open Docket" and view "Supporting Documents").

This initial regulatory flexibility analysis has been prepared consistent with 5 U.S.C. 603.

(1) Reasons for the Action

This proposed rule is necessary to create a secure and resilient supply chain, by addressing threats to the U.S. economy and national security from ongoing malicious cyber activities and preventing theft of hundreds of billions of dollars of U.S. intellectual property. The President's Executive Order (E.O.) 14028, "Improving the Nation's Cybersecurity,"⁵² emphasized that industrial security needs strengthening to ensure investments are not lost through intellectual property theft, among other supply chain risks.

Currently, the FAR and DFARS prescribe contract clauses intended to protect FCI and CUI within the DoD supply chain. Specifically, the clause at FAR 52.204–21, Basic Safeguarding of Covered Contractor Information Systems, is prescribed at FAR 4.1903 for use in Government solicitations and contracts when the contractor or a subcontractor at any tier may have FCI residing in or transiting through its information system. The FAR clause focuses on ensuring a basic level of cybersecurity hygiene and is reflective of actions that a prudent businessperson would employ.

In addition, DFARS clause 252.204–7012, *Safeguarding Covered Defense Information and Cyber Incident Reporting*, requires defense contractors and subcontractors to provide "adequate security" to process, store or transmit CUI on information systems or networks, and to report cyber incidents that affect these systems or networks. The clause states that to provide

adequate security, the contractor shall implement, at a minimum, the security requirements in "National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171 Rev 2, Protecting CUI in Nonfederal Systems and Organizations." Contractors are also required to flow down DFARS clause 252.204–7012 to all subcontracts that involve CUI.

However, neither FAR 52.204–21 nor DFARS 252.204–7012, provide for DoD verification of a contractor's implementation of basic safeguarding requirements specified in FAR 52.204–21 nor the security requirements specified in DFARS 252.204–7012 which requires implementation of NIST SP 800–171 Rev 2 prior to contract award. Instead, DFARS clause 252.204–7012 requires prospective contractors or subcontractors to self-attest upon submission of their offer that they have implemented or will implement NIST SP 800–171 Rev 2.

Findings from DoD Inspector General report (DODIG–2019–105 "Audit of Protection of DoD CUI on Contractor-Owned Networks and Systems") indicate that DoD contractors did not consistently implement mandated system security requirements for safeguarding CUI and recommended that DoD take steps to assess a contractor's ability to protect this information. The report emphasizes that malicious actors can exploit the vulnerabilities of contractors' networks and systems and exfiltrate information related to some of the Nation's most valuable advanced defense technologies.

Due to these shortcomings and the associated risks to national security, the Department developed the Cybersecurity Maturity Model Certification (CMMC) Program to assess contractor and subcontractor implementation of DoD's required cybersecurity standards.

The Cybersecurity Maturity Model Certification (CMMC) Program verifies compliance with DoD cyber protection standards by defense contractors and subcontractors. It is designed to protect sensitive unclassified information that is shared by the Department with its contractors and subcontractors. The program incorporates a set of cybersecurity requirements into acquisition contracts and provides the Department increased assurance that contractors and subcontractors are meeting these requirements. The CMMC Program has three key features:

- **Tiered Model:** CMMC requires that companies implement cybersecurity requirements at progressively advanced levels, depending on the type and sensitivity of the information. The

⁵² https://www.gsa.gov/technology/it-contract-vehicles-and-purchasing-programs/technology-products-services/it-security/executive-order-14028?gclid=CjwKCAjwrranBhAEiWAZbhNtbkRN9aYRhpHsrVE6jJroenQW0tC_DGtCLYch8KBj_f5dny_LtBNziBoCukIQAvD_BwE.

program also sets forth the process for information flow down to subcontractors.

- *Assessment Requirement:* CMMC assessments allow the Department to verify the implementation of cybersecurity requirements.
- *Implementation through Contracts:* Once CMMC is fully implemented, certain DoD contractors that handle sensitive unclassified DoD information will be required to achieve a particular CMMC level as a condition of contract award.

In September 2020, the DoD published an interim DFARS rule in the **Federal Register** (DFARS Case 2019–D041) that implemented the DoD’s initial vision for the CMMC Program (“CMMC 1.0”) and outlined the basic features of the program (tiered model, required assessments, and implementation through contracts). The interim rule became effective on November 30, 2020.

In March 2021, the Department initiated an internal review of CMMC’s implementation, informed by more than 750 public comments in response to the interim DFARS rule. This comprehensive, programmatic assessment engaged cybersecurity and acquisition leaders within DoD to refine policy and program implementation.

In November 2021, the Department announced “CMMC 2.0,” which is an updated program structure and revised requirements designed to achieve the primary goals of an internal DoD review of the CMMC Program. With the implementation of CMMC 2.0, the Department introduced several key changes that build on and refine the original program requirements. These include:

- Streamlining the model from five levels to three levels.
- Exclusively implementing National Institute of Standards and Technology (NIST) cybersecurity guidelines.
- Allowing all companies at Level 1 and a subset of companies at Level 2 to demonstrate compliance through self-assessments.
- Increased oversight of professional and ethical standards of third-party assessors.
- Allowing companies, under limited circumstances, to make Plan of Action & Milestones (POA&M) to achieve certification.

In July 2022, the CMMC PMO met with the Office of Advocacy for the U.S. SBA to address the revisions planned in CMMC 2.0 that are responsive to prior SBA concerns. As a result of the alignment of CMMC 2.0 to NIST guidelines, the Department’s requirements will continue to evolve as

changes are made to the underlying NIST SP 800–171 Rev 2 and NIST SP 800–172 requirements.

(2) Objectives of, and Legal Basis for, the Rule

Legal Basis: 5 U.S.C. 301; Sec. 1648, Public Law 116–92, 133 Stat. 1198.

The objective of this proposed rule (CMMC Program rule) is to provide the Department with increased assurance that a defense contractor can adequately protect sensitive unclassified information commensurate with the risk, accounting for information flow down to its subcontractors in a multi-tier supply chain. This rule meets the objective by providing a mechanism to assess contractor and subcontractor implementation of DoD’s cyber security protection requirements for FCI and CUI. Implementation of the CMMC Program is intended to address the following policy issues:

(a) Verification of a Contractor’s Cybersecurity Posture

Effective June 2016, FAR clause 52.204–21 *Basic Safeguarding of Contractor Information Systems*, requires federal contractors and subcontractors to implement 15 basic cyber hygiene requirements, as applicable, to protect contractor information systems that process, store, or transmit FCI.

December 31, 2017, was DoD’s deadline for contractors to implement, as applicable, the cybersecurity protection requirements set forth in NIST SP 800–171 Rev 2, *Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations*, in accordance with DFARS clause 252.204–7012, *Safeguarding Covered Defense Information and Cyber Incident Reporting*. The current NIST 800–171A Assessment Guide states, “For the CUI security requirements in NIST Special Publication 800–171 Rev 2, nonfederal organizations describe in a system security plan, how the specified requirements are met or how organizations plan to meet the requirements [in a Plan of Action].”⁵³ NIST’s process provides contractors with a tool to assess their security posture and decide if or when to mitigate the risks based upon the organizational risk tolerance. As such, a contractor could be compliant with NIST SP 800–171 Rev 2 if some of NIST SP 800–171 Rev 2 requirements are implemented but others are listed in a Plan of Action. As a result, at present, defense contractors and subcontractors

can process, store, or transmit CUI without having implemented all security requirements set forth in NIST SP 800–171 Rev 2 and without establishing concrete, prompt, and enforceable timelines for addressing shortfalls and gaps documented in the Plan of Action.

Findings from DoD Inspector General report (DODIG–2019–105 “Audit of Protection of DoD Controlled Unclassified Information on Contractor-Owned Networks and Systems”) indicated that DoD contractors did not consistently implement mandated system security requirements for safeguarding CUI and recommended that DoD take steps to assess a contractor’s ability to protect this information.

CMMC adds a third-party assessment requirement, as applicable, to verify defense contractors and subcontractors have implemented the required security requirements prior to award. CMMC also adds affirmation processes at every CMMC level requiring contractors and subcontractors to attest to compliance with CMMC’s security requirements and then provide annual affirmations thereafter.

(b) Comprehensive Implementation of Cybersecurity Requirements

Although the security requirements in NIST SP 800–171 Rev 2 address a range of threats, they do not sufficiently address Advanced Persistent Threats (APTs). An APT is an adversary that possesses sophisticated levels of expertise and significant resources, which allow it to create opportunities to achieve its objectives by using multiple attack vectors (e.g., cyber, physical, and deception). To address APTs, NIST has published NIST SP 800–172, *Enhanced Security Requirements for Protecting Controlled Unclassified Information: A Supplement to NIST Special Publication 800–171 Rev 2*. CMMC Level 3 provides for government assessment of a contractor’s implementation of a defined subset of NIST SP 800–172 *Enhanced Security Requirements* with DoD predefined parameters and specifications.

(c) Scale and Depth

Today, DoD prime contractors must include DFARS clause 252.204–7012 in subcontracts for which performance will involve covered defense information, but this does not provide the Department with sufficient insights with respect to the cybersecurity posture of all members of a multi-tier supply chain for any given program or technology development effort. CMMC 2.0 requires prime contractors to flow down

⁵³ <https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-171A.pdf>.

appropriate CMMC Level requirements, as applicable, to subcontractors throughout their supply chain(s).

Given the size and scale of the DIB, the Department cannot scale its existing cybersecurity assessment capability to conduct on-site assessments of approximately 220,000 DoD contractors and subcontractors every three years. The Department’s existing assessment capability is best suited for conducting targeted assessments for the relatively small subset of DoD contractors and subcontractors that support designated high-priority programs involving CUI.

CMMC addresses the Department’s scaling challenges by utilizing a private-sector accreditation structure. A DoD-authorized Accreditation Body will authorize, accredit, and provide oversight of C3PAOs which in turn will conduct CMMC Level 2 Certification Assessments of actual and prospective DoD contractors and subcontractors. OSCs will directly contract with an authorized or accredited C3PAO to obtain a CMMC Certification Assessment. The cost of CMMC Level 2 activities is driven by multiple factors, including market forces that govern availability of C3PAOs and the size and complexity of the enterprise or enclave under assessment. The Government will perform CMMC Level 3 Certification

Assessments. Government resource limitations may affect schedule availability.

(d) Reduces Duplicate or Repetitive Assessments of Our Industry Partners

CMMC assessment results and contractor affirmations of compliance will be posted in the Supplier Performance Risk System (SPRS), DoD’s authoritative source for supplier and product performance information. Posting CMMC assessment results in SPRS precludes the need to validate CMMC implementation on a contract-by-contract basis. This enables DoD to identify whether the CMMC assessment requirements have been met for relevant contractor information system(s), avoids duplicative assessments, and eliminates the need for program level assessments, all of which decreases costs to both DoD and industry.

(3) Anticipated Benefits and Costs

(a) Benefits

The CMMC Program validates implementation of DoD’s required cyber protection standards for companies in the DIB. Furthermore, this rule benefits the efficient functioning of the economy and private markets for all sizes of companies, including the smallest, most vulnerable companies, by: (1) protecting

DoD from the loss of FCI and CUI; (2) promoting improvements in cybersecurity and accountability across DoD supply chains; (3) promoting continued innovation by helping to prevent significant loss of revenue, benefits, and jobs to the companies involved in developing those innovations for DoD; (4) promoting U.S. technical advantage and superiority; and (5) improving the safeguarding of competitive advantages and protections for proprietary information and capabilities through requirements flow-down throughout the defense contractor supply chain.

(b) Costs

A Regulatory Impact Analysis (RIA) that includes a detailed discussion and explanation about the assumptions and methodology used to estimate the cost of this regulatory action is available at www.regulations.gov (search for “DoD–2023–OS–0063” click “Open Docket” and view “Supporting Documents”). The total estimated Public (large and small entities) and Government costs associated with this rule, calculated in over a 20-year horizon in 2023 dollars at a 7 percent discount rate and a 3 percent discount rate are provided as follows:

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**Table 28 - Total Estimated Cost of CMMC Requirements for the Public and the Government
(7 percent discount)**

Total cost	Public	Government	Total
Annualized Costs	\$3,989,182,374	\$9,508,593	\$3,998,690,967
Present Value Costs	\$42,261,454,899	\$100,734,168	\$42,362,189,067

**Table 29 - Total Estimated Costs of CMMC Requirements for the Public and the Government
(3 percent discount)**

Total cost	Public	Government	Total
Annualized Costs	\$4,219,513,555	\$9,953,205	\$4,229,466,760
Present Value Costs	\$62,775,706,830	\$148,078,564	\$62,923,785,394

The following shows the estimated number of small entities⁵⁴ anticipated to pursue compliance or certification, at

each CMMC level, over a phased implementation. These estimates were

generated based upon prior year procurement data.

⁵⁴ Small entities are small business concerns.

Table 30 - Number of Small Entities Pursuing CMMC Over a Phased Implementation

Year	Level 1 Self-Assess	Level 2 Self-Assess	Level 2 Certification	Level 3 Certification	Total
1	699	20	382	3	1,104
2	3,493	101	1,926	45	5,565
3	11,654	335	6,414	151	18,554
4	22,336	642	12,293	289	35,560
5	22,333	642	12,289	289	35,553
6	22,333	642	12,289	289	35,553
7	20,162	579	11,096	261	32,098
Total	103,010	2,961	56,689	1,327	163,987

The following is a summary of the estimated public costs of CMMC for

small entities, per assessment of each contractor information system, at the

required periodicity for each CMMC level.

Table 31 - Small Entities (per Assessment)

Assessment Phase (\$)	Level 1 Self- Assessment	Level 2 Self- Assessment	Level 2 Certification	Level 3 Certification
Periodicity	Annual	Triennial	Triennial	Triennial
Plan and Prepare the Assessment	\$1,803	\$14,426	\$20,699	\$1,905
Conduct the Assessment	\$2,705	\$15,542	\$76,743	\$1,524
Report Assessment Results	\$909	\$2,851	\$2,851	\$1,876
Affirmations	\$560	*\$4,377	*\$4,377	*\$5,628
Subtotal	<u>\$5,977</u>	<u>\$37,196</u>	<u>\$104,670</u>	<u>\$10,933</u>
**POA&M	\$0	\$0	\$0	\$1,869
Total	<u>\$5,977</u>	<u>\$37,196</u>	<u>\$104,670</u>	<u>\$12,802</u>

*Reflects the 3-year cost to match the periodicity.

**Requirements "NOT MET" (if needed and if allowed) will be documented in a Plan of Action and Milestones.

The following estimates are Small Entity Public and Government costs for

CMMC requirements calculated over a

20-year horizon in 2023 dollars at a 7 percent discount rate.

Table 32 – Costs of CMMC Requirements for Small Businesses

	Public	Government	Total
Annualized Costs	\$2,616,493,297	\$7,238,247	\$2,623,731,544
Present Value Costs	\$27,719,167,263	\$76,682,096	\$27,795,849,359

BILLING CODE 6001–FR–C**(4) Small Business Entities Impacted**

This rule will impact small businesses that do business with the Department of Defense as a prime or subcontractor, except for contracts or orders that are exclusively for COTS items or valued at or below the micro-purchase threshold.

According to the Federal Procurement Data System (FPDS) there is an annual average of 30,145 unique small business contractors in DoD: FY 2019 (31,189), FY 2020 (29,166), FY 2021 (27,427) and FY 2022 (32,798).

Cost Assumptions and Analysis for CMMC 2.0

Complete details on CMMC requirements and associated costs, savings, and benefits of this rule are provided in the Regulatory Impact Analysis referenced in the Preamble. Key components of CMMC Program requirements are described in 32 CFR Subpart D.

(a) Comparison to CMMC 1.0 Cost Analysis

Public comment feedback on CMMC 1.0 indicated that cost estimates were too low. CMMC 2.0 cost estimates account for that feedback with the following improvements:

- Allowance for outsourced IT services
- Increased total time for the contractor to prepare for the assessment, including limited time for learning the reporting and affirmation processes
- Allowance for use of consulting firms to assist with the assessment process
- Time for a senior level manager to review the assessment and affirmation before submitting the results into SPRS
- Updated government and contractor labor rates that include applicable burden costs

As a result, some CMMC 2.0 costs may be higher than those included in CMMC 1.0.

(b) Assumptions for CMMC 2.0 Cost Analysis

In estimating the public cost for a small defense contractor to achieve CMMC compliance or certification at

each CMMC level, DoD considered non-recurring engineering costs, recurring engineering costs, assessment costs, and affirmation costs for each CMMC Level. These costs include labor and consulting.

Estimates include size and complexity assumptions to account for typical organizational differences between small companies and others with respect to the handling of Information Technology (IT) and cybersecurity:

- small entities are likely to have a less complex, less expansive operating environment and IT/Cybersecurity infrastructure compared to larger defense contractors
- small entities are likely to outsource IT and cybersecurity to an External Service Provider (ESP)
- entities (small and other than small) pursuing CMMC Level 2 Self-Assessment are likely to seek consulting or implementation assistance from an ESP to either help them prepare for the assessment technically or participate in the assessment with the C3PAOs.

Estimates do not include implementation (Non-recurring Engineering Costs (NRE)) or maintenance costs (Recurring Engineering (RE) ⁵⁵) for requirements prescribed in current regulations.

For CMMC Levels 1 and 2, cost estimates are based upon assessment, reporting, and affirmation activities which a contractor will take to validate conformance with existing cybersecurity requirements from the FAR clause 52.204–21, effective June 15, 2016, to protect FCI, and the DFARS clause 252.204–7012 which required implementation of NIST SP 800–171 Rev 2 not later than December 31, 2017, to protect CUI. As such, cost estimates are not included for an entity to implement the CMMC Level 1 or 2 security requirements, maintain compliance with current security requirements, or remediate a Plan of Action for unimplemented requirements.

⁵⁵ The terms nonrecurring engineering costs and recurring engineering costs are terms of art and do not only encompass actual engineering costs.

For CMMC Level 3, the cost estimates factor in the assessment, reporting, and affirmation activities in addition to estimates for NRE and RE to implement and maintain CMMC Level 3 security requirements. CMMC Level 3 security requirements are a selection of NIST SP 800–172 Enhanced Security Requirements as described in 32 CFR 170.14(c)(4) and are not currently required through other regulations. DoD expects that CMMC Level 3 will apply only to a small subset of defense contractors and subcontractors.

The Cost Categories used for each CMMC Level are described:

- **Nonrecurring Engineering Costs:** Estimates consist of hardware, software, and the associated labor to implement the same. Costs associated with implementing the requirements defined in FAR 52.204–21 and NIST SP 800–171 Rev 2 are assumed to have been implemented and, therefore, are not accounted for in this cost estimate. As such, these costs only appear in CMMC Level 3. If nonrecurring engineering costs are referenced, they are only accounted for as a one-time occurrence and are reflected in the year of the initial assessment.

- **Recurring Engineering Costs:** Estimates consist of annually recurring fees and associated labor for technology refresh. Costs associated with implementing the requirements defined in FAR 52.204–21 and NIST SP 800–171 Rev 2 are assumed to have been implemented and, therefore, are not accounted for in this cost estimate. As such, these costs only appear in CMMC Level 3.

- **Assessment Costs:** Estimates consist of activities for pre-assessment preparations (which includes gathering and/or developing evidence that the assessment objectives for each requirement have been satisfied), conducting and/or participating in the actual assessment, and completion of any post-assessment work. Assessment costs are represented by notional phases. Assessment costs assume the company passes the assessment on the first attempt (conditional—with an allowable POA&M or final). Each phase includes an estimate of hours to conduct the assessment activities including:

(c) Labor Hour Estimates for a Company (and any ESP Support) To Prepare for and Participate in the Assessment

(d) C3PAO Cost Estimates for Companies Pursuing a Certification

- Labor hour estimates for certified or authorized assessors to work with the small business to conduct the actual assessment.

(e) Assessment Costs Broken Down Into Phases

- *Phase 1:* Planning and preparing for the assessment.

- *Phase 2:* Conducting the assessment (self or C3PAO).

- *Phase 3:* Reporting of Assessment Results.

- *Phase 4:* POA&M Closeout (for CMMC Level 3 only, where allowed, if applicable).

- CMMC allows a limited open Plan of Action and Milestones (POA&M) for a period of 180 days to remediate the POA&M, see 32 CFR 170.21.

Affirmations: Estimates consist of costs for a contractor or subcontractor to submit to SPRS an initial affirmation of compliance that the contractor information system is compliant with

and will maintain compliance with the requirements of the applicable CMMC Level. If POA&Ms are allowed, an affirmation must be submitted with the POA&M closeout. With the exception of Small Entities for Level 1 and Level 2, it is assumed the task requires the same labor categories and estimated hours as the final reporting phase of the assessment.

The categories and rates used for estimating purposes were compiled by subject matter experts based on comparable industry data and are defined in the table.

Table 33 - Small Entities - Labor Rates Used for Estimate

Code ⁵⁶	Rate per Hour ⁵⁷	Description	Background / Years' Experience ⁵⁸	With Master's Degree ⁵⁸
MGMT5	\$ 190.52	Director	Chief Info. Systems Officer / Chief Info. Officer	
IT4-SB	\$ 86.24	Staff IT Specialist	Cyber Background, 7-10 years	5-7 years
ESP / C3PAO ⁵⁹	\$ 260.28	Cyber Subject Matter Expert	4 years	

(c) Cost Analysis/Estimates by CMMC Level

CMMC Level 1 Self-Assessment and Affirmation Costs for Small Business Entities

- *Nonrecurring and recurring engineering costs:* There are no nonrecurring or recurring engineering costs associated with CMMC Level 1 since it is assumed the contractor or subcontractor has already implemented the basic safeguarding requirements set forth in FAR 52.204–21, which are the CMMC Level 1 security requirements.

- *Self-Assessment Costs and Initial Affirmation Costs:* It is estimated that the cost to support a CMMC Level 1 assessment and affirmation is *\$5,977 (as summarized in Table 1) A Level I Self-Assessment is conducted annually,

and is based on the assumptions detailed:

- *Phase 1: Planning and preparing for the assessment:* \$1,803
 - A director (MGMT5) for 4 hours (\$190.52/hr × 4hrs = \$762)
 - An external service provider (ESP) for 4 hours (\$260.28 × 4hrs = \$1,041)
- *Phase 2: Conducting the self-assessment:* \$2,705
 - A director (MGMT5) for 6 hours (\$190.52/hr × 6hrs = \$1,143)
 - An external service provider (ESP) for 6 hours (\$260.28 × 6hrs = \$1,562)
- *Phase 3: Reporting of Assessment Results into SPRS:* \$909
 - A director (MGMT5) for 2 hours (\$190.52/hr × 2hrs = \$381)
 - An external service provider (ESP) for 2 hours (\$260.28/hr * 2hrs =

\$521)

- A staff IT specialist (IT4–SB) for 0.08 hours⁶⁰ (\$86.24/hr × 0.08hrs = \$7)
- *Affirmation:* initial affirmation post assessment: \$560
- *Reaffirmations:* It is estimated that the costs to reaffirm a CMMC Level I annually for a small entity is \$560
 - A director (MGMT5) for 2 hours (\$190.52/hr × 2hrs = \$381)
 - A staff IT specialist (IT4–SB) for 2.08 hours (\$86.24/hr × 2.08hrs = \$179)
- The Level 1 Self-Assessment and Affirmations cost burden will be addressed as part of the 48 CFR acquisition rule.
 - *Summary:* The following is the annual small entities total cost summary for CMMC Level 1 self-assessments and affirmations over a ten-year period:

⁵⁶ IT = Information Technology, MGMT = Management.

⁵⁷ IT and MGMT rates represent an estimate for in-house labor and includes the labor rate plus fringe expenses.

⁵⁸ Background assumes a Bachelor's degree as the minimum education level, additional requirements are noted including required years of experience. A

Master's degree may reduce the required years of experience as noted.

⁵⁹ The ESP/C3PAO rate represents an estimate for outsourced labor and includes the labor rate, overhead expense, G&A expense, and profit.

⁶⁰ A person needs to enter the information into SPRS, which should only take five minutes.

(Example calculation, Year 1: *\$5,977 per entity × 699 entities (cumulative) = \$4,177,845).

Table 34 – Level 1: Self-Assessment for Small Entities

Year	Small Entities Per Year	Cumulative Small Entities	Annual Total Cost (self-assess, affirm)
1	699	699	\$4,177,845
2	3,493	4,192	\$25,055,116
3	11,654	15,846	\$94,709,771
4	22,336	38,182	\$228,209,547
5	22,333	60,515	\$361,691,392
6	22,333	82,848	\$495,173,237
7	20,162	103,010	\$615,679,258
8 ⁶¹		103,010	\$615,679,258
9		103,010	\$615,679,258
10		103,010	\$615,679,258
Total	103,010		\$3,671,733,942

CMMC Level 2 Self-Assessment and Affirmation Costs for Small Business Entities

The costs account for a CMMC Level 2 Self-Assessment of the applicable contractor information system(s) with NIST SP 800–171 Rev 2 requirements based on assumptions defined.

- *Nonrecurring and recurring engineering costs:* There are no nonrecurring or recurring engineering costs associated with a CMMC Level 2 Self-Assessment since it is assumed the contractor or subcontractor has implemented the NIST SP 800–171 Rev 2 security requirements.

- *Assessment Costs and Initial Affirmation Costs:* It is estimated that the cost to support a CMMC Level 2 self-assessment and affirmation for a small entity is *\$34,277. The three-year cost is \$37,196 (as summarized in 4.1.2, Table 2), which includes the triennial assessment + affirmation, plus two

additional annual affirmations (\$34,277 + \$1,459 + \$1,459).

- *Phase 1: Planning and preparing for the self-assessment: \$14,426*
 - A director (MGMT5) for 32 hours (\$190.52/hr × 32hrs = \$6,097)
 - An external service provider (ESP) for 32 hours (\$260.28/hr × 32hrs = \$8,329)
- *Phase 2: Conducting the self-assessment: \$15,542*
 - A director (MGMT5) for 16 hours (\$190.52/hr × 16hrs = \$3,048)
 - An external service provider (ESP) for 48 hours (\$260.28/hr × 48hrs = \$12,493)
- *Phase 3: Reporting of assessment results: \$2,851*
 - A director (MGMT5) for 4 hours (\$190.52/hr × 4hrs = \$762)
 - An external service provider (ESP) for 8 hours (\$260.28/hr × 8hrs = \$2,082)
 - A staff IT specialist (IT4–SB) for 0.08 hours (\$86.24/hr × 0.08hrs = \$7)

- *Affirmation*—initial affirmation post assessment: \$1,459
- *Reaffirmations:* It is estimated that the costs to reaffirm a CMMC Level 2 Self-Assessment annually is \$1,459 (three-year costs to reaffirm a CMMC Level 2 Self-Assessment annually is \$4,377, or \$1,459 × 3):
 - A director (MGMT5) for 4 hours (\$190.52/hr × 4hrs = \$762)
 - A staff IT specialist (IT4–SB) for 8.08 hours (\$86.24/hr × 8.08hrs = \$697)
 - The Level 2 Self-Assessment and Affirmations cost burden will be addressed as part of the 48 CFR acquisition rule.
 - *Summary:* The following is the annual small entities total cost summary for CMMC Level 2 Self-Assessments and Affirmations over a ten-year period: (Example calculation, Year 2: (*\$34,277 self-assessment per entity × 101 entities) + (\$1,459 annual affirmation per entity × 20 entities) = \$3,491,193).

Table 35 - \ Level 2: Self-Assessment for Small Entities

Year	Entities Performing Triennial Self-Assessments and Initial Affirmation	Entities Performing Annual Affirmation Actions Only	Total Cost
1	20	0	\$685,547
2	101	20	\$3,491,193
3	335	121	\$11,659,448
4	662	436	\$23,327,706
5	743	997	\$26,922,622
6	977	1,405	\$35,538,762
7	1,241	1,720	\$45,047,546
8	743	2,218	\$28,703,951
9	977	1,984	\$36,383,471
10	1,241	1,720	\$45,047,546
Total	7,040	10,621	\$256,807,792

CMMC Level 2 Certification and Affirmation Costs for Small Business Entities

The costs account for a CMMC Level 2 Certification assessment and affirmation costs of the applicable contractor information system(s) with NIST SP 800–171 Rev 2 requirements based on the assumptions defined. CMMC Level 2 certification assessments require hiring a C3PAO to perform the assessment.

- Nonrecurring or recurring engineering costs: There are no nonrecurring or recurring engineering costs associated with CMMC Level 2 C3PAO Certification since it is assumed the contractor has implemented NIST SP 800–171 Rev 2 requirements.

- *Assessment Costs and Initial Affirmation Costs:* It is estimated that the cost to support a CMMC Level 2 C3PAO Certification and affirmation for a small entity is *\$101,752. The three-year cost is \$104,670 (as summarized in section 3(b), Table 1), and includes the triennial assessment + affirmation plus

two additional annual affirmations (\$101,752 + \$1,459 + \$1,459).

- *Phase 1: Planning and preparing for the assessment: \$20,699*
 - A director (MGMT5) for 54 hours (\$190.52/hr × 54hrs = \$10,288)
 - An external service provider (ESP) for 40 hours (\$260.28/hr × 40hrs = \$10,411)
- *Phase 2: Conducting the C3PAO assessment: \$45,509*
 - A director (MGMT5) for 64 hours (\$190.52/hr × 64hrs = \$12,193)
 - An external service provider (ESP) for 128 hours (\$260.28/hr × 128hrs = \$33,316)
- *Phase 3: Reporting of C3PAO Assessment Results: \$2,851*
 - A director (MGMT5) for 4 hours (\$190.52/hr × 4hrs = \$762)
 - An external service provider (ESP) for 8 hours (\$260.28/hr × 8hrs = \$2,082)
 - A staff IT specialist (IT4–SB) for 0.08 hours (\$86.24/hr × 0.08hrs = \$7)
- *Affirmation—initial affirmation post assessment: \$1,459*

- *C3PAO Costs:* C3PAO engagement inclusive of Phases 1, 2, and 3 (3-person team) for 120 hours (\$260.28/hr × 120hrs = \$31,234)
- *Reaffirmations:* It is estimated that the costs to reaffirm a CMMC Level 2 C3PAO Assessment annually is \$1,459 (three-year cost is \$4,377, or \$1,459 × 3)
 - A director (MGMT5) for 4 hours (\$190.52/hr × 4hrs = \$762)
 - A staff IT specialist (IT4–SB) for 8.08 hours (\$86.24/hr × 8.08hrs = \$697)
- The Level 2 Affirmations cost burden will be addressed as part of the 48 CFR acquisition rule.
 - *Summary:* The following is the annual small entities total cost summary for CMMC Level 2 Certifications and Affirmations over a ten-year period: (Example calculation, Year 2: (*\$101,752 assessment per entity × 1,926 entities) + (\$1,459 annual affirmation per entity × 382 entities) = \$196,531,451).

Table 36 - Level 2: Certification for Small Entities

Year	Entities Performing Triennial Certifications and Initial Affirmation	Entities Performing Annual Affirmation Actions Only	Total Cost
1	382	0	\$38,869,223
2	1,926	382	\$196,531,451
3	6,414	2,308	\$656,003,811
4	12,675	8,340	\$1,301,872,564
5	14,215	19,089	\$1,474,252,306
6	18,703	26,890	\$1,942,295,763
7	23,771	32,918	\$2,466,768,671
8	14,215	42,474	\$1,508,368,920
9	18,703	37,986	\$1,958,483,830
10	23,771	32,918	\$2,466,768,671
Total	134,775	203,305	\$14,010,215,209

CMMC Level 3 Certification and Affirmation Costs for Small Business Entities

A company pursuing a Level 3 Certification must have an active, final CMMC Level 2 Certification, and also must demonstrate compliance with CMMC Level 3, which includes implementation of a subset of security requirements from NIST SP 800–172 that have DoD predefined selections and parameters. CMMC Level 3 requires compliance with certain security requirements not required in prior rules. Therefore, the Nonrecurring Engineering and Recurring Engineering cost estimates have been included for the initial implementation and maintenance of the required subset of NIST SP 800–172 requirements. The cost estimates account for time for a contractor or subcontractor to implement these security requirements and prepare for, support, and participate in a CMMC Level 3 assessment conducted by DoD. The company should keep in mind that the total cost of a Level 3 certification includes the cost of a Level 2 C3PAO assessment as well as the cost to implement and assess the requirements specific to Level 3. CMMC Level 3 is expected to affect a small subset of the DIB.

The estimated engineering costs per small entity associated with CMMC Level 3.

- *Nonrecurring Engineering Costs:* \$2,700,000.
- *Recurring Engineering Costs:* \$490,000.
- *Assessment Costs and Initial Affirmation Costs:* It is estimated that the cost to support a CMMC Level 3 C3PAO Certification for a small entity is *\$9,050 The three-year cost is \$12,802 (summarized in 4.1.2, Table 2), and includes the triennial assessment + affirmation, plus two additional annual affirmations (\$9,050 + \$1,876 + \$1,876):
- *Phase 1: Planning and preparing for the Level 3 assessment:* \$1,905
 - A director (MGMT5) for 10 hours (\$190.52/hr × 10hrs = \$1,905)
- *Phase 2: Conducting the Level 3 assessment:* \$1,524
 - A director (MGMT5) for 8 hours (\$190.52/hr × 8hrs = \$1,524)
- *Phase 3: Reporting of Level 3 assessment results:* \$1,876
 - A director (MGMT5) for 8 hours (\$190.52/hr × 8hrs = \$1,524)
 - A staff IT specialist (IT4–SB) for 4.08 hours (\$86.24/hr × 4.08hrs = \$352)
- *Phase 4: Remediation (for CMMC Level 3 if necessary and allowed):* \$1,869
 - A director (MGMT5) for 8 hours (\$190.52/hr × 8hrs = \$1,524)
 - A staff IT specialist (IT4–SB) for 48 hours (\$86.24/hr × 48hrs = \$345)
- *Affirmation—initial affirmation post assessment:* \$1,876

- *Reaffirmations:* It is estimated that the costs to reaffirm a CMMC Level 3 Assessment annually is \$1,876 (three-year cost is \$5,628, or \$1,876 × 3)
- A director (MGMT5) for 8 hours (\$190.52/hr × 8hrs = \$1,524)
- A staff IT specialist (IT4–SB) for 4.08 hours (\$86.24/hr × 4.08hrs = \$352)
- The Level 3 Affirmations cost burden will be addressed as part of the 48 CFR acquisition rule.
- *Summary:* The following is the annual small entities total cost summary for CMMC Level 3 Certifications and Affirmations over a ten-year period. Example calculation, Year 2 (reference per entity amounts shown):
- *(\$9,050 Certification per entity × 45 entities) + (\$1,876 Annual Affirmation per entity × 3 entities) = \$412,897, and
- \$121,500,000 Nonrecurring Engineering cost (\$2,700,000 per entity × 45 entities being certified), and
- \$23,520,000 Recurring Engineering cost (\$490,000 per entity × 45 entities being certified) + (\$490,000 per entity × 3 entities performing affirmations)
- \$145,432,897 Total Cost = Certification and Affirmation Cost (\$412,897) + Nonrecurring Engineering cost (\$121,500,000) + Recurring Engineering cost (\$23,520,000), or \$145,432,897.

Table 37 - Level 3 Certification for Small Entities

Yr	Entities Performing Triennial Certification including Initial Affirmation	Entities Re-affirmation Actions Only	Triennial Certification and Affirmation Total Cost	Non-recurring Engineering Cost	Recurring Engineering Cost	Total Cost
1	3	0	\$27,151	\$8,100,000	\$1,470,000	\$9,597,151
2	45	3	\$412,897	\$121,500,000	\$23,520,000	\$145,432,897
3	151	48	\$1,456,663	\$407,700,000	\$97,510,000	\$506,666,663
4	292	196	\$3,010,423	\$780,300,000	\$239,120,000	\$1,022,430,423
5	334	443	\$3,853,914	\$780,300,000	\$380,730,000	\$1,164,883,914
6	440	626	\$5,156,569	\$780,300,000	\$522,340,000	\$1,307,796,569
7	553	774	\$6,456,917	\$704,700,000	\$650,230,000	\$1,361,386,917
8	334	993	\$4,885,718		\$650,230,000	\$655,115,718
9	440	887	\$5,646,207		\$650,230,000	\$655,876,207
10	553	774	\$6,456,917		\$650,230,000	\$656,686,917
Tot	3,145	4,744	\$37,363,377	\$3,582,900,000	\$3,865,610,000	\$7,485,873,377

Relevant Federal rules which may duplicate, overlap, or conflict with the rule.

The rule does not duplicate, overlap, or conflict with any other Federal rules. Rather, this rule allows DoD to validate and verify that defense contractors and subcontractors have implemented existing cybersecurity requirements set forth in FAR clause 52.204-21 and in the NIST SP 800-171 Rev 2, which are intended to protect FCI and CUI during contract performance.

D. Sec. 202, Public Law 104-4, "Unfunded Mandates Reform Act" (2 U.S.C. Chapter 25)

The Unfunded Mandates Reform Act requires agencies to assess anticipated costs and benefits before issuing a rule including mandates that require the spending of \$100M dollars or more in a single year (in 1995 dollars and updated for inflation) by State, local, or Tribal governments, in the aggregate, or by the private sector. This rule's impact, if any, on State, local, or Tribal governments, in the aggregate, will not exceed \$100M dollars or more in a single year, and it will not significantly or uniquely affect small governments. This rule is expected to have an impact on the private sector of \$100M dollars or more annually; however, this rule is being published as a national security function of the United States as unauthorized disclosure of FCI or CUI information to parties outside the

Department or foreign entities can cause significant harm to the interests of the United States. See the regulatory impact section of the preamble for an assessment of the costs and benefits for this rule.

E. Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been determined that this rule, as proposed, does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA). DoD has submitted an information collection request (ICR) proposal to OMB. See the Supporting Statements in docket number DoD-2023-OS-0097 for specific details and to provide comments on the information collection requirements for the CMMC Program. Comments are invited on: (a) whether the proposed collections of information are necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the proposed information collections; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collections on respondents, including the use of automated collection techniques or other forms of information technology.

Part A: Estimation of Respondent Burden Hours and Labor Cost

For purposes of the proposed rule, DoD is proposing several separate information collections that will be addressed in the CMMC Title 32 Program rule and Title 48 acquisition rule. CMMC Program Information Collections and Recordkeeping Requirements are discussed in four separate groupings:

- (1) CMMC Level 1 Self-Assessment Collection
- (2) CMMC Level 2 Self-Assessment Collection
- (3) CMMC Level 2 Certification Assessment Collection
- (4) CMMC Level 3 Certification Assessment Collection

CMMC Level 1 Self-Assessment Collection

The Level 1 Self-Assessment information collection reporting and recordkeeping requirements will be included in a modification of an existing DFARS collection approved under OMB Control Number 0750-0004, *Assessing Contractor Implementation of Cybersecurity Requirements*. Modifications to this DFARS collection will be addressed as part of the Title 48 acquisition rule. The information collection reporting and recordkeeping requirements include:

- OSAs conduct a self-assessment based on NIST guidelines as addressed in § 170.15 of this part.

This is an assessment to validate implementation of the 15 security requirements listed in FAR clause 52.204–21(b)(1).

- OSAs upload assessment results and affirmations in SPRS in accordance with § 170.15 and § 170.22 of this part.

CMMC Level 2 Self-Assessment Collection

The Level 2 Self-Assessment information collection reporting and recordkeeping requirements will be included in a modification of an existing DFARS collection approved under OMB Control Number 0750–0004, *Assessing Contractor Implementation of Cybersecurity Requirements*. Modifications to this DFARS collection will be addressed as part of the Title 48 acquisition rule. The information collection reporting and recordkeeping requirements include:

(a) OSAs conduct a self-assessment based on NIST guidelines as addressed in § 170.16. This is an assessment to validate implementation of the 110 security requirements from NIST SP 800–171 Rev 2.

(b) OSAs upload assessment results and affirmations in SPRS in accordance with § 170.16 and § 170.22.

(c) OSAs may have a POA&M at CMMC Level 2 as addressed in § 170.21(a)(2). OSAs must perform a POA&M closeout self-assessment and post compliance results in SPRS in accordance with § 170.16.

CMMC Level 2 Certification Assessment Collection

The Level 2 Certification Assessment information collection reporting and recordkeeping requirements are included in this part with the exception of the requirement for the OSC to upload the affirmation in SPRS that will be included in the Title 48 acquisition rule and an update to the DFARS collection approved under OMB Control Number 0750–0004, *Assessing Contractor Implementation of Cybersecurity Requirements*. Additionally, the information collection

reporting requirements for the CMMC instantiation of eMASS are included in a separate information collection request (ICR) for this part and cover only those requirements pertaining to the CMMC process. The information collection reporting requirements for eMASS include:

- The Accreditation Body provides the CMMC PMO with current data on C3PAOs, including authorization and accreditation records and status using the CMMC instantiation of eMASS as addressed in § 170.8(b)(9).
- C3PAOs submit pre-assessment and planning material, final assessment reports, and appropriate CMMC certificates of assessment into the CMMC instantiation of eMASS as addressed in § 170.9(b)(8). C3PAOs upload assessment data compliant with the CMMC assessment data standard into the CMMC instantiation of eMASS as addressed in § 170.9(b)(18).
- C3PAOs post POA&M closeout assessment compliance results into the CMMC instantiation of eMASS in accordance with § 170.17(a)(1)(ii)(B) of this part.
- C3PAOs upload artifacts (list of artifacts, hash of artifacts, and hashing algorithm used) into the CMMC instantiation of eMASS as addressed in § 170.9(b)(18) of this part.
- C3PAOs submit assessment appeals, review records, and decision results of assessment appeals using the CMMC instantiation of eMASS as addressed in § 170.9(b)(21) of this part.

Additional information collection reporting and recordkeeping requirements for this part include:

- OSCs prepare for assessments based on NIST guidelines as addressed in § 170.17.
- C3PAOs conduct assessments based on NIST guidelines as addressed in § 170.17.
- This is an assessment to validate implementation of the 110 security requirements from NIST SP 800–171 Rev 2.
- Prospective C3PAOs must complete and submit the Standard Form (SF) 328

Certificate Pertaining to Foreign Interests upon request from Defense Counterintelligence and Security Agency (DCSA) (OMB Control Number 0704–0579).

- OSCs may have a POA&M at CMMC Level 2 as addressed in § 170.21(a)(2). C3PAOs must perform a POA&M closeout assessment.

- OSCs may submit appeals to C3PAOs as addressed in § 170.9(b)(20).

- The Accreditation Body provides all plans related to potential sources of revenue, to include but not limited to: fees, licensing, processes, membership, and/or partnerships to the Government's CMMC PMOs addressed in § 170.8(b)(13).

- C3PAOs maintain records for a period of six years of monitoring, education, training, technical knowledge, skills, experience, and authorization of each member of its personnel involved in inspection activities; contractual agreements with OSCs and organizations for whom consulting services were provided; and working papers generated from Level 2 Certification Assessments as addressed in § 170.9(b)(10).

- CAICOs maintain records for a period of six (6) years of all procedures, processes, and actions related to fulfillment of the requirements set forth in § 170.10(b)(9).

- OSCs must retain artifacts used as evidence for the assessment for the duration of the validity period of the certificate of assessment, and at minimum, for six (6) years from the date of certification assessment as addressed in § 170.17(c)(4).

The public respondent burden and labor cost for the information collection reporting and recordkeeping requirements under the CMMC Level 2 Certification Assessment are as follows:

Note: This respondent burden and labor cost does not include the requirement for the OSC to upload the affirmation in SPRS (addressed in Title 48 acquisition rule and ICR).

**Table 38 - Public Respondent Burden and Labor Costs for the
CMMC Instantiation of eMASS**

Collection Instrument	Entity Type	Number of Responses ⁶²	Hours per Response	Burden Hours	Hourly Rate	Burden Per Response	Total Burden
	Computations	a	b	c = a * b	d	e = b * d	f = a * e
Level 2 Certification Assessment eMASS Reporting	Accreditation Board	240	0.08	19.2	\$84.91	\$7	\$ 1,630
Level 2 Certification Assessment eMASS Reporting	C3PAOs (Small)	8,098	0.25	2,024.50	\$239.89	\$ 60	\$ 485,657
	C3PAOs (Other Than Small)	2,844	0.25	711.00	\$131.44	\$ 33	\$ 93,454

⁶² Respondent is equivalent to an entity; an entity provides one response annually.

Table 39 - Public Respondent Burden and Labor Costs for the Other**CMMC Program Reporting/Recordkeeping Requirements**

Collection and Rule Citation	Entity Type	Number of Responses ⁶³	Hours per Response	Burden Hours	Hourly Rate	Burden Per Response	Total Burden
	Computations	a	b	c = a * b	d	e = b * d	f = a * e
Level 2 Certification Assessment §170.17 (a) Reporting and Recordkeeping Requirements	C3PAOs (Small) (Reporting and Recordkeeping)	8,098	417.83	3,383,587.34	\$239.89	\$100,233	\$811,688,767
Level 2 Certification Assessment §170.17 (a) Reporting and Recordkeeping Requirements	C3PAOs (Other Than Small) (Reporting and Recordkeeping)	2,844	833.83	2,371,412.52	\$131.44	\$109,599	\$311,698,462
Level 2 Certification Assessment §170.17 (a) Reporting and Recordkeeping Requirements	Accreditation Body (Recordkeeping)						
Level 2 Certification Assessment §170.17 (a) Reporting and Recordkeeping Requirements	CAICO (Recordkeeping)						

CMMC Level 3 Certification Assessment Collection

The Level 3 Certification Assessment information collection reporting and recordkeeping requirements are included in this part with the exception of the requirement for the OSC to upload the affirmation in SPRS that will be included in the Title 48 acquisition rule and an update to the DFARS collection approved under OMB Control Number 0750–0004, *Assessing Contractor Implementation of Cybersecurity Requirements*. Additionally, the information collection reporting requirements for the CMMC instantiation of eMASS are included in a separate ICR for this part and cover only those requirements pertaining to the CMMC process. The information collection reporting requirements for eMASS include:

- DCMA DIBCAC submits pre-assessment and planning material, final assessment reports, and appropriate CMMC certificates of assessment into the CMMC instantiation of eMASS as addressed in § 170.7 of this part. The DCMA DIBCAC uploads assessment data compliant with the CMMC

assessment data standard into the CMMC instantiation of eMASS as addressed in § 170.7(a)(5) of this part.

- DCMA DIBCAC posts POA&M closeout assessment compliance results into the CMMC instantiation of eMASS in accordance with § 170.18(a)(1)(ii)(B) of this part.
- DCMA DIBCAC uploads artifacts (list of artifacts, hash of artifacts, and hashing algorithm used) into the CMMC instantiation of eMASS as addressed in § 170.7(a)(5) of this part.
- DCMA DIBCAC submits assessment appeals, review records, and decision results of assessment appeals using the CMMC instantiation of eMASS as addressed in § 170.7(a)(2) and (6) of this part.
- Additional information collection reporting and recordkeeping requirements for this part include:
 - OSCs prepare for assessment based on NIST guidelines as addressed in § 170.18.
 - DCMA DIBCAC conducts assessment based on NIST guidelines as addressed in § 170.18. This is an assessment to validate implementation of 24 selected security requirements from NIST SP 800–172.

- OSCs may have a POA&M at CMMC Level 3 as addressed in § 170.21(a)(3). DCMA DIBCAC must perform a POA&M closeout assessment.

- OSCs may submit appeals to DCMA DIBCAC as addressed in § 170.7(a)(6).

- OSCs must retain artifacts used as evidence for the assessment for the duration of the validity period of the certificate of assessment, and at minimum, for six (6) years from the date of certification assessment as addressed in § 170.18(c)(4).

- DCMA DIBCAC maintains records for a period of six years of monitoring, education, training, technical knowledge, skills, experience, and authorization of each member of its personnel involved in inspection activities and working papers generated from Level 3 Certification Assessments.

The public and government respondent burden and labor cost for the information collection reporting and recordkeeping requirements under the CMMC Level 3 Certification Assessment are as follows:

Note: This respondent burden and labor cost does not include the requirement for the OSC to upload the affirmation in SPRS (addressed in Title 48 acquisition rule and ICR).

Table 40 - Government Burden and Labor Costs for the CMMC Instantiation of eMASS

Collection Instrument	Entity Type	Number of Responses ⁶⁴	Hours per Response	Burden Hours	Hourly Rate ⁶⁵	Burden Per Response	Total Burden
	Computations	a	b	c = a * b	d	e = b * d	f = a * e
Level 3 Certification Assessment eMASS Reporting	DCMA DIBCAC (Small)	190	0.25	47.50	\$108.47	\$ 27	\$ 5,152
Level 3 Certification Assessment eMASS Reporting	DCMA DIBCAC (Other Than Small)	23	0.25	5.75	\$81.01	\$ 20	\$ 466

⁶³ Respondent is equivalent to an entity; an entity provides one response annually.

⁶⁴ Respondent is equivalent to an entity; an entity provides one response annually.

⁶⁵ The hourly rate was calculated from base rates and increased by a factor of approximately 51 percent which includes an estimated fringe factor (fringe factor includes estimated average insurance

and pension benefits) plus overhead (overhead factor represents supervision and management of the labor and other daily work activities such as recordkeeping).

Table 41 - Public Respondent Burden And Labor Costs For The Other**CMMC Program Reporting/Recordkeeping Requirements**

Collection and Rule Citation	Entity Type	Number of Responses⁶⁶	Hours per Response	Burden Hours	Hourly Rate	Burden Per Response	Total Burden
Level 3 Certification Assessment §170.18 (a)	OSC (Small)	190	42.08	7,995.20	\$170.48	\$ 7,174	\$1,363,022
Reporting/Recordkeeping Requirements	OSC (Other Than Small)	23	384.08	8,833.84	\$ 94.53	\$36,307	\$ 835,063

Table 42 - Government Burden and Labor Costs for the Other**CMMC Program Reporting/Recordkeeping Requirements**

Collection and Rule Citation	Entity Type	Number of Responses⁶⁷	Process Hours per Response	Total Process Hours	Hourly Rate	Process Cost Per Response	Total Cost to Process Responses
Level 3 Certification Assessment §170.18 (a) Reporting / Recordkeeping Requirements	DCMA DIBCA C (Small)	190	117.75	22,372.50	\$ 108.47	\$ 12,772	\$ 2,426,745
Level 3 Certification Assessment §170.18 (a) Reporting / Recordkeeping Requirements	DCMA DIBCA C (Other Than Small)	23	435.75	10,022.25	\$ 81.01	\$ 35,300	\$ 811,902

Part B: Respondent Costs Other Than Burden Hour Costs

⁶⁶ Respondent is equivalent to an entity; an entity provides one response annually.

Part B: Respondent Costs Other Than Burden Hour Costs

Non-Recurring and Recurring Engineering estimated costs are

included for Level 3 Certification Assessments. Non-recurring Engineering reflects a one-time cost consisting of hardware, software, and the associated labor to implement the same. Recurring

Engineering reflects annually recurring fees and associated labor for technology refresh. The estimated amounts are average annual amounts for the entity types indicated.

Table 43 - Respondent Costs Other Than Burden

Rule Citation	Collection Requirement	Entity Type	Non-Recurring Cost	Recurring Cost	Total Costs
§170.18 (a)	Level 3	Small	\$ 513,000,000	\$ 93,100,000	\$ 606,100,000
§170.18 (a)	Certification	Other Than Small	\$ 485,300,000	\$ 94,760,000	\$ 580,060,000
TOTAL					\$ 1,186,160,000

Part C: Operational and Maintenance Costs

Government operational and maintenance costs include the estimate

to develop the operational CMMC instantiation of eMASS. The estimated average annual amount is \$2,731,861.

Estimation of Total Public and Government Burden and Cost

Table 44 - Estimation of Total Public and Government Burden:

CMMC Level 2 and Level 3 Certification Assessments

Total Estimated Public Burden Hours	5,774,583.6
Total Estimated Government Burden Hours	32,448
Total Estimated Public & Government Burden Hours	5,807,031.6
Total Estimated Annual Public Labor Cost (Average Over Phase-In Period)	\$1,126,166,055
Total Estimated Annual Government Labor Cost	\$3,244,266
Estimated Respondent Non-Recurring and Recurring Cost (Average Annual)	\$1,186,160,000
Estimated Government Operational and Maintenance Cost (Average Annual)	\$2,731,861
Total Estimated Cost	\$2,318,302,182

Needs and Uses: The CMMC Program provides for the assessment of contractor and subcontractor implementation of DoD cybersecurity requirements for contractor information systems and enhances the protection of FCI and CUI within the DoD supply

chain. The CMMC Program will be implemented in DFARS to incorporate CMMC Program requirements into defense contracts and subcontracts.

Affected Public: Businesses or other for-profit or not-for-profit entities.

Frequency: On occasion.

Commenter's Obligation: Voluntary.

OMB Desk Officer: Written comments and recommendations on the proposed information collections should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, DoD Desk Officer, Room 10102, New Executive

⁶⁷ Each entity has one response annually; the public and the government are the respondents at Level 3.

Office Building, Washington, DC 20503, with a copy to the Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Mailbox #24 Suite 08D09, Alexandria, VA 22350-1700. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

You may also submit comments, identified by docket number DoD-2023-OS-0063 and title through the Federal eRulemaking Portal at <https://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <https://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

To request more information on these proposed information collections or to obtain a copy of the proposal and associated collection instruments, please write to Department of Defense, Office of the DoD Chief Information Officer, 4800 Mark Center Drive, Suite 11G14, Alexandria, VA 22350 or contact Ms. Diane Knight at 202-770-9100 or diane.l.knight10.civ@mail.mil.

F. Executive Order 13132, "Federalism"

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications. This proposed rule will not have a substantial effect on State and local governments.

G. Executive Order 13175, "Consultation and Coordination With Indian Tribal Governments"

Executive Order 13175 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct compliance costs on one or more Indian Tribes, preempts Tribal law, or effects the distribution of power and responsibilities between the federal government and Indian Tribes. This proposed rule will not have a

substantial effect on Indian Tribal governments.

List of Subjects in 32 CFR Part 170

CMMC, CMMC Program, CMMC Levels, Cybersecurity, Certification, Federal Contract Information, Controlled Unclassified Information, Contracts, Government procurement, Incorporation by reference.

■ Accordingly, the Department of Defense proposes to add 32 CFR part 170 to read as follows:

PART 170—CYBERSECURITY MATURITY MODEL CERTIFICATION (CMMC) PROGRAM

Subpart A—General Information.

Sec.

- 170.1 Purpose.
- 170.2 Incorporation by reference.
- 170.3 Applicability.
- 170.4 Acronyms and definitions.
- 170.5 Policy.

Subpart B—Government Roles and Responsibilities.

- 170.6 CMMC PMO.
- 170.7 DCMA DIBCAC.

Subpart C—CMMC Assessment and Certification Ecosystem.

- 170.8 Accreditation Body.
- 170.9 CMMC Third-Party Assessment Organizations (C3PAOs).
- 170.10 CMMC Assessor and Instructor Certification Organization (CAICO).
- 170.11 CMMC Certified Assessor (CCA).
- 170.12 CMMC Certified Instructor (CCI).
- 170.13 CMMC Certified Professional (CCP).

Subpart D—Key Elements of the CMMC Program.

- 170.14 CMMC model.
- 170.15 CMMC Level 1 Self-Assessment and Affirmation requirements.
- 170.16 CMMC Level 2 Self-Assessment and Affirmation requirements.
- 170.17 CMMC Level 2 Certification Assessment and Affirmation requirements.
- 170.18 CMMC Level 3 Certification Assessment and Affirmation requirements.
- 170.19 CMMC scoping.
- 170.20 Standards acceptance.
- 170.21 Plan of Action and Milestones requirements.
- 170.22 Affirmation.
- 170.23 Application to subcontractors.
- 170.24 CMMC scoring methodology.

Appendix A to Part 170—Guidance

Authority: 5 U.S.C. 301; Sec. 1648, Pub. L. 116-92, 133 Stat. 1198.

Subpart A—General Information.

§ 170.1 Purpose.

(a) This part describes the Cybersecurity Maturity Model Certification (CMMC) Program of the Department of Defense (DoD) and establishes policy for requiring defense

contractors and subcontractors to implement prescribed cybersecurity standards for safeguarding: Federal Contract Information (FCI), and Controlled Unclassified Information (CUI), as well as conduct an assessment of contractor information systems that process, store, or transmit FCI or CUI; provide security protections for such CUI systems; or are not logically or physically isolated from all such CUI systems, for compliance with the applicable prescribed cybersecurity standard.

(b) The CMMC Program is designed to enhance protection of FCI and CUI when it is processed, stored, or transmitted on defense contractor information systems to meet evolving threats and safeguard the sensitive unclassified information that supports and enables the warfighter. The CMMC Program provides a consistent methodology to assess a defense contractor's implementation of required cybersecurity requirements. The CMMC Program utilizes the security standards set forth in the Federal Acquisition Regulation (FAR) clause 52.204-21; National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171 Rev 2; and selected requirements from the NIST SP 800-172, as applicable (see table 1 to § 170.14(c)(4) CMMC Level 3 Requirements).

(c) The CMMC Program provides DoD with a viable means of conducting the volume of assessments necessary to verify contractor and subcontractor implementation of required cybersecurity requirements.

(d) The CMMC Program balances the need to safeguard FCI and CUI and the requirement to share information appropriately with defense contractors in order to develop capabilities for the DoD. The CMMC Program is designed to ensure implementation of cybersecurity practices for defense contractors and to provide DoD with increased assurance that FCI and CUI information will be adequately safeguarded when residing on or transiting contractor information systems.

(e) This part creates no right or benefit, substantive or procedural, enforceable by law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

§ 170.2 Incorporation by Reference.

Certain material is incorporated by reference into this part with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. Material approved for

incorporation by reference (IBR) is available for inspection at the Department of Defense (DoD) and at the National Archives and Records Administration (NARA). Contact DoD online: <https://DoDcio.defense.gov/CMMC/>; email osd.mc-alex.DoD-cio.mbx.cmmc-rule@mail.mil; or phone: (202) 770-9100. For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations.html or email fr.inspection@nara.gov. The material may be obtained from the following sources:

(a) National Institute of Standards and Technology, U.S. Department of Commerce, 100 Bureau Drive, Gaithersburg, MD 20899; (301) 975-8443; <https://csrc.nist.gov/publications/>.

(1) FIPS PUB 200, Minimum Security Requirements for Federal Information and Information Systems, published March 2006; IBR approved for § 170.4(b).

(2) FIPS PUB 201-3, Personal Identity Verification (PIV) of Federal Employees and Contractors, published January 2022; IBR approved for § 170.4(b).

(3) SP 800-37, revision 2, Risk Management Framework for Information Systems and Organizations, published December 2018; IBR approved for § 170.4(b).

(4) SP 800-39, Managing Information Security Risk: Organization, Mission, and Information System View, published March 2011; IBR approved for § 170.4(b).

(5) SP 800-53 revision 5, Security and Privacy Controls for Information Systems and Organizations, published September 2020 (includes updates as of Dec. 10, 2020); IBR approved for § 170.4(b).

(6) SP 800-82 revision 2, Guide to Industrial Control Systems (ICS) Security, published June 3, 2015, updated November 10, 2018; IBR approved for § 170.4(b).

(7) SP 800-115, Technical Guide to Information Security Testing and Assessment, published September 2008; IBR approved for § 170.4(b).

(8) SP 800-160, Volume 2, revision 1, Developing Cyber-Resilient Systems: A Systems Security Engineering Approach, published December 2021; IBR approved for §§ 170.4(b).

(9) SP 800-171 revision 2, Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations, published February 2020 (includes updates as of January 28, 2021); IBR approved for §§ 170.4(b); 170.14(a), (b), and (c).

(10) SP 800-171A, Assessing Security Requirements for Controlled Unclassified Information, published

June 2018; IBR approved for §§ 170.11(a), 170.14(d), 170.15(c), 170.16(c), 170.17(c).

(11) SP 800-172, Enhanced Security Requirements for Protecting Controlled Unclassified Information: A Supplement to NIST Special Publication 800-171, published February 2021; IBR approved for §§ 170.5(a) and 170.14(a) and (c).

(12) SP 800-172A, Assessing Enhanced Security Requirements for Controlled Unclassified Information, published March 2022; IBR approved for §§ 170.4(b), 170.14(d), and 170.18(c).

(b) The Committee on National Security Systems (CNSS), National Security Agency, Savage Road, Suite 6165, Fort George G. Meade, MD 20755-6716; 410-854-6805; www.cnss.gov/CNSS/issuances/Instructions.cfm.

(1) Committee on National Security Systems Instruction No. 4009, Committee on National Security Systems (CNSS) Glossary, published March 2022; IBR approved for § 170.4(b).

(2) [Reserved].

(c) International Organization for Standardization (ISO) Chemin de Blandonnet 8, CP 401-1214 Vernier, Geneva, Switzerland; +41 22 749 01 11; www.iso.org/popular-standards.html.

(1) ISO/IEC 17011:2017, Conformity assessment—Requirements for accreditation bodies accrediting conformity assessment bodies, published 2017; IBR approved for §§ 170.8(b) and 170.98(b).

(2) ISO/IEC 17020:2012, Conformity assessment—Requirements for the operation of various types of bodies performing inspection, published 2012; IBR approved for §§ 170.8(a) and (b) and 170.9(a) and (b).

(3) ISO/IEC 17024:2012, Conformity assessment—General requirements for bodies operating certification of persons, published 2012; IBR approved for §§ 170.8(b) and 170.10(a) and (b).

Note to § 170.2(c): The American National Standards Institute (ANSI) IBR Portal provides access to standards that have been incorporated by reference in the U.S. Code of Federal Regulations at <https://ibr.ansi.org>. These standards incorporated by the U.S. government in rulemakings are offered at no cost in “read only” format and are presented for online reading. There are no print or download options. All users will be required to install the *FileOpen plug-in* and accept an online end user license agreement prior to accessing any standards.

§ 170.3 Applicability.

(a) The requirements of this part apply to:

(1) All DoD contract and subcontract awardees that will process, store, or transmit information that meets the

standards for FCI or CUI on contractor information systems; and,

(2) Private-sector businesses or other entities comprising the CMMC Assessment and Certification Ecosystem, as specified in subpart C of this part.

(b) The requirements of this part do not apply to government information systems operated by contractors or subcontractors on behalf of the Government.

(c) CMMC Program requirements apply to all DoD solicitations and contracts pursuant to which a defense contractor or subcontractor will process, store, or transmit FCI or CUI on unclassified contractor information systems, including those for the acquisition of commercial items (except those exclusively for COTS items) valued at greater than the micro-purchase threshold except under the following circumstances:

(1) The procurement occurs during Implementation Phase 1, 2, or 3 as described in paragraph (e) of this section, in which case CMMC Program requirements apply in accordance with the requirements for the relevant phase-in period; or

(2) Application of CMMC Program requirements to a procurement or class of procurements may be waived in advance of the solicitation at the discretion of DoD in accordance with all applicable policies, procedures, and approval requirements.

(d) DoD Program Managers or requiring activities are responsible for selecting the CMMC Level that will apply for a particular procurement or contract based upon the type of information, FCI or CUI, that will be processed on, stored on, or transmitted through a contractor information system. Application of the CMMC Level for subcontractors will be determined in accordance with § 170.23.

(e) DoD is utilizing a phased approach for the inclusion of CMMC Program requirements in solicitations and contracts. Implementation of CMMC Program requirements will occur over four (4) phases:

(1) *Phase 1.* Begins on the effective date of the CMMC revision to DFARS 252.204-7021. DoD intends to include CMMC Level 1 Self-Assessment or CMMC Level 2 Self-Assessment for all applicable DoD solicitations and contracts as a condition of contract award. DoD may, at its discretion, include CMMC Level 1 Self-Assessment or CMMC Level 2 Self-Assessment for applicable DoD solicitations and contracts as a condition to exercise an option period on a contract awarded prior to the effective date. DoD may

also, at its discretion, include CMMC Level 2 Certification Assessment in place of CMMC Level 2 Self-Assessment for applicable DoD solicitations and contracts.

(2) *Phase 2.* Begins six months following the start date of Phase 1. In addition to Phase 1 requirements, DoD intends to include CMMC Level 2 Certification Assessment all for applicable DoD solicitations and contracts as a condition of contract award. DoD may, at its discretion, delay the inclusion of CMMC Level 2 Certification Assessment to an option period instead of as a condition of contract award. DoD may also, at its discretion, include CMMC Level 3 Certification Assessment for applicable DoD solicitations and contracts.

(3) *Phase 3.* Begins one calendar year following the start date of Phase 2. In addition to Phase 1 and 2 requirements, DoD intends to include CMMC Level 2 Certification Assessment for all applicable DoD solicitations and contracts as a condition of contract award and as a condition to exercise an option period on a contract awarded prior to the effective date. DoD intends to include CMMC Level 3 Certification Assessment for all applicable DoD solicitations and contracts as a condition of contract award. DoD may, at its discretion, delay the inclusion of CMMC Level 3 Certification Assessment to an option period instead of as a condition of contract award.

(4) *Phase 4, Full Implementation.* Begins one calendar year following the start date of Phase 3. DoD will include CMMC Program requirements in all applicable DoD solicitations and contracts including option periods on contracts awarded prior to the beginning of Phase 4.

§ 170.4 Acronyms and definitions.

(a) *Acronyms.* Unless otherwise noted, these acronyms and their terms are for the purposes of this part.

AC Access Control
 APT Advanced Persistent Threat
 APP Approved Publisher Partner
 AT Awareness and Training
 ATP Approved Training Provider
 C3PAO CMMC Third-Party Assessment Organization
 CA Security Assessment
 CAICO CMMC Assessors and Instructors Certification Organization
 CAGE Commercial and Government Entity
 CCA CMMC Certified Assessor
 CCP CMMC Certified Professional
 CFR Code of Federal Regulations
 CIO Chief Information Officer
 CM Configuration Management
 CMMC Cybersecurity Maturity Model Certification
 CMMC PMO CMMC Program Management Office

CNC Computerized Numerical Control
 CoPC Code of Professional Conduct
 CSP Cloud Service Provider
 CUI Controlled Unclassified Information
 DCMA Defense Contract Management Agency
 DD Represents any two-character CMMC Domain acronym
 DFARS Defense Federal Acquisition Regulation Supplement
 DIB Defense Industrial Base
 DIBCAC DCMA's Defense Industrial Base Cybersecurity Assessment Center
 DoD Department of Defense
 DoDI Department of Defense Instruction
 eMASS Enterprise Mission Assurance Support Service
 ESP External Service Provider
 FAR Federal Acquisition Regulation
 FCI Federal Contract Information
 FedRAMP Federal Risk and Authorization Management Program
 GFE Government Furnished Equipment
 IA Identification and Authentication
 ICS Industrial Control System
 IIoT Industrial Internet of Things
 IoT Internet of Things
 IR Incident Response
 IS Information System
 IEC International Electrotechnical Commission
 ISO/IEC International Organization for Standardization/International Electrotechnical Commission
 IT Information Technology
 L# CMMC Level Number
 MA Maintenance
 MP Media Protection
 MSP Managed Service Provider
 MSSP Managed Security Service Provider
 NARA National Archives and Records Administration
 NAICS North American Industry Classification System
 NIST National Institute of Standards and Technology
 N/A Not Applicable
 ODP Organization-Defined Parameter
 OSA Organization Seeking Assessment
 OSC Organization Seeking Certification
 OT Operational Technology
 PIEE Procurement Integrated Enterprise Environment
 PLC Programmable Logic Controller
 POA&M Plan of Action and Milestones
 PRA Paperwork Reduction Act
 RM Risk Management
 SAM System for Award Management
 SC System and Communications Protection
 SCADA Supervisory Control and Data Acquisition
 SI System and Information Integrity
 SIEM Security Information and Event Management
 SP Special Publication
 SPRS Supplier Performance Risk System
 SSP System Security Plan

(b) *Definitions.* Unless otherwise noted, these terms and their definitions are for the purposes of this part.

Access Control (AC) means the process of granting or denying specific requests to obtain and use information and related information processing services; and/or entry to specific

physical facilities (e.g., federal buildings, military establishments, or border crossing entrances), as defined in FIPS 201–3 (incorporated by reference, see § 170.2).

Accreditation means a status pursuant to which a CMMC Assessment and Certification Ecosystem member (person or organization), having met all criteria for the specific role they perform including required ISO/IEC accreditations, may act in that role as set forth in § 170.8 for the Accreditation Body and § 170.9 for C3PAOs. (CMMC-custom term)

Accreditation Body is defined in § 170.8 and means the organization responsible for authorizing and accrediting members of the CMMC Assessment and Certification Ecosystem, as required. The Accreditation Body must be approved by DoD. At any given point in time, there will be only one Accreditation Body for the DoD CMMC Program. The current *Accreditation Body* is doing business as the Cyber AB at cyberab.org. (CMMC-custom term)

Advanced Persistent Threat (APT) means an adversary that possesses sophisticated levels of expertise and significant resources that allow it to create opportunities to achieve its objectives by using multiple attack vectors (e.g., cyber, physical, and deception). These objectives typically include establishing and extending footholds within the information technology infrastructure of the targeted organizations for purposes of exfiltrating information, undermining or impeding critical aspects of a mission, program, or organization; or positioning itself to carry out these objectives in the future. The advanced persistent threat pursues its objectives repeatedly over an extended period-of-time, adapts to defenders' efforts to resist it, and is determined to maintain the level of interaction needed to execute its objectives, as is defined in NIST SP 800–39, (incorporated by reference, see § 170.2).

Assessment means the testing or evaluation of security controls to determine the extent to which the controls are implemented correctly, operating as intended, and producing the desired outcome with respect to meeting the security requirements for an information system or organization, as defined in § 170.15 to § 170.18. (CMMC-custom term)

(i) *Self-Assessment* is the term for the activity performed by an entity to evaluate its own CMMC Level, as applied to Level 1 and some Level 2.

(ii) *CMMC Level 2 Certification Assessment* is the term for the activity

performed by a C3PAO to evaluate the CMMC Level of an OSC.

(iii) *CMMC Level 3 Certification Assessment* is the term for the activity performed by the Department of Defense to evaluate the CMMC Level of an OSC.

Assessment Findings Report means the delivery of the final written assessment results by the third-party or government assessment team to the OSC. (CMMC-custom term)

Assessment Team means participants in the CMMC assessment such as the CMMC Certified Assessors and CMMC Certified Professionals, or DCMA DIBCAC assessors. This does not include the OSC participants preparing for or participating in the assessment. (CMMC-custom term)

Asset Categories means a grouping of assets that process, store or transmit information of similar designation, or provide security protection to those assets. (CMMC-custom term)

Authentication is defined in FIPS 200 (incorporated by reference, see § 170.2).

Authorized means an interim status during which a CMMC ecosystem member (person or organization), having met all criteria for the specific role they perform other than the required ISO/IEC accreditations, may act in that role for a specified time as set forth in § 170.8 for the Accreditation Body and § 170.9 for C3PAOs. (CMMC-custom term)

Capability means a combination of mutually reinforcing controls implemented by technical means, physical means, and procedural means. Such controls are typically selected to achieve a common information security or privacy purpose, as defined in NIST SP 800–37 (incorporated by reference, see § 170.2).

Cloud Service Provider (CSP) means an external company that provides a platform, infrastructure, applications, and/or storage services for its clients. (Source: CISA Cloud Security Technical Reference Architecture; see https://www.cisa.gov/sites/default/files/publications/CISA%20Cloud%20Security%20Technical%20Reference%20Architecture_Version%201.pdf; page 44.)

CMMC Assessment and Certification Ecosystem means the people and organizations described in subpart C of this part. This term is sometimes shortened to CMMC Ecosystem. (CMMC-custom term)

CMMC Assessment Scope means the set of all assets in the OSA's environment that will be assessed against CMMC security requirements. (CMMC-custom term)

CMMC Assessor and Instructor Certification Organization (CAICO) is defined in § 170.10 and means the

organization responsible for training, testing, authorizing, certifying, and recertifying CMMC assessors, instructors, and related practitioners. (CMMC-custom term)

CMMC Instantiation of eMASS means a CMMC instance of the Enterprise Mission Assurance Support Service (eMASS), a government owned and operated system). (CMMC-custom term)

CMMC Level 1 Self-Assessment is defined in § 170.15(c)(1). (CMMC-custom term)

CMMC Level 2 Conditional Certification Assessment is defined in § 170.17(a)(1)(ii). (CMMC-custom term)

CMMC Level 2 Conditional Self-Assessment is defined in § 170.16(a)(1)(ii). (CMMC-custom term)

CMMC Level 2 Final Certification Assessment is defined in § 170.17(a)(1)(iii). (CMMC-custom term)

CMMC Level 2 Final Self-Assessment is defined in § 170.16(a)(1)(iii). (CMMC-custom term)

CMMC Level 3 Conditional Certification Assessment is defined in § 170.18(a)(1)(ii). (CMMC-custom term)

CMMC Level 3 Final Certification Assessment is defined in § 170.18(a)(1)(iii). (CMMC-custom term)

CMMC Third-Party Assessment Organization (C3PAO) means an organization that has been accredited by the Accreditation Body to conduct CMMC Level 2 Certification Assessments and has the roles and responsibilities identified in § 170.9. (CMMC-custom term)

Contractor is defined in 48 CFR 3.502–1.

Contractor Risk Managed Assets are defined in table 3 to § 170.19(c)(1) CMMC Level 2 Scoping. (CMMC-custom term)

Controlled Unclassified Information (CUI) is defined in 32 CFR 2002.4(h).

Controlled Unclassified Information (CUI) Assets means assets that can process, store, or transmit CUI. (CMMC-custom term)

DCMA DIBCAC High Assessment means an assessment that is conducted by Government personnel using NIST SP 800–171A, Assessing Security Requirements for Controlled Unclassified Information that:

- (i) Consists of:
 - (A) A review of a contractor's Basic Assessment;
 - (B) A thorough document review;
 - (C) Verification, examination, and demonstration of a contractor's system security plan to validate that NIST SP 800–171 security requirements have been implemented as described in the contractor's system security plan; and
 - (D) Discussions with the contractor to obtain additional information or clarification, as needed; and

(ii) Results in a confidence level of “High” in the resulting score. (Source: DFARS Clause 252.204–7020, see 48 CFR 252.204–7020).

Defense Industrial Base (DIB) is defined in 32 CFR 236.2.

Enterprise means an organization with a defined mission/goal and a defined boundary, using information systems to execute that mission, and with responsibility for managing its own risks and performance. An enterprise may consist of all or some of the following business aspects: acquisition, program management, financial management (e.g., budgets), human resources, security, and information systems, information and mission management. (Source: CNSSI 4009; <https://www.cnss.gov/CNSS/issuances/Instructions.cfm>.)]

External Service Provider (ESP) means external people, technology, or facilities that an organization utilizes for provision and management of comprehensive IT and/or cybersecurity services on behalf of the organization. In the CMMC Program, CUI or Security Protection Data (e.g., log data, configuration data), must be processed, stored, or transmitted on the ESP assets to be considered an ESP. (CMMC-custom term)

Federal Contract Information (FCI) is defined in 48 CFR 4.1901.

Federal Contract Information (FCI) Assets means assets that process, store, or transmit FCI. FCI Assets are part of the Level 1 CMMC Assessment Scope and are assessed against all CMMC Level 1 requirements. (CMMC-custom term)

Government Furnished Equipment (GFE) has the same meaning as “government-furnished property” as defined in 48 CFR 45.101.

Industrial Control Systems (ICS) means a general term that encompasses several types of control systems, including supervisory control and data acquisition (SCADA) systems, distributed control systems (DCS), and other control system configurations such as Programmable Logic Controllers (PLC) often found in the industrial sectors and critical infrastructures. An ICS consists of combinations of control components (e.g., electrical, mechanical, hydraulic, pneumatic) that act together to achieve an industrial objective (e.g., manufacturing, transportation of matter or energy), as defined in NIST SP 800–82 R2 (incorporated by reference, see § 170.2).

Information System (IS) is defined in NIST SP 800–171 Rev 2 (incorporated by reference, see § 170.2).

Internet of Things (IoT) means the network of devices that contain the

hardware, software, firmware, and actuators which allow the devices to connect, interact, and freely exchange data and information, as defined in NIST SP 800–172A (incorporated by reference, see § 170.2).

Operational Technology (OT) means programmable systems or devices that interact with the physical environment (or manage devices that interact with the physical environment). These systems or devices detect or cause a direct change through the monitoring or control of devices, processes, and events. Examples include industrial control systems, building management systems, fire control systems, and physical access control mechanisms, as defined in NIST SP 800–160v2 Rev 1 (incorporated by reference, see § 170.2).

Organization-Defined means as determined by the OSA being assessed except as defined in the case of Organization-Defined Parameter (ODP). (CMMC-custom term)

Organization-Defined Parameter (ODP) means selected enhanced security requirements contain selection and assignment operations to give organizations flexibility in defining variable parts of those requirements, as defined in NIST SP 800–172A (incorporated by reference, see § 170.2).

Note 1 to ODP: For CMMC Level 3, the organization defining the parameters is the DoD.

Organization Seeking Assessment (OSA) means the entity seeking to conduct, obtain, or maintain a CMMC assessment for a given information system at a particular CMMC Level. The term OSA includes all Organizations Seeking Certification (OSCs). (CMMC-custom term)

Organization Seeking Certification (OSC) means the entity seeking to contract, obtain, or maintain CMMC certification for a given information system at a particular CMMC Level. An OSC is also an OSA. (CMMC-custom term)

Out-of-Scope Assets means assets that cannot process, store, or transmit CUI because they are physically or logically separated from information systems that do process, store or transmit CUI, or are inherently unable to do so; except for assets that provide security protection for a CUI asset (see the definition for Security Protection Assets). (CMMC-custom term)

Periodically means occurring at regular intervals. As used in many requirements within CMMC, the interval length is organization-defined to provided OSA flexibility, with an interval length of no more than one year. (CMMC-custom term)

Plan of action and milestones (POA&M) means a document that identifies tasks needing to be accomplished. It details resources required to accomplish the elements of the plan, any milestones in meeting the tasks, and scheduled completion dates for the milestones, as defined in NIST SP 800–115 (incorporated by reference, see § 170.2).

Prime Contractor is defined in 48 CFR 3.502–1.

Process, store, or transmit means data can be used by an asset (e.g., accessed, entered, edited, generated, manipulated, or printed); data is inactive or at rest on an asset (e.g., located on electronic media, in system component memory, or in physical format such as paper documents); or data is being transferred from one asset to another asset (e.g., data in transit using physical or digital transport methods). (CMMC-custom term)

Restricted Information Systems means systems (and associated IT components comprising the system) that are configured based on government requirements (e.g., connected to something that was required to support a functional requirement) and are used to support a contract (e.g., fielded systems, obsolete systems, and product deliverable replicas). (CMMC-custom term)

Risk means a measure of the extent to which an entity is threatened by a potential circumstance or event, and typically a function of the adverse impacts that would arise if the circumstance or event occurs and the likelihood of occurrence, as defined in CNSSI 4009 (incorporated by reference, see § 170.2).

Risk Assessment means the process of identifying risks to organizational operations (including mission, functions, image, reputation), organizational assets, individuals, other organizations, and the Nation, resulting from the operation of a system. Risk Assessment is part of risk management, incorporates threat and vulnerability analyses, and considers mitigations provided by security controls planned or in place. Synonymous with risk analysis, as defined in NIST SP 800–39 (incorporated by reference, see § 170.2).

Security Protection Assets means assets providing security functions or capabilities to the OSA's CMMC Assessment Scope, irrespective of whether or not these assets process, store, or transmit CUI. (CMMC-custom term)

Specialized Assets means types of assets considered Specialized Assets for CMMC: Government Furnished Equipment, Internet of Things (IoT) or

Industrial Internet of Things (IIoT), Operational Technology (OT), Restricted Information Systems, and Test Equipment. (CMMC-custom term)

Subcontractor is defined in 48 CFR 3.502–1.

Supervisory Control and Data Acquisition (SCADA) means a generic name for a computerized system that is capable of gathering and processing data and applying operational controls over long distances. Typical uses include power transmission and distribution and pipeline systems. SCADA was designed for the unique communication challenges (e.g., delays, data integrity) posed by the various media that must be used, such as phone lines, microwave, and satellite. Usually shared rather than dedicated, as defined in NIST SP 800–82 Rev 2 (incorporated by reference, see § 170.2).

System Security Plan (SSP) means the formal document prepared by the information system owner (or common security controls owner for inherited controls) that provides an overview of the security requirements for the system and describes the security controls in place or planned for meeting those requirements. The plan can also contain as supporting appendices or as references, other key security-related documents such as a risk assessment, privacy impact assessment, system interconnection agreements, contingency plan, security configurations, configuration management plan, and incident response plan, as defined in CNSSI 4009 (incorporated by reference, see § 170.2).

Test Equipment means hardware and/or associated IT components used in the testing of products, system components, and contract deliverables. (CMMC-custom term)

User means an individual, or (system) process acting on behalf of an individual, authorized to access a system, as defined in NIST SP 800–53 Rev 5, (incorporated by reference, see § 170.2).

§ 170.5 Policy.

(a) Protection of FCI and CUI on contractor information systems is of paramount importance to the DoD and can directly impact its ability to successfully conduct essential missions and functions. It is DoD policy that defense contractors and subcontractors shall be required to safeguard FCI and CUI that is processed, stored, or transmitted on contractor information systems by applying specified security requirements. In addition, Defense contractors and subcontractors may be required to implement additional safeguards defined in NIST SP 800–172

(incorporated by reference, see § 170.2), implementing DoD specified parameters to meet CMMC Level 3 requirements (see table 1 to § 170.14(c)(4) CMMC Level 3 Requirements). These additional requirements are necessary to protect CUI being processed, stored, or transmitted in contractor information systems, when designated by a CMMC Level 3 requirement as defined by a DoD program manager or requiring activity. In general, the Department will identify a CMMC Level 3 requirement for solicitations supporting its most critical programs and technologies.

(b) Program managers and requiring activities are responsible for identifying the CMMC Level that will apply to a procurement. Selection of the applicable CMMC Level will be based on factors including but not limited to:

- (1) Criticality of the associated mission capability;
- (2) Type of acquisition program or technology;
- (3) Threat of loss of the FCI or CUI to be shared or generated in relation to the effort;
- (4) Potential for and impacts from exploitation of information security deficiencies; and
- (5) Other relevant policies and factors, including Milestone Decision Authority guidance.

(c) In accordance with the implementation plan described in § 170.3, CMMC Program requirements will apply to new DoD solicitations and contracts, and shall flow down to subcontractors who will process, store, or transmit FCI or CUI in performance of the subcontract, as described in § 170.23.

(d) In very limited circumstances, a Service Acquisition Executive or Component Acquisition Executive in the DoD may elect to waive inclusion of CMMC Program requirements in a solicitation or contract, and in accordance with all applicable policies, procedures, and requirements. In such cases, contractors and subcontractors will remain obligated to comply with all applicable cybersecurity and information security requirements.

(e) The CMMC Program does not alter any separately applicable requirements to protect FCI or CUI, including those requirements in accordance with FAR 52.204–21 (48 CFR 52.204–21), Basic Safeguarding of Covered Contractor Information Systems, or covered defense information in accordance with DFARS subpart 204.73 (48 CFR 204.73), Safeguarding Covered Defense Information and Cyber Incident Reporting, or any other applicable information protection requirements. The CMMC Program provides a means

of verifying implementation of the security requirements set forth in FAR 52.204–21, NIST SP 800–171 Rev 2, and NIST SP 800–172, as applicable.

Subpart B—Government Roles and Responsibilities

§ 170.6 CMMC PMO.

(a) The Office of the Department of Defense Chief Information Officer (DoD CIO) Office of the Deputy CIO for Cybersecurity (DoD CIO(CS)) provides oversight of the CMMC Program and is responsible for establishing CMMC assessment, accreditation, and training requirements as well as developing and updating CMMC Program policies and implementing guidance. The CMMC PMO is responsible for the granting and revocation of the validity status of the appropriate CMMC certification level, which officially resides within SPRS based on inputs from the OSA, C3PAO, and or DCMA DIBCAC.

(b) The CMMC PMO is responsible for investigating and acting upon indications that an active CMMC Self-Assessment, described in §§ 170.15 and 170.16, or CMMC Certification Assessment, described in §§ 170.17 and 170.18, has been called into question. Indications that may trigger investigative evaluations include, but are not limited to, reports from the CMMC Accreditation Body, a C3PAO, or anyone knowledgeable of the security processes and activities of the OSA. Investigative evaluations include, but are not limited to, reviewing pertinent assessment information and exercising the right to require a DCMA DIBCAC assessment of the OSA, as provided for under the DFARS clauses 252.204–7012 and 252.204–7020 (48 CFR 252.204–7012 and 252.204–7020).

(c) If the investigative results show that adherence to the provisions of this rule have not been achieved or maintained, the CMMC PMO may revoke the validity status of the appropriate existing CMMC Self-Assessment(s) or CMMC Final Certification Assessment(s).

§ 170.7 DCMA DIBCAC.

(a) In support of the CMMC Program, DoD intends that the DCMA DIBCAC assessors performing Level 3 assessments will:

- (1) Complete CMMC Level 2 and Level 3 training.
- (2) Conduct CMMC Level 3 Certification Assessments and upload assessment results into the CMMC instantiation of eMASS.
- (3) Issue CMMC Level 3 Certification Assessment certificates.
- (4) Conduct CMMC Level 2 assessments of the Accreditation Body

and prospective C3PAOs information systems that process, store, and/or transmit CUI.

(5) Create and maintain a process for assessors to collect the list of assessment artifacts to include artifact names, their return values of the hashing algorithm, the hashing algorithm used, and upload that data into the CMMC instantiation of eMASS.

(6) As authorized and in accordance with all legal requirements, enter and track, OSC appeals and updated results arising from CMMC Level 3 Certification Assessment activities into the CMMC instantiation of eMASS.

(7) Retain all records in accordance with DCMA–MAN 4501–04.

(b) [Reserved].

Subpart C—CMMC Assessment and Certification Ecosystem

§ 170.8 Accreditation Body.

(a) *Roles and responsibilities.* The Accreditation Body is responsible for authorizing and ensuring the accreditation of CMMC Third-Party Assessment Organizations (C3PAOs) in accordance with ISO/IEC 17020:2012 (incorporated by reference, see § 170.2) and all applicable authorization and accreditation requirements set forth. At any given point in time, there will be only one Accreditation Body for the DoD CMMC Program.

(b) *Requirements.* The Accreditation Body shall:

- (1) Become and remain a member in good standing of the Inter-American Accreditation Cooperation (IAAC) and become an International Laboratory Accreditation Cooperation (ILAC) Mutual Recognition Arrangement (MRA) signatory, with a signatory status scope of ISO/IEC 17020:2012.
- (2) Become and remain a member in good standing of the International Accreditation Forum (IAF) with mutual recognition arrangement signatory status scope of ISO/IEC 17024:2012 (incorporated by reference, see § 170.2).

(3) Achieve and maintain full compliance with ISO/IEC 17011:2017 (incorporated by reference, see § 170.2) and complete a peer assessment by other ILAC signatories for competence in accrediting conformity assessment bodies to ISO/IEC 17020:2012, both within 24 months of DoD approval. If ISO/IEC 17011:2017 is revised or superseded, the Accreditation Body shall achieve full compliance with the updated standard within 12 months of the date of revision.

(i) Prior to achieving full compliance as set forth in this paragraph (b)(3), the Accreditation Body shall:

(A) Authorize, but not accredit, C3PAOs who meet all requirements set

forth in § 170.9 to grant CMMC Level 2 Certification Assessments and issue certificates of assessment for OSCs.

(B) Require all C3PAOs to achieve and maintain the ISO/IEC 17020:2012 requirements within 27 months of authorization. If ISO/IEC 17020:2012 is revised or superseded, the Accreditation Body shall require full compliance with the updated standard within 12 months of the date of revision.

(ii) After achieving full compliance as set forth in this paragraph (b)(3), the Accreditation Body shall accredit C3PAOs, in accordance with ISO/IEC 17020:2012, or subsequent revisions, who meet all requirements set forth in § 170.9 to grant CMMC Level 2 Certification Assessments and issue certificates of assessment for OSCs.

(4) Ensure that the Accreditation Body's Board of Directors, professional staff, Information Technology (IT) staff, accreditation staff, and independent assessor staff complete a Tier 3 background investigation resulting in a determination of national security eligibility. This Tier 3 background investigation will not result in a security clearance and is not being executed for the purpose of government employment. The Tier 3 background investigation is initiated using the Standard Form (SF) 86 and submitted by DoD CIO Security to Washington Headquarters Services (WHS) for coordination for processing by the Defense Counterintelligence and Security Agency (DCSA). These positions are designated as non-critical sensitive with a risk designation of "Moderate Risk" in accordance with title 5 CFR 1400.201(b) and (d) and the investigative requirements of title 5 CFR 731.106(c)(2).

(5) Comply with Foreign Ownership, Control or Influence (FOCI) by:

(i) Completing the Standard Form (SF) 328 Certificate Pertaining to Foreign Interests and submit it directly to Defense Counterintelligence and Security Agency (DCSA) and undergo a National Security Review with regards to the protection of controlled unclassified information based on the factors identified in 32 CFR 117.11(b) using the procedures outlined in 32 CFR 117.11(c). The Accreditation Body must receive a non-disqualifying eligibility determination by the CMMC PMO to be recognized by the Department of Defense.

(ii) Reporting any change to the information provided on its SF 328 by resubmitting the SF 328 to DCSA within 15 business days of the change being effective. A disqualifying eligibility determination, based on the results of the change, will result in the

Accreditation Body losing its authorization or accreditation.

(iii) Identifying all prospective C3PAOs to the CMMC PMO. The CMMC PMO will sponsor the prospective C3PAO for a FOCI risk assessment conducted by the DCSA using the SF 328 as part of the authorization and accreditation processes.

(iv) Notifying prospective C3PAOs of the CMMC PMO's eligibility determination resulting from the FOCI risk assessment.

(6) Obtain a CMMC Level 2 Certification Assessment in accordance with the procedures specified in § 170.17(a)(1) and (c). This assessment, conducted by DCMA DIBCAC, shall meet all requirements for a Level 2 Final Certification Assessment and will not result in a CMMC Level 2 certificate. The CMMC Level 2 assessment process must be performed on a triennial basis.

(7) Provide all documentation and records in English.

(8) Establish, maintain, and manage an up-to-date list of authorized and accredited C3PAOs on a single publicly accessible website and provide the list of these entities and their status to the DoD through submission in the CMMC instantiation of eMASS.

(9) Provide the CMMC PMO with current data on C3PAOs, including authorization and accreditation records and status in the CMMC instantiation of eMASS. This data shall include the dates associated with the authorization and accreditation of each C3PAO.

(10) Provide the DoD with information about aggregate statistics pertaining to operations of the CMMC Ecosystem to include the authorization and accreditation status of C3PAOs or other information as requested.

(11) Provide inputs for assessor supplemental guidance to the CMMC PMO. Participate and support coordination of these and other inputs through DoD-led Working Groups.

(12) Ensure that all information about individuals is encrypted and protected in all Accreditation Body information systems and databases.

(13) Provide all plans that are related to potential sources of revenue, to include but not limited to: fees, licensing, processes, membership, and/or partnerships to the Department's CMMC PMO.

(14) Ensure that the CMMC Assessors and Instructors Certification Organization (CAICO) is compliant with ISO/IEC 17024:2012. If ISO/IEC 17024:2012 is revised or superseded, the Accreditation Body shall require full compliance with the updated standard within 12 months of the date of revision.

(15) Ensure all training products, instruction, and testing materials are of high quality and subject to CAICO quality control policies and procedures, to include technical accuracy and alignment with all applicable legal, regulatory, and policy requirements.

(16) Render a final decision on all elevated appeals.

(17) Develop and maintain a comprehensive plan and schedule to comply with all ISO/IEC 17011:2017, or subsequent revisions, and DoD requirements for Conflict of Interest, Code of Professional Conduct, and Ethics policies as set forth in the DoD contract. All policies shall apply to the Accreditation Body, and other individuals, entities, and groups within the CMMC ecosystem who provide CMMC assessments, CMMC instruction, CMMC training materials, or CMMC certification on behalf of the Accreditation Body. All policies in this section must be approved by the CMMC PMO prior to effectivity in accordance with the following requirements.

(i) *Conflict of Interest (CoI) Policy.* The CoI policy shall:

(A) Include a detailed risk mitigation plan for all potential conflicts of interest that may pose a risk to compliance with ISO/IEC 17011:2017, or subsequent revisions.

(B) Require members of the Accreditation Body to disclose to the CMMC PMO, in writing, as soon as it is known or reasonably should be known, any actual, potential, or perceived conflict of interest with sufficient detail to allow for assessment.

(C) Require members of the Accreditation Body who leave the board or organization to enter a "cooling off period" of six (6) months whereby they are prohibited from working with the Accreditation Body or participating in CMMC activities.

(D) Require CMMC Ecosystem members to actively avoid participating in any activity, practice, or transaction that could result in an actual or perceived conflict of interest.

(E) Require CMMC Ecosystem members to disclose to Accreditation Body leadership, in writing, any actual or potential conflict of interest as soon as it is known, or reasonably should be known.

(ii) *Code of Professional Conduct (CoPC) policy.* The CoPC policy shall:

(A) Describe the performance standards by which the members of the CMMC ecosystem will be held accountable and the procedures for addressing violations of those performance standards.

(B) Require the Accreditation Body to investigate and resolve any potential

violations that are reported or as identified by the DoD.

(C) Require the Accreditation Body to inform the DoD in writing of new investigations within 72 hours.

(D) Require the Accreditation Body to report to the DoD in writing the outcome of completed investigations within 15 business days.

(E) Require CMMC Ecosystem members to represent themselves and their companies accurately; to include not misrepresenting any professional credentials or status, including CMMC authorization or certification status, nor exaggerating the services that they or their company are capable or authorized to deliver.

(F) Require CMMC Ecosystem members to be honest and factual in all CMMC-related activities with colleagues, clients, trainees, and others with whom they interact.

(G) Prohibit CMMC Ecosystem members from participating in the CMMC assessment process for a CMMC assessment in which they previously served as a consultant to prepare the organization for any CMMC assessment.

(H) Require CMMC Ecosystem members to maintain the confidentiality of customer and government data to preclude unauthorized disclosure.

(I) Require CMMC Ecosystem members to report results and data from assessments and training objectively, completely, clearly, and accurately.

(J) Prohibit CMMC Ecosystem members from cheating, assisting another in cheating, or allowing cheating on CMMC examinations.

(K) Require CMMC Ecosystem members to utilize official training content developed by a CMMC training organization approved by the CAICO in all CMMC certification courses.

(iii) *Ethics policy.* The Ethics policy shall:

(A) Require CMMC Ecosystem members to report to the Accreditation Body within 30 days of convictions, guilty pleas, or no contest pleas to crimes of fraud, larceny, embezzlement, misappropriation of funds, misrepresentation, perjury, false swearing, conspiracy to conceal, or a similar offense in any legal proceeding, civil or criminal, whether or not in connection with activities that relate to carrying out their role in the CMMC ecosystem.

(B) Prohibit harassment or discrimination by CMMC Ecosystem members in all interactions with individuals whom they encounter in connection with their roles in the CMMC ecosystem.

(C) Require CMMC Ecosystem members to have and maintain a

satisfactory record of integrity and business ethics.

§ 170.9 CMMC Third-Party Assessment Organizations (C3PAOs).

(a) *Roles and responsibilities.* C3PAOs are organizations that are responsible for granting CMMC Level 2 Certification Assessments and issuing certificates of assessment for OSCs. C3PAOs must be accredited or authorized by the Accreditation Body in accordance with the requirements set forth.

(b) *Requirements.* C3PAOs shall:

(1) Obtain authorization or accreditation from the Accreditation Body in accordance with § 170.8(b)(3).

(2) Comply with the Accreditation Body policies for Conflict of Interest, Code of Professional Conduct, and Ethics set forth in § 170.8(b)(17); and achieve and maintain compliance with ISO/IEC 17020:2012 (incorporated by reference, see § 170.2) within 27 months of authorization. If ISO/IEC 17020:2012 is revised or superseded, the C3PAO shall achieve full compliance with the updated standard within 12 months of the date of revision.

(3) Require all C3PAO company personnel participating in the CMMC assessment process to complete a Tier 3 background investigation resulting in a determination of national security eligibility. This includes the CMMC Assessment Team and the quality assurance individual. This Tier 3 background investigation will not result in a security clearance, and is not being executed for the purpose of government employment. The Tier 3 background investigation is initiated using the Standard Form (SF) 86. These positions are designated as non-critical sensitive with a risk designation of “Moderate Risk” in accordance with title 5 CFR 1400.201(b) and (d) and the investigative requirements of title 5 CFR 731.106(c)(2).

(4) Require all C3PAO company personnel participating in the CMMC assessment process who are not eligible to obtain a Tier 3 background investigation to meet the equivalent of a favorably adjudicated Tier 3 background investigation. DoD will determine the Tier 3 background investigation equivalence for use with the CMMC Program only.

(5) Comply with Foreign Ownership, Control or Influence (FOCI) by:

(i) Completing and submitting Standard Form (SF) 328 Certificate Pertaining to Foreign Interests upon request from DCSA and undergo a National Security Review with regards to the protection of controlled unclassified information based on the factors identified in 32 CFR 117.11(b)

using the procedures outlined in 32 CFR 117.11(c).

(ii) Receiving a non-disqualifying eligibility determination from the CMMC PMO resulting from the FOCI risk assessment in order to proceed to a DCMA DIBCAC CMMC Level 2 assessment as part of the authorization and accreditation process set forth in paragraph (b)(6) of this section.

(iii) Reporting any change to the information provided on its SF 328 by resubmitting the SF 328 to DCSA within 15 business days of the change being effective. A disqualifying eligibility determination, based on the results of the change, will result in the C3PAO losing its authorization or accreditation.

(6) Obtain a CMMC Level 2 Certification Assessment in accordance with the procedures specified in § 170.17(a)(1) and (c). This assessment, conducted by DCMA DIBCAC, shall meet all requirements for a Level 2 Final Certification Assessment and will not result in a CMMC Level 2 certificate. The CMMC Level 2 assessment process must be performed on a triennial basis.

(7) Provide all documentation and records in English.

(8) Submit pre-assessment and planning material, final assessment reports, and CMMC certificates of assessment into the CMMC instantiation of eMASS.

(9) Submit all assessment appeal investigations and decisions to include assessment results into the CMMC instantiation of eMASS.

(10) Unless disposition is otherwise authorized by the CMMC PMO, maintain all assessment related records for a period of six (6) years. Such records include any materials provided by OSC, generated by the C3PAO in the course of an assessment, any working papers generated from Level 2 Certification Assessments; and materials relating to monitoring, education, training, technical knowledge, skills, experience, and authorization of all personnel involved in inspection activities; contractual agreements with OSCs; and organizations for whom consulting services were provided.

(11) Provide any requested audit information, including any out-of-cycle from ISO/IEC 17020:2012 requirements, or subsequent revisions, to the Accreditation Body.

(12) Ensure that all personal information is encrypted and protected in all C3PAO information systems and databases.

(13) Meet the requirements for Assessment Team composition, comprised of a Lead CCA, CCAs, and any participating CCPs.

(14) Implement a quality assurance function that ensures the accuracy and completeness of assessment data prior to upload into the CMMC instantiation of eMASS. Any individual fulfilling the quality assurance function must be a CCA and cannot be a member of an Assessment Team for which they are performing a quality assurance role. A quality assurance individual shall manage the C3PAO's quality assurance reviews as defined in paragraph (b)(15) of this section and the appeals process as required by paragraph (b)(21) of this section and in accordance with ISO/IEC 17020:2012 and ISO/IEC 17011:2017, or subsequent revisions.

(15) Conduct quality assurance reviews for each assessment, including observations of the Assessment Team's conduct and management of CMMC assessment processes.

(16) Ensure that all CMMC assessment activities are performed on the information system within the CMMC Assessment Scope.

(17) Maintain all facilities, personnel, and equipment involved in CMMC activities that are in scope of their CMMC Level 2 assessment and comply with all security requirements and procedures as prescribed by the Accreditation Body.

(18) Upload into the CMMC instantiation of eMASS assessment data compliant with the CMMC assessment data standard as set forth in eMASS CMMC Assessment Import Templates on the CMMC eMASS website: <https://cmmc.emass.apps.mil>.¹

(19) Issue certificates of assessment to OSCs in accordance with the certification requirements set forth in § 170.17.

(20) Address all OSC appeals arising from CMMC Level 2 assessment activities. Any appeal not resolved by the C3PAO will elevate to the Accreditation Body for final determination.

(21) Submit assessment appeals, review records, and decision results of assessment appeals to DoD using the CMMC instantiation of eMASS.

§ 170.10 CMMC Assessor and Instructor Certification Organization (CAICO).

(a) *Roles and responsibilities.* The CAICO is responsible for training, testing, authorizing, certifying, and recertifying CMMC assessors, instructors, and related professionals. Only the CAICO may make decisions relating to examination certifications, including the granting, maintaining, recertifying, expanding, and reducing

the scope of certification, and suspending or withdrawing certification in accordance with current ISO/IEC 17024:2012 (incorporated by reference, see § 170.2). At any given point in time, there will be only one CAICO for the DoD CMMC Program.

(b) *Requirements.* The CAICO shall:

(1) Comply with the Accreditation Body policies for Conflict of Interest, Code of Professional Conduct, and Ethics set forth in § 170.8(b)(17); and achieve and maintain full compliance with ISO/IEC 17024:2012 within 25 months of registration. If ISO/IEC 17024:2012 is revised or superseded, the CAICO shall achieve full compliance with the updated standard within 12 months of the date of revision.

(2) Provide all documentation and records in English.

(3) Train, test, certify, and recertify CCAs, CCIIs, and CCPs in accordance with the requirements of this section.

(4) The CAICO's certification examinations must be certified under ISO/IEC 17024:2012, or subsequent revisions, by a recognized U.S.-based accreditor who is not a member of the CMMC Accreditation Body and complies with ISO/IEC 17011:2017, or subsequent revisions.

(5) Establish quality control policies and procedures for the generation of training products, instruction, and testing materials.

(6) Oversee development, administration, and management pertaining to the quality of training and examination materials for CMMC assessor and instructor certification and recertification.

(7) Establish and publish an authorization and certification appeals process to receive, evaluate, and make decisions on complaints and appeals in accordance with ISO/IEC 17024:2012, or subsequent revisions.

(8) Address all appeals arising from the CMMC assessor, instructor, and practitioner authorizations and certifications process through use of internal processes in accordance with ISO/IEC 17024:2012, or subsequent revisions.

(9) Maintain records for a period of six (6) years of all procedures, processes, and actions related to fulfillment of the requirements set forth in this section and provide the Accreditation Body access to those records.

(10) Provide the Accreditation Body information about the authorization and accreditation status of assessors, instructors, training community, and publishing partners.

(11) Ensure separation of duties between individuals involved in testing

activities, training activities, and certification activities.

(12) Safeguard and require any subcontractor, as applicable, to safeguard the confidentiality of applicant, candidate, and certificate-holder information and ensure the overall security of the certification process.

(13) Ensure that all personal information is encrypted and protected in all CAICO and CAICO subcontractor, as applicable, information systems and databases.

(14) Ensure the security of assessor and instructor examinations and the fair and credible administration of examinations.

(15) Neither disclose nor allow any subcontractor, as applicable, to disclose CMMC data or metrics related to authorization or certification activities to any entity other than the Accreditation Body and DoD, except as required by law.

(16) Require retraining and recertification of CCAs, CCIIs, and CCPs upon significant change to DoD's CMMC Program requirements under this rule.

§ 170.11 CMMC Certified Assessor (CCA).

(a) *Roles and responsibilities.* CCAs, in support of a C3PAO, conduct CMMC Level 2 Certification Assessments of OSCs in accordance with NIST SP 800–171A (incorporated by reference, see § 170.2), the assessment processes defined in § 170.17, and the scoping requirements defined in § 170.19. CCAs are certified by the CAICO after successful completion of the CCA training and testing requirements set forth in paragraph (b) of this section. A CCA may conduct CMMC Level 2 Certification Assessments and participate on a C3PAO Assessment Team.

(b) *Requirements.* CCAs shall:

(1) Obtain and maintain certification from the CAICO in accordance with the requirements set forth in § 170.10. Certification is valid for 3 years from the date of issuance.

(2) Comply with the Accreditation Body policies for Conflict of Interest, Code of Professional Conduct, and Ethics set forth in § 170.8(b)(17).

(3) Complete a Tier 3 background investigation resulting in a determination of national security eligibility. This Tier 3 background investigation will not result in a security clearance and is not being executed for the purpose of government employment. The Tier 3 background investigation is initiated using the Standard Form (SF) 86. These positions are designated as non-critical sensitive with a risk designation of "Moderate Risk" in

¹ This system is accessible only to authorized users.

accordance with title 5 CFR 1400.201(b) and (d) and the investigative requirements of title 5 CFR 731.106(c)(2).

(4) Meet the equivalent of a favorably adjudicated Tier 3 background investigation when not eligible for a Tier 3 background investigation. DoD will determine the Tier 3 background investigation equivalence for use with the CMMC Program only.

(5) Provide all documentation and records in English.

(6) Be a CCP who has at least 3 years of cybersecurity experience, 1 year of assessment or audit experience, and at least one baseline certification aligned to either paragraph (b)(6)(i) or (ii) of this section through 15 February 2025 and aligned to paragraph (b)(6)(ii) of this section only beginning 16 February 2025.

(i) IAT Level II from DoD Manual 8570 Information Assurance Workforce Improvement Program.

(ii) Intermediate Proficiency Level for Career Pathway Certified Assessor 612 from DoD Manual 8140.03 Cyberspace Workforce Qualification & Management Program.

(7) Qualify as a Lead CCA by having at least 5 years of cybersecurity experience, 5 years of management experience, 3 years of assessment or audit experience, and at least one baseline certification aligned to either paragraph (b)(7)(i) or (ii) of this section through 15 February 2025 and aligned to paragraph (b)(7)(ii) of this section only beginning 16 February 2025.

(i) IAM Level II from DoD Manual 8570 Information Assurance Workforce Improvement Program.

(ii) Advanced Proficiency Level for Career Pathway Certified Assessor 612 from DoD Manual 8140.03 Cyberspace Workforce Qualification & Management Program.

(8) Only use IT, cloud, cybersecurity services, and end-point devices provided by the authorized/accredited C3PAO that they support and has received a CMMC Level 2 Certification Assessment or higher for all assessment activities. Individual assessors are prohibited from using any other IT, including IT that is personally owned, to include internal and external cloud services and end-point devices, to store, process, handle, or transmit CMMC assessment reports or any other CMMC assessment-related information.

(9) Immediately notify the responsible C3PAO of any breach or potential breach of security to any CMMC-related assessment materials under the assessors' purview.

(10) Not share any CMMC assessment-related outcomes or advance

information with any person not assigned to that specific assessment, except as otherwise required by law.

§ 170.12 CMMC Certified Instructor (CCI).

(a) *Roles and responsibilities.* A CMMC Certified Instructor (CCI) teaches CMMC assessor candidates. A CCI is trained, tested, and certified to perform CMMC instructional duties by the CAICO to teach CMMC assessor candidates. Candidate CCIs are certified by the CAICO after successful completion of the CCI training and testing requirements set forth in paragraph (b) of this section.

(b) *Requirements.* CCIs shall:

(1) Obtain and maintain certification from the CAICO in accordance with the requirements set forth in § 170.10. Certification is valid for 3 years from the date of issuance.

(2) Comply with the Accreditation Body policies for Conflict of Interest, Code of Professional Conduct, and Ethics set forth in § 170.8(b)(17).

(3) Provide all documentation and records in English.

(4) Provide the Accreditation Body and the CAICO with the most up-to-date and accurate information detailing their qualifications, training experience, professional affiliations, and certifications, and, upon reasonable request, submit documentation verifying this information.

(5) Not provide CMMC consulting services while serving as a CMMC instructor.

(6) Not participate in the development of exam objectives and/or exam content or act as an exam proctor while at the same time serving as a CCI.

(7) Keep confidential all information obtained or created during the performance of CMMC training activities, including trainee records, except as required by law.

(8) Not disclose any CMMC-related data or metrics to anyone without prior coordination with and approval from DoD.

(9) Notify the Accreditation Body or the CAICO if required by law or authorized by contractual commitments to release confidential information.

(10) Not share with anyone any CMMC training-related information not previously publicly disclosed.

§ 170.13 CMMC Certified Professional (CCP).

(a) *Roles and responsibilities.* A CMMC Certified Professional (CCP) completes rigorous training on CMMC and the assessment process to provide advice, consulting, and recommendations to their clients. Candidate CCPs are certified by the

CAICO after successful completion of the CCP training and testing requirements set forth in paragraph (b) of this section. CCPs are eligible to become CMMC Certified Assessors and can participate as a CCP on CMMC Level 2 Certification Assessments with CCA oversight where the CCA makes all final determinations.

(b) *Requirements.* CCPs shall:

(1) Obtain and maintain certification from the CAICO in accordance with the requirements set forth in § 170.10. Certification is valid for 3 years from the date of issuance.

(2) Comply with the Accreditation Body policies for Conflict of Interest, Code of Professional Conduct, and Ethics as set forth in § 170.8(b)(17).

(3) Complete a Tier 3 background investigation resulting in a determination of national security eligibility. This Tier 3 background investigation will not result in a security clearance and is not being executed for the purpose of government employment. The Tier 3 background investigation is initiated using the Standard Form (SF) 86. These positions are designated as non-critical sensitive with a risk designation of "Moderate Risk" in accordance with title 5 CFR 1400.201(b) and (d) and the investigative requirements of title 5 CFR 731.106(c)(2).

(4) Require all CCPs, who are not eligible to obtain a Tier 3 background investigation, to meet the equivalent of a favorably adjudicated Tier 3 background investigation. DoD will determine the Tier 3 background investigation equivalence for use with the CMMC Program only.

(5) Provide all documentation and records in English.

(6) Not share any CMMC assessment-related outcomes or advance information with any person not assigned to that specific assessment, except as otherwise required by law.

Subpart D—Key Elements of the CMMC Program

§ 170.14 CMMC Model.

(a) *Overview.* The CMMC Model incorporates the security requirements from:

(1) FAR 52.204–21 (48 CFR 52.204–21) *Basic Safeguarding of Covered Contractor Information Systems*;

(2) NIST SP 800–171 Rev 2, *Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations* (incorporated by reference, see § 170.2); and

(3) Selected requirements from NIST SP 800–172, *Enhanced Security Requirements for Protecting Controlled*

Unclassified Information: A Supplement to NIST Special Publication 800–171 Rev 2, (incorporated by reference, see § 170.2).

(b) *CMMC domains*. The CMMC Model consists of domains that map to the Security Requirement Families defined in NIST SP 800–171 Rev 2.

(c) *CMMC level requirements*. CMMC Levels 1–3 utilize the safeguarding requirements and security requirements specified in FAR clause 52.204–21 (Level 1), NIST SP 800–171 Rev 2 (Level 2), and selected security requirements from NIST SP 800–172 (Level 3). This paragraph discusses the numbering

scheme and the security requirements for each level.

(1) *Numbering*. Each security requirement has an identification number in the format—DD.L#–REQ—where:

(i) DD is the two-letter domain abbreviation;

(ii) L# is the CMMC level number; and

(iii) REQ is the FAR clause 52.204–21 paragraph number, NIST SP 800–171 Rev 2, or NIST SP 800–172 requirement number.

(2) *CMMC Level 1 requirements*. The security requirements in CMMC Level 1 are those set forth in FAR clause 52.204–21(b)(1)(i) through (b)(1)(xv).

(3) *CMMC Level 2 requirements*. The security requirements in CMMC Level 2 are identical to the requirements in NIST SP 800–171 Rev 2.

(4) *CMMC Level 3 requirements*. The security requirements in CMMC Level 3 are selected from NIST SP 800–172, and where applicable, Organization-Defined Parameters (ODPs) are assigned. Table 1 to this paragraph identifies the selected requirements and applicable ODPs that represent the CMMC Level 3 security requirements. ODPs for the NIST SP 800–172 requirements are italicized, where applicable:

TABLE 1 TO § 170.14(c)(4)

Security requirement No. ¹	CMMC level 3 security requirements (Selected NIST SP 800–172 Requirement with DoD ODPs italicized)
(i) AC.L3–3.1.2e	Restrict access to systems and system components to only those information resources that are owned, provisioned, or issued by the organization.
(ii) AC.L3–3.1.3e	Employ <i>secure information transfer solutions</i> to control information flows between security domains on connected systems.
(iii) AT.L3–3.2.1e	Provide awareness training <i>upon initial hire, following a significant cyber event, and at least annually</i> , focused on recognizing and responding to threats from social engineering, advanced persistent threat actors, breaches, and suspicious behaviors; update the training <i>at least annually</i> or when there are significant changes to the threat.
(iv) AT.L3–3.2.2e	Include practical exercises in awareness training for <i>all users, tailored by roles, to include general users, users with specialized roles, and privileged users</i> , that are aligned with current threat scenarios and provide feedback to individuals involved in the training and their supervisors.
(v) CM.L3–3.4.1e	Establish and maintain an authoritative source and repository to provide a trusted source and accountability for approved and implemented system components.
(vi) CM.L3–3.4.2e	Employ automated mechanisms to detect misconfigured or unauthorized system components; after detection, <i>remove the components or place the components in a quarantine or remediation network</i> to facilitate patching, re-configuration, or other mitigations.
(vii) CM.L3–3.4.3e	Employ automated discovery and management tools to maintain an up-to-date, complete, accurate, and readily available inventory of system components.
(viii) IA.L3–3.5.1e	Identify and authenticate <i>systems and system components, where possible</i> , before establishing a network connection using bidirectional authentication that is cryptographically based and replay resistant.
(ix) IA.L3–3.5.3e	Employ automated or manual/procedural mechanisms to prohibit system components from connecting to organizational systems unless the components are known, authenticated, in a properly configured state, or in a trust profile.
(x) IR.L3–3.6.1e	Establish and maintain a security operations center capability that operates <i>24/7, with allowance for remote/on-call staff</i> .
(xi) IR.L3–3.6.2e	Establish and maintain a cyber-incident response team that can be deployed by the organization within <i>24 hours</i> .
(xii) PS.L3–3.9.2e	Ensure that organizational systems are protected if adverse information develops or is obtained about individuals with access to CUI.
(xiii) RA.L3–3.11.1e	Employ <i>threat intelligence, at a minimum from open or commercial sources, and any DoD-provided sources</i> , as part of a risk assessment to guide and inform the development of organizational systems, security architectures, selection of security solutions, monitoring, threat hunting, and response and recovery activities.
(xiv) RA.L3–3.11.2e	Conduct cyber threat hunting activities <i>on an on-going aperiodic basis or when indications warrant</i> , to search for indicators of compromise in <i>organizational systems</i> and detect, track, and disrupt threats that evade existing controls.
(xv) RA.L3–3.11.3e	Employ advanced automation and analytics capabilities in support of analysts to predict and identify risks to organizations, systems, and system components.
(xvi) RA.L3–3.11.4e	Document or reference in the system security plan the security solution selected, the rationale for the security solution, and the risk determination.
(xvii) RA.L3–3.11.5e	Assess the effectiveness of security solutions <i>at least annually or upon receipt of relevant cyber threat information, or in response to a relevant cyber incident</i> , to address anticipated risk to organizational systems and the organization based on current and accumulated threat intelligence.
(xviii) RA.L3–3.11.6e	Assess, respond to, and monitor supply chain risks associated with organizational systems and system components.
(xix) RA.L3–3.11.7e	Develop a plan for managing supply chain risks associated with organizational systems and system components; update the plan <i>at least annually, and upon receipt of relevant cyber threat information, or in response to a relevant cyber incident</i> .
(xx) CA.L3–3.12.1e	Conduct penetration testing <i>at least annually or when significant security changes are made to the system</i> , leveraging automated scanning tools and ad hoc tests using subject matter experts.
(xxi) SC.L3–3.13.4e	Employ <i>physical isolation techniques or logical isolation techniques or both</i> in organizational systems and system components.

TABLE 1 TO § 170.14(c)(4)—Continued

Security requirement No. ¹	CMMC level 3 security requirements (Selected NIST SP 800–172 Requirement with DoD ODPs italicized)
(xxii) SI.L3–3.14.1e	Verify the integrity of <i>security critical and essential software</i> using root of trust mechanisms or cryptographic signatures.
(xxiii) SI.L3–3.14.3e	Ensure that <i>Specialized Assets including IoT, IIoT, OT, GFE, Restricted Information Systems, and test equipment</i> are included in the scope of the specified enhanced security requirements or are segregated in purpose-specific networks.
(xxiv) SI.L3–3.14.6e	Use threat indicator information and effective mitigations obtained from, <i>at a minimum, open or commercial sources, and any DoD-provided sources</i> , to guide and inform intrusion detection and threat hunting.

¹ Roman numerals in parentheses before the Security Requirement are for numbering purposes only. The numerals are not part of the naming convention for the requirement.

(d) *Implementation.* Assessment of security requirements is prescribed by NIST SP 800–171A (incorporated by reference, see § 170.2) and NIST SP 800–172A (incorporated by reference, see § 170.2). Descriptive text in these documents support OSA implementation of the security requirements and use the terms organization-defined and periodically. Except where referring to an Organization-Defined Parameter (ODP), organization-defined means as determined by the OSA being assessed. Periodically means occurring at regular intervals. As used in many requirements within CMMC, the interval length is organization-defined to provided contractor flexibility, with an interval length of no more than one year.

§ 170.15 CMMC Level 1 Self-Assessment and Affirmation requirements.

(a) *CMMC Level 1 Self-Assessment.* To comply with CMMC Level 1 requirements, the OSA must meet the requirements detailed in paragraphs (a)(1) and (2) of this section.

(1) *Self-Assessment.* The OSA must complete and achieve a MET result for all security requirements specified in § 170.14(c)(2). No POA&Ms are permitted for CMMC Level 1. The OSA must conduct a self-assessment in accordance with the procedures set

forth in paragraph (c)(1) of this section and submit assessment results in SPRS. To maintain compliance with CMMC Level 1 Self-Assessment requirements, the OSA must conduct a self-assessment of CMMC Level 1 on an annual basis and submit the results in SPRS.

(i) *SPRS inputs.* The self-assessment results in the Supplier Performance Risk System (SPRS) shall include, at minimum, the following items:

- (A) CMMC Level.
- (B) Assessment Date
- (C) Assessment Scope.
- (D) All industry CAGE code(s) associated with the information system(s) addressed by the CMMC Assessment Scope
- (E) Compliance result.
- (ii) *CMMC status revocation.* If the CMMC PMO determines that the provisions of Level 1 of this rule have not been achieved or maintained, as addressed in § 170.6, a revocation of the validity status of the CMMC Level 1 Self-Assessment may occur. At that time, standard contractual remedies will apply and the OSA will be ineligible for additional awards with CMMC Level 1 Self-Assessment or higher requirements for the information system within the CMMC Assessment Scope until such time as a valid CMMC Level 1 Self-Assessment is achieved.

(2) *Affirmation.* Affirmations are required for all CMMC Level 1 Self-

Assessments. Affirmation procedures are set forth in § 170.22.

(b) *Contract eligibility.* Prior to award of any contract or subcontract with a CMMC Level 1 requirement, OSAs must comply with all CMMC Level 1 Self-Assessment requirements and have submitted an affirmation of compliance into SPRS for all information systems within the CMMC Assessment Scope.

(c) *Procedures.*—(1) *Self-Assessment.* The OSA must perform a CMMC Level 1 Self-Assessment scored in accordance with the CMMC Scoring Methodology described in § 170.24. The Level 1 Self-Assessment must be performed in accordance with the CMMC Level 1 scope requirements set forth in § 170.19(a) and (b) and the following:

(i) *NIST SP 800–171A.* The CMMC Level 1 Self-Assessment must be performed using the objectives defined in NIST SP 800–171A (incorporated by reference, see § 170.2) for the security requirement that maps to the CMMC Level 1 security requirement as specified in table 1 to paragraph (c)(1)(ii) of this section. In any case where an objective addresses CUI, FCI should be substituted for CUI in the objective.

(ii) Mapping Table for CMMC Level 1 security requirements to the NIST SP 800–171A objectives.

TABLE 1 TO § 170.15(c)(1)(ii)—CMMC LEVEL 1 SECURITY REQUIREMENTS TO NIST SP 800–171A

CMMC Level 1 security requirements as set forth in § 170.14(c)(2)	NIST SP 800–171A
AC.L1-b.1.i	3.1.1
AC.L1-b.1.ii	3.1.2
AC.L1-b.1.iii	3.1.20
AC.L1-b.1.iv	3.1.22
IA.L1-b.1.v	3.5.1
IA.L1-b.1.vi	3.5.2
MP.L1-b.1.vii	3.8.3
PE.L1-b.1.viii	3.10.1
First phrase of PE.L1-b.1.ix (FAR b.1.ix *)	3.10.3
Second phrase of PE.L1-b.1.ix (FAR b.1.ix *)	3.10.4
Third phrase of PE.L1-b.1.ix (FAR b.1.ix *)	3.10.5
SC.L1-b.1.x	3.13.1
SC.L1-b.1.xi	3.13.5
SI.L1-b.1.xii	3.14.1

TABLE 1 TO § 170.15(c)(1)(ii)—CMMC LEVEL 1 SECURITY REQUIREMENTS TO NIST SP 800–171A—Continued

CMMC Level 1 security requirements as set forth in § 170.14(c)(2)	NIST SP 800–171A
SI.L1-b.1.xiii	3.14.2
SI.L1-b.1.xiv	3.14.4
SI.L1-b.1.xv	3.14.5

* Three of the FAR 52.204–21 requirements were broken apart by “phrase” when NIST SP 800–171 Rev 2 was developed.

(iii) Additional explanatory material can be found in the CMMC Level 1 Assessment Guide located at <https://DoDcio.defense.gov/CMMC/>.

(2) [Reserved].

§ 170.16 CMMC Level 2 Self-Assessment and Affirmation requirements.

(a) *Level 2 Self-Assessment.* To comply with CMMC Level 2 Self-Assessment requirements, the OSA must meet the requirements detailed in paragraphs (a)(1) and (2) of this section. Meeting the CMMC Level 2 Self-Assessment requirements detailed in paragraphs (a)(1) and (2) of this section also satisfies the CMMC Level 1 Self-Assessment requirements detailed in § 170.15 for the same CMMC Assessment Scope.

(1) *Self-Assessment.* The OSA must complete and achieve a MET result for all security requirements specified in § 170.14(c)(3). The OSA must conduct a self-assessment in accordance with the procedures set forth in paragraph (c)(1) of this section and submit assessment results in SPRS. To maintain compliance with CMMC Level 2 Self-Assessment requirements, the OSA must perform a CMMC Level 2 Self-Assessment on a triennial basis and submit the results in SPRS.

(i) *SPRS inputs.* The self-assessment results in the Supplier Performance Risk System (SPRS) shall include, at minimum, the following information:

- (A) CMMC Level.
- (B) Assessment Date.
- (C) Assessment Scope.
- (D) All industry CAGE code(s)

associated with the information system(s) addressed by the CMMC Assessment Scope.

(E) Overall self-assessment score (*e.g.*, 105 out of 110).

(F) POA&M usage and compliance status, as applicable.

(ii) *Conditional self-assessment.* OSAs have achieved CMMC Level 2 Conditional Self-Assessment if the Level 2 self-assessment results in a POA&M and the POA&M meets all the CMMC Level 2 POA&M requirements listed in § 170.21(a)(2).

(A) *Plan of Action and Milestones.* A Level 2 POA&M is allowed only in accordance with the CMMC POA&M requirements listed in § 170.21.

(B) *POA&M closeout.* The OSA must implement all CMMC Level 2 security requirements and close out the POA&M within 180 days of the initial self-assessment. Upon remediation of the remaining requirements, the OSA must perform a POA&M closeout self-assessment and post compliance results to SPRS. If the POA&M is not closed out within the 180-day timeframe, the Conditional Level 2 Self-Assessment status of the OSA will expire. If Conditional Level 2 Self-Assessment expires within the period of performance of a contract, standard contractual remedies will apply, and the OSA will be ineligible for additional awards with CMMC Level 2 Self-Assessment or higher requirements for the information system within the CMMC Assessment Scope.

(iii) *Final Self-Assessment.* The OSA will achieve CMMC Level 2 Final Self-Assessment compliance for the information system(s) within the CMMC Assessment Scope upon implementation of all security requirements and close out of the POA&M, as applicable.

(iv) *CMMC status revocation.* If the CMMC PMO determines that the provisions of Level 1 or Level 2 of this rule have not been achieved or maintained, as addressed in § 170.6, a revocation of the validity status of the CMMC Level 2 Self-Assessment may occur. At that time, standard contractual remedies will apply and the OSA will be ineligible for additional awards with CMMC Level 2 Self-Assessment or higher requirements for the information system within the CMMC Assessment Scope until such time as a valid CMMC Level 2 Self-Assessment is achieved.

(2) *Affirmation.* Affirmations are required at the time of each assessment, and annually thereafter, for all CMMC Level 2 Self-Assessments. Affirmation procedures are provided in § 170.22.

(b) *Contract eligibility.* In order to be awarded a contract from DoD with a CMMC Level 2 Self-Assessment requirement, the following two requirements must be met:

(1) OSAs must achieve, as specified in paragraph (a)(1) of this section, either CMMC Level 2 Conditional Self-

Assessment or CMMC Level 2 Final Self-Assessment.

(2) OSAs must submit an affirmation of compliance into SPRS, as specified in § 170.16(a)(2).

(c) *Procedures.*—(1) *Self-Assessment.* The OSA must perform a CMMC Level 2 Self-Assessment in accordance with NIST SP 800–171A (incorporated by reference, see § 170.2) and the CMMC Level 2 scoping requirements set forth in § 170.19(a) and (c) for the information systems within the CMMC Assessment Scope. The assessment must be scored in accordance with the CMMC Scoring Methodology described in § 170.24. If a POA&M exists, a POA&M closeout assessment must be performed by the OSA when all remaining requirements have been remediated. The POA&M closeout assessment must be performed within the 180-day closeout period. Additional guidance can be found in the guidance document listed in paragraph (c) of appendix A to this part.

(2) *Self-Assessment of Cloud Service Provider.* An OSA may use a Federal Risk and Authorization Management Program (FedRAMP) Moderate (or higher) cloud environment to process, store, or transmit CUI in execution of a contract or subcontract with a requirement for CMMC Level 2 under the following circumstances:

(i) The Cloud Service Provider's (CSP) product or service offering is FedRAMP Authorized at the FedRAMP Moderate (or higher) baseline in accordance with the FedRAMP Marketplace; or

(ii) The Cloud Service Provider's (CSP) product or service offering is not FedRAMP Authorized at the FedRAMP Moderate (or higher) baseline but meets security requirements equivalent to those established by the FedRAMP Moderate (or higher) baseline.

Equivalency is met if the OSA has the CSP's System Security Plan (SSP) or other security documentation that describes the system environment, system responsibilities, the current status of the Moderate baseline controls required for the system, and a Customer Responsibility Matrix (CRM) that summarizes how each control is MET and which party is responsible for maintaining that control that maps to the NIST SP 800–171 Rev 2

requirements. (See https://www.fedramp.gov/assets/resources/documents/FedRAMP_Moderate_Security_Controls.xlsx.)

(iii) In accordance with § 170.19, the OSA's on-premises infrastructure connecting to the CSP's product or service offering is part of the CMMC Assessment Scope, which will also be assessed. As such, the security requirements from the CRM must be documented or referred to in the OSA's System Security Plan (SSP).

§ 170.17 CMMC Level 2 Certification Assessment and Affirmation requirements.

(a) *Level 2 Certification Assessment requirements.* To comply with CMMC Level 2 Certification Assessment requirements, the OSC must meet the requirements set forth in paragraphs (a)(1) and (2) of this section. Meeting the CMMC Level 2 Certification Assessment requirements detailed in paragraphs (a)(1) and (2) of this section also satisfies the CMMC Level 2 Self-Assessment requirements set forth in § 170.16 for the same CMMC Assessment Scope.

(1) *Level 2 Certification Assessment.* The OSC must complete and achieve a MET result for all security requirements specified in table 1 to § 170.14(c)(4) CMMC Level 3 Requirements. After implementing the CMMC Level 2 security requirements, the OSC must achieve either CMMC Level 2 Conditional Certification or Final Certification through obtaining a CMMC Level 2 Certification Assessment by an authorized or accredited C3PAO following the procedures outlined in paragraph (c) of this section. Assessment results will be submitted into the CMMC instantiation of eMASS, which then provides automated transmission to SPRS. The CMMC Level 2 Certification Assessment process must be performed on a triennial basis.

(i) *Inputs into the CMMC instantiation of eMASS.* The Level 2 Certification assessment results input into the CMMC instantiation of eMASS shall include, at minimum, the following information:

- (A) Date and level of the assessment.
- (B) C3PAO name and unique identifier.

(C) For each Assessor conducting the assessment, name and business contact information.

(D) All industry CAGE codes associated with the information systems addressed by the CMMC Assessment Scope.

(E) The name, date, and version of the SSP.

(F) Title 32 program rule (32 CFR part 170) at time of assessment.

(G) Certification date.

(H) Assessment result for each requirement objective.

(I) POA&M usage and compliance, as applicable.

(J) List of the artifact names, the return values of the hashing algorithm, and the hashing algorithm used.

(ii) *Conditional Certification Assessment.* The OSC has achieved CMMC Level 2 Conditional Certification Assessment if a POA&M exists upon completion of the assessment and the POA&M meets all CMMC Level 2 POA&M requirements listed in § 170.21(a)(2).

(A) *Plan of Action and Milestones.* A Level 2 POA&M is allowed only in accordance with the CMMC POA&M requirements listed in § 170.21.

(B) *POA&M closeout.* The OSC must implement all CMMC Level 2 security requirements and close out their POA&M within 180 days of the initial assessment. Upon remediation of the remaining requirements, the OSC must obtain a POA&M closeout assessment performed by a C3PAO. Results will be submitted by the C3PAO into the CMMC instantiation of eMASS, which then provides automated transmission to SPRS. If the POA&M is not closed out within the 180-day timeframe, the Conditional Level 2 Certification status will expire. If Conditional Level 2 Certification expires within the period of performance of a contract, standard contractual remedies will apply, and the OSC will be ineligible for additional awards with CMMC Level 2 Certification Assessment or higher requirements for the information systems within the CMMC Assessment Scope.

(iii) *Final Certification Assessment.* The OSC will achieve CMMC Level 2 Final Certification Assessment for the information systems within the CMMC Assessment Scope upon implementation of all security requirements and close out of the POA&M, as applicable.

(iv) *CMMC status revocation.* If the CMMC PMO determines that the provisions of Level 1 or Level 2 of this rule have not been achieved or maintained, as addressed in § 170.6, a revocation of the validity status of the CMMC Level 2 Final Certification Assessment may occur. At that time, standard contractual remedies will apply and the OSC will be ineligible for additional awards with CMMC Level 2 Certification Assessment or higher requirements for the information system within the CMMC Assessment Scope until such time as a valid CMMC Level 2 Certification Assessment is achieved. The revocation of a CMMC Level 2 Final Certification Assessment will automatically cause the revocation of any CMMC Level 3 Certification

Assessments that were dependent upon that CMMC Level 2 Final Certification Assessment.

(2) *Affirmation.* Affirmations are required upon completion of each assessment, and annually thereafter, for all CMMC Level 2 Certification Assessments. Affirmation procedures are provided in § 170.22.

(b) *Contract eligibility.* In order to be awarded a contract from DoD with a CMMC Level 2 Certification Assessment requirement, the following two requirements must be met:

(1) OSCs must achieve, as specified in paragraph (a)(1) of this section, either CMMC Level 2 Conditional Certification Assessment or CMMC Level 2 Final Certification Assessment.

(2) OSCs must submit an affirmation of compliance into SPRS, as specified in paragraph (a)(2) of this section.

(c) *Procedures—(1) Assessment.* An authorized or accredited C3PAO must perform an assessment in accordance with NIST SP 800–171A (incorporated by reference, see § 170.2) and the CMMC Level 2 scoping requirements set forth in § 170.19(a) and (c) for the information systems within the CMMC Assessment Scope. The assessment must be scored in accordance with the CMMC Scoring Methodology described in § 170.24 and final results are subsequently communicated to the OSC through a CMMC Assessment Findings Report.

(2) *Security requirement re-evaluation.* A security requirement that is NOT MET (as defined in § 170.24) may be re-evaluated during the course of the assessment and for 10 business days following the active assessment period if all of the following conditions exist:

(i) Additional evidence is available to demonstrate the security requirement has been MET;

(ii) Cannot change or limit the effectiveness of other requirements that have been scored MET; and

(iii) The CMMC Assessment Findings Report has not been delivered.

(3) *POA&M.* If a POA&M exists, a POA&M closeout assessment must be performed by a C3PAO when all remaining security requirements have been remediated. The POA&M closeout assessment must be performed within the 180-day closeout period to achieve the assessment requirement for a Final Certification. Additional guidance can be found in § 170.21 and in the guidance document listed in paragraph (c) of appendix A to this part.

(4) *Artifact retention and integrity.* The artifacts used as evidence for the assessment must be retained by the OSC for the duration of the validity period of the certificate of assessment, and at

minimum, for six (6) years from the date of certification assessment. To ensure that the artifacts have not been altered, the OSC must hash the artifact files using a NIST-approved hashing algorithm. The OSC must provide the C3PAO with a list of the artifact names, the return values of the hashing algorithm, and the hashing algorithm for upload into the CMMC instantiation of eMASS. Additional guidance for hashing artifacts can be found in the guidance document listed in paragraph (h) of appendix A to this part.

(5) *Assessment of Cloud Service Provider.* An OSC may use a Federal Risk and Authorization Management Program (FedRAMP) Moderate (or higher) cloud environment to process, store, or transmit CUI in execution of a contract or subcontract with a requirement for CMMC Level 2 under the following circumstances:

(i) The Cloud Service Provider's (CSP) product or service offering is FedRAMP Authorized at the FedRAMP Moderate (or higher) baseline in accordance with the FedRAMP Marketplace; or

(ii) The Cloud Service Provider's (CSP) product or service offering is not FedRAMP Authorized at the FedRAMP Moderate (or higher) baseline but meets security requirements equivalent to those established by the FedRAMP Moderate (or higher) baseline. Equivalency is met if the OSA has the CSP's System Security Plan (SSP) or other security documentation that describes the system environment, system responsibilities, the current status of the Moderate baseline controls required for the system, and a Customer Responsibility Matrix (CRM) that summarizes how each control is MET and which party is responsible for maintaining that control that maps to the NIST SP 800-171 Rev 2 requirements. (See https://www.fedramp.gov/assets/resources/documents/FedRAMP_Moderate_Security_Controls.xlsx).

(iii) In accordance with § 170.19, the OSC's on-premises infrastructure connecting to the CSP's product or service offering is part of the CMMC Assessment Scope. As such, the security requirements from the CRM must be documented or referred to in the OSC's SSP.

§ 170.18 CMMC Level 3 Certification Assessment and Affirmation requirements.

(a) *Level 3 Certification Assessment requirements.* To comply with CMMC Level 3 Certification Assessment requirements, the OSC must meet the requirements set forth in paragraphs (a)(1) and (2) of this section. Receipt of a CMMC Level 2 Final Certification

Assessment for information systems within the Level 3 CMMC Assessment Scope is a prerequisite for a CMMC Level 3 Certification Assessment.

(1) *Level 3 Certification Assessment.* The OSC must achieve a CMMC Level 2 Final Certification Assessment on the Level 3 CMMC Assessment Scope, as defined in § 170.19(c) and complete and implement all Level 3 security requirements specified in table 1 to § 170.14(c)(4) CMMC Level 3 Requirements prior to initiating a CMMC Level 3 Certification Assessment, which will be performed by DCMA DIBCAC¹ on behalf of the DoD. To achieve and maintain CMMC Level 3 Certification Assessment, OSCs must achieve both a CMMC Level 2 Final Certification Assessment in accordance with § 170.17 and a CMMC Level 3 Final Certification Assessment in accordance with this section on a triennial basis for all information systems within the Level 3 CMMC Assessment Scope. DCMA DIBCAC will submit the assessment results into the CMMC instantiation of eMASS, which then provides automated transmission to SPRS.

(i) *Inputs into the CMMC instantiation of eMASS.* The assessment results input into the CMMC instantiation of eMASS shall include, at minimum, the following items:

- (A) Date and level of the assessment.
- (B) For each Assessor(s) conducting the assessment, name and business contact information.
- (C) All industry CAGE code(s) associated with the information system(s) addressed by the CMMC Assessment Scope.
- (D) The name, date, and version of the system security plan(s) (SSP).
- (E) Certification date.
- (F) Result for each security requirement objective.

(G) POA&M usage and compliance, as applicable.

(H) List of the artifact names, the return values of the hashing algorithm, and the hashing algorithm used.

(ii) *Conditional Certification Assessment.* The OSC has achieved CMMC Level 3 Conditional Certification Assessment if a POA&M exists upon completion of the assessment and the POA&M meets all CMMC Level 3 POA&M requirements listed in § 170.21(a)(3).

(A) *Plan of Action and Milestones.* A Level 3 POA&M is allowed only in accordance with the CMMC POA&M requirements listed in § 170.21.

(B) *POA&M Closeout.* The OSC must implement all CMMC Level 3 security

requirements and close out the POA&M within 180 days of the initial assessment. Upon remediation of the remaining security requirements, the OSC must arrange to have DCMA DIBCAC perform a POA&M closeout assessment. Results will be submitted into the CMMC instantiation of eMASS, which then provides automated transmission to SPRS. If the POA&M is not closed out within the 180-day timeframe, the Conditional Level 3 Certification status will expire. If Level 3 Conditional Certification expires within the period of performance of a contract, standard contractual remedies will apply, and the OSC will be ineligible for additional awards with CMMC Level 3 Certification Assessment requirements for the information systems within the CMMC Assessment Scope.

(iii) *Final Certification Assessment.* The OSC will achieve CMMC Level 3 Final Certification Assessment for the information systems within the CMMC Assessment Scope upon implementation of all security requirements and close out of any POA&M, as applicable.

(iv) *CMMC status revocation.* If the CMMC PMO determines that the provisions of this rule have not been achieved or maintained, as addressed in § 170.6, a revocation of the validity status of the CMMC Level 3 Final Certification Assessment may occur. At that time, standard contractual remedies will apply and the OSC will be ineligible for additional awards with CMMC Level 3 Certification Assessment or higher requirements for the information system within the CMMC Assessment Scope until such time as a valid CMMC Level 3 Certification Assessment is achieved. The revocation of a CMMC Level 2 Final Certification Assessment will automatically cause the revocation of any CMMC Level 3 Certification Assessments that were dependent upon that CMMC Level 2 Final Certification Assessment.

(2) *Affirmation.* Affirmations are required upon completion of each assessment, and annually thereafter, for all CMMC Level 3 Certification Assessments. Affirmation procedures are provided in § 170.22.

(b) *Contract eligibility.* In order to be awarded a contract from DoD with a CMMC Level 3 Certification Assessment requirement, the following two requirements must be met:

(1) OSCs must achieve, as specified in paragraph (a)(1) of this section, either CMMC Level 3 Conditional Certification Assessment or CMMC Level 3 Final Certification Assessment.

¹ <https://www.dcmamil.com/DIBCAC>.

(2) OSCs must submit an affirmation of compliance into SPRS, as specified in paragraph (a)(2) of this section.

(c) *Procedures*—(1) *Assessment*. The CMMC Level 3 Certification Assessment process includes:

(i) *CMMC Level 2 Final Certification Assessment*. CMMC Level 2 Final Certification Assessment must be obtained for information systems within the Level 3 CMMC Assessment Scope prior to assessment against the CMMC Level 3 security requirements of NIST SP 800–172A (incorporated by reference, see § 170.2). The OSC must have a CMMC Level 2 Final Certification Assessment for the same scope as the Level 3 assessment. Asset requirements differ for each CMMC Level. Scoping differences are set forth in § 170.19(e).

(ii) *CMMC Level 3 Certification Assessment*. DCMA DIBCAC will perform an assessment of the CMMC Level 3 security requirements in accordance with NIST SP 800–172A for information systems within the Level 3 CMMC Assessment Scope, determined in accordance with § 170.19(d). The assessment will be scored in accordance with the CMMC Scoring Methodology set forth in § 170.24 and final results are subsequently communicated to the OSC through a CMMC Assessment Findings Report. In the execution of the CMMC Level 3 Certification Assessment, DCMA DIBCAC may perform checks of CMMC Level 2 security requirements in accordance with CMMC Level 3 scoping. If DCMA DIBCAC identifies that a Level 2 security requirement is NOT MET, the Level 3 assessment process may be placed on hold or terminated.

(2) *Security requirement re-evaluation*. A security requirement under assessment that is NOT MET may be re-evaluated during the course of the assessment and for 10 business days following the active assessment period if all of the following conditions exist:

(i) Additional evidence is available to demonstrate the security requirement has been MET;

(ii) The additional evidence does not materially impact previously assessed security requirements; and

(iii) The CMMC Assessment Findings Report has not been delivered.

(3) *POA&M*. If a POA&M exists after the initial assessment, a POA&M closeout assessment will be performed by DCMA DIBCAC when all remaining security requirements have been implemented. The POA&M closeout assessment must be performed within the 180-day closeout period to achieve the assessment requirement for Final Certification. Additional guidance is

located in § 170.21 and in the guidance document listed in paragraph (a) of appendix A to this part.

(4) *Artifact retention and integrity*.

The OSC shall retain the hashed artifacts used as evidence during the assessment process. The OSC shall retain the unedited artifacts for the duration of the validity period of the certificate of assessment, and at a minimum, for six (6) years from the date of certification assessment. To ensure that the artifacts have not been altered, the OSC must hash the artifact files using a NIST-approved hashing algorithm. Assessors will collect the list of the artifact names, the return values of the hashing algorithm, and the hashing algorithm used and upload that data into the CMMC instantiation of eMASS. Additional guidance for hashing artifacts can be found in the guidance document listed in paragraph (h) of appendix A to this part.

(5) *Assessment of Cloud Service Provider*. An OSC may use a Federal Risk and Authorization Management Program (FedRAMP) Moderate (or higher) cloud environment to process, store, or transmit CUI in execution of a contract or subcontract with a requirement for CMMC Level 3 under the following circumstances:

(i) The Cloud Service Provider's (CSP) product or service offering is FedRAMP Authorized at the FedRAMP Moderate (or higher) baseline in accordance with the FedRAMP Marketplace; or

(ii) The Cloud Service Provider's (CSP) product or service offering is not FedRAMP Authorized at the FedRAMP Moderate (or higher) baseline but meets security requirements equivalent to those established by the FedRAMP Moderate (or higher) baseline. Equivalency is met if the OSC has the CSP's System Security Plan (SSP) or other security documentation that describes the system environment, system responsibilities, the current status of the Moderate baseline controls required for the system, and a Customer Responsibility Matrix (CRM) that summarizes how each control is MET and which party is responsible for maintaining that control that maps to the NIST SP 800–171 Rev 2 requirements. (See https://www.fedramp.gov/assets/resources/documents/FedRAMP_Moderate_Security_Controls.xlsx.)

(iii) In accordance with § 170.19, the OSC's on-premises infrastructure connecting to the CSP's product or service offering is part of the CMMC Assessment Scope. As such, the security requirements from the CRM must be documented or referred to in the OSC's SSP.

§ 170.19 CMMC scoping.

(a) *Scoping requirement*. (1) The CMMC Assessment Scope must be specified prior to assessment in accordance with the requirements of this section. The CMMC Assessment Scope is the set of all assets in the OSA's environment that will be assessed against CMMC security requirements.

(2) The requirements for defining the CMMC Assessment Scope for CMMC Levels 1, 2, and 3 are set forth in this section. Additional guidance regarding scoping can be found in the guidance documents listed in paragraphs (e) through (g) of appendix A to this part.

(b) *CMMC Level 1 Scoping*. Prior to performing a Level 1 CMMC Level 1 Self-Assessment, the OSA must specify the CMMC Assessment Scope.

(1) *Assets in scope for CMMC Level 1 Self-Assessment*. OSA information systems which process, store, or transmit FCI are in scope for CMMC Level 1 and must be self-assessed against applicable CMMC security requirements.

(2) *Assets not in scope for CMMC Level 1 Self-Assessment*—(i) *Out of Scope Assets*. OSA information systems which do not process, store, or transmit FCI are outside the scope of the CMMC Level 1 Self-Assessment. There are no documentation requirements for these assets.

(ii) *Specialized Assets*. Specialized Assets are those assets that can process, store, or transmit FCI but are unable to be fully secured, including: Internet of Things (IoT) devices, Industrial Internet of Things (IIoT) devices, Operational Technology (OT), Government Furnished Equipment (GFE), Restricted Information Systems, and Test Equipment. Specialized Assets are not part of the Level 1 CMMC Assessment Scope and are not assessed against CMMC security requirements.

(3) *CMMC Level 1 Self-Assessment scoping considerations*. To scope a CMMC Level 1 Self-Assessment, OSAs should consider the people, technology, facilities, and External Service Providers (ESP) within its environment that process, store, or transmit FCI.

(c) *CMMC Level 2 Scoping*. Prior to performing a Level 2 CMMC assessment, the OSA must specify the CMMC Assessment Scope.

(1) The CMMC Assessment Scope for CMMC Level 2 is based on the specification of asset categories and their respective requirements as defined in table 1 to this paragraph. Additional information is available in the guidance document listed in paragraph (f) of appendix A to this part.

TABLE 1 TO § 170.19(c)(1)—CMMC LEVEL 2 ASSET CATEGORIES AND ASSOCIATED REQUIREMENTS

Asset category	Asset description	OSA requirements	CMMC assessment requirements
○ Assets that are in the Level 2 CMMC Assessment Scope			
Controlled Unclassified Information (CUI) Assets.	○ Assets that process, store, or transmit CUI	○ Document in the asset inventory ○ Document in the System Security Plan (SSP). ○ Document in the network diagram of the CMMC Assessment Scope. ○ Prepare to be assessed against CMMC security requirements.	○ Assess against CMMC security requirements.
Security Protection Assets.	○ Assets that provide security functions or capabilities to the OSA's CMMC Assessment Scope, irrespective of whether or not these assets process, store, or transmit CUI	○ Document in the asset inventory ○ Document in the SSP. ○ Document in the network diagram of the CMMC Assessment Scope. ○ Prepare to be assessed against CMMC security requirements.	○ Assess against CMMC security requirements.
Contractor Risk Managed Assets.	○ Assets that can, but are not intended to, process, store, or transmit CUI because of security policy, procedures, and practices in place ○ Assets are not required to be physically or logically separated from CUI assets.	○ Document in the asset inventory ○ Document in the SSP. ○ Document in the network diagram of the CMMC Assessment Scope. ○ Prepare to be assessed against CMMC security requirements.	○ Review the SSP: i. If sufficiently documented, do not assess against other CMMC security requirements, except as noted. ii. If OSA's risk-based security policies, procedures, and practices documentation or other findings raise questions about these assets, the assessor can conduct a limited check to identify deficiencies. iii. The limited check(s) shall not materially increase the assessment duration nor the assessment cost. iv. The limited check(s) will be assessed against CMMC security requirements.
Specialized Assets	○ Assets that can process, store, or transmit CUI but are unable to be fully secured, including: Internet of Things (IoT) devices, Industrial Internet of Things (IIoT) devices, Operational Technology (OT), Government Furnished Equipment (GFE), Restricted Information Systems, and Test Equipment	○ Document in the asset inventory ○ Document in the SSP. ○ Show these assets are managed using the contractor's risk-based security policies, procedures, and practices. ○ Document in the network diagram of the CMMC Assessment Scope.	○ Review the SSP. ○ Do not assess against other CMMC security requirements.
○ Assets that are not in the Level 2 CMMC Assessment Scope			
Out-of-Scope Assets	○ Assets that cannot process, store, or transmit CUI; and do not provide security protections for CUI Assets ○ Assets that are physically or logically separated from CUI assets ○ Assets that fall into any in-scope asset category cannot be considered an Out-of-Scope Asset	○ Prepare to justify the inability of an Out-of-Scope Asset to store, process, or transmit CUI	○ None.

(2) If the OSA utilizes an External Service Provider (ESP), other than a Cloud Service Provider (CSP), the ESP must have a CMMC Level 2 Final Certification Assessment. If the ESP is internal to the OSA, the security requirements implemented by the ESP should be listed in the OSA's SSP to show connection to its in-scope environment. In the CMMC Program,

CUI or Security Protection Data (*e.g.*, log data, configuration data), must be processed, stored, or transmitted on the ESP assets to be considered an ESP. If using a CSP for Level 2 Self-Assessment, see § 170.16(c)(2). If using a CSP for Level 2 Certification Assessment, see § 170.17(c)(5).

(d) *CMMC Level 3 scoping.* Prior to performing a Level 3 CMMC assessment,

the CMMC Assessment Scope must be specified.

(1) The CMMC Assessment Scope for Level 3 is based on the specification of asset categories and their respective requirements as set forth in table 2 to this paragraph. Additional information is available in the guidance document listed in paragraph (g) of appendix A to this part.

TABLE 2 TO § 170.19(d)(1)—CMMC LEVEL 3 ASSET CATEGORIES AND ASSOCIATED REQUIREMENTS

Asset category	Asset description	OSC requirements	CMMC assessment requirements
○ Assets that are in the Level 3 CMMC Assessment Scope			
Controlled Unclassified Information (CUI) Assets.	○ Assets that process, store, or transmit CUI ○ Assets that can, but are not intended to, process, store, or transmit CUI (defined as Contractor Risk Managed Assets in Table 2 to paragraph (c)(1) of this section CMMC Scoping).	○ Document in the asset inventory ○ Document in the System Security Plan (SSP). ○ Document in the network diagram of the CMMC Assessment Scope. ○ Prepare to be assessed against CMMC security requirements.	○ Assess against all CMMC security requirements.

TABLE 2 TO § 170.19(d)(1)—CMMC LEVEL 3 ASSET CATEGORIES AND ASSOCIATED REQUIREMENTS—Continued

Asset category	Asset description	OSC requirements	CMMC assessment requirements
Security Protection Assets.	Assets that provide security functions or capabilities to the OSC's CMMC Assessment Scope, irrespective of whether or not these assets process, store, or transmit CUI.	- Document in the asset inventory - Document in the System Security Plan (SSP). - Document in the network diagram of the CMMC Assessment Scope. - Prepare to be assessed against CMMC security requirements.	Assess against all CMMC security requirements.
Specialized Assets	Assets that can process, store, or transmit CUI but are unable to be fully secured, including: Internet of Things (IoT) devices, Industrial Internet of Things (IIoT) devices, Operational Technology (OT), Government Furnished Equipment (GFE), Restricted Information Systems, and Test Equipment.	- Document in the asset inventory - Document in the System Security Plan (SSP). - Document in the network diagram of the CMMC Assessment Scope. - Prepare to be assessed against CMMC security requirements.	- Assess against all CMMC security requirements. - Intermediary devices are permitted to provide the capability for the specialized asset to meet one or more CMMC security requirements.
○ Assets that are not in the Level 3 CMMC Assessment Scope			
Out-of-Scope Assets	- Assets that cannot process, store, or transmit CUI; and do not provide security protections for CUI Assets. - Assets that are physically or logically separated from CUI assets. - Assets that fall into any in-scope asset category cannot be considered an Out-of-Scope Asset.	Prepare to justify the inability of an Out-of-Scope Asset to store, process, or transmit CUI.	None.

(2) If the organization seeking CMMC Level 3 Certification Assessment utilizes an ESP, other than a CSP, the ESP must also have a CMMC Level 3 Final Certification Assessment. If the ESP is internal to the OSC, the security requirements implemented by the ESP should be listed in the OSC's SSP to show connection to its in-scope environment. If using a CSP, see § 170.18(c)(5). In the CMMC Program, CUI or Security Protection Data (e.g., log data, configuration data), must be processed, stored, or transmitted on the ESP assets to be considered an ESP.

(e) *Relationship between Level 2 and Level 3 CMMC Assessment Scope.* The Level 3 CMMC Assessment Scope must be equal to or a subset of the Level 2 CMMC Assessment Scope in accordance with § 170.18(a), e.g., a Level 3 data enclave with greater restrictions and protections within a Level 2 data enclave. Any Level 2 POA&M items must be closed prior to the initiation of the CMMC Level 3 Certification Assessment. DCMA DIBCAC may check any Level 2 security requirement of any in-scope asset, and if they determine a requirement is NOT MET, DCMA DIBCAC may allow for remediation or may immediately terminate the Level 3 Assessment. For further information or to contact DCMA DIBCAC regarding CMMC, please refer to <https://www.dcmamil/DIBCAC/> or email dcmamil_dibcac_cmmc@mail.mil.

§ 170.20 Standards acceptance.

(a) *NIST SP 800-171 Rev 2 DoD assessments.* In order to avoid duplication of efforts, thereby reducing

the aggregate cost to industry and the Department, OSCs that have completed a DCMA DIBCAC High Assessment aligned with CMMC Level 2 Scoping will be eligible for CMMC Level 2 Final Certification Assessment under the following conditions:

(1) *DCMA DIBCAC High Assessment.* An OSC that achieved a perfect score with no open POA&M from a DCMA DIBCAC High Assessment conducted prior to the effective date of this rule, is eligible for a CMMC Level 2 Final Certification Assessment with a validity period of three (3) years from the date of the original DCMA DIBCAC High Assessment. Eligible DCMA DIBCAC High Assessments include ones conducted with Joint Surveillance in accordance with the DCMA Manual 2302-01 Surveillance. The scope of the CMMC Level 2 Final Certification Assessment is identical to the scope of the DCMA DIBCAC High Assessment. In accordance with § 170.17, the OSC must also submit an affirmation in SPRS and annually thereafter to achieve contractual eligibility.

(2) [Reserved]

(b) [Reserved]

§ 170.21 Plan of Action and Milestones requirements.

(a) *POA&M.* An OSA shall maintain a POA&M, as applicable, as part of operations under the security requirement for Risk Assessments and Continuous Monitoring (CA.L2-3.12.2) for CMMC Levels 2 and 3 in accordance with § 170.14(c)(3) and (4), respectively. For purposes of conducting a CMMC assessment and satisfying the

contractual eligibility requirements for CMMC Level 1, 2, or 3, an OSA is only permitted to have a POA&M for select requirements scored as NOT MET during the CMMC assessment and only under the following conditions:

(1) *CMMC Level 1 Self-Assessment.* A POA&M is not permitted at any time for CMMC Level 1 Self-Assessments

(2) *CMMC Level 2 Self-Assessment and CMMC Level 2 Certification Assessment.* An OSA is only permitted to have a POA&M for CMMC Level 2 if all the following conditions are met:

(i) The assessment score divided by the total number of security requirements is greater than or equal to 0.8;

(ii) None of the security requirements included in the POA&M have a point value of greater than 1 as specified in the CMMC Scoring Methodology set forth in § 170.24, except SC.L2-3.13.11 CUI Encryption may be included on a POA&M if it has a value of 1 or 3; and

(iii) None of the following security requirements are included in the POA&M:

(A) AC.L2-3.1.20 External Connections (CUI Data).

(B) AC.L2-3.1.22 Control Public Information (CUI Data).

(C) PE.L2-3.10.3 Escort Visitors (CUI Data).

(D) PE.L2-3.10.4 Physical Access Logs (CUI Data).

(E) PE.L2-3.10.5 Manage Physical Access (CUI Data).

(3) *CMMC Level 3 Certification Assessment.* An OSC is only permitted to have a POA&M for CMMC Level 3 if all the following conditions are met:

(i) The assessment score divided by the total number of CMMC Level 3 security requirements is greater than or equal to 0.8; and

(ii) The POA&M does not include any of following security requirements:

(A) IR.L3–3.6.1e Security Operations Center.

(B) IR.L3–3.6.2e Cyber Incident Response Team.

(C) RA.L3–3.11.1e Threat-Informed Risk Assessment.

(D) RA.L3–3.11.6e Supply Chain Risk Response.

(E) RA.L3–3.11.7e Supply Chain Risk Plan.

(F) RA.L3–3.11.4e Security Solution Rationale.

(G) SI.L3–3.14.3e Specialized Asset Security.

(b) *POA&M Closeout assessment.* The closing of a POA&M must be confirmed by a POA&M Closeout assessment within 180-days of the initial assessment. A POA&M Closeout assessment is a CMMC assessment that assesses only the NOT MET requirements that were identified with POA&M in the initial assessment.

(1) *CMMC Level 2 Self-Assessment.* For a CMMC Level 2 Self-Assessment, the POA&M Closeout assessment shall be performed by the OSA in the same manner as the initial self-assessment.

(2) *CMMC Level 2 Certification Assessment.* For CMMC Level 2 Certification Assessment, the POA&M Closeout assessment must be performed by an authorized or accredited C3PAO.

(3) *CMMC Level 3 Certification Assessment.* For CMMC Level 3 Certification Assessment, DCMA DIBCAC will perform the POA&M Closeout Assessment of the CMMC Level 3 security requirements.

§ 170.22 Affirmation.

(a) *General.* The OSA must affirm continuing compliance with the appropriate level CMMC Self-Assessment or CMMC Certification Assessment. The affirmation shall be submitted in accordance with the following requirements:

(1) *Affirming official.* All CMMC affirmations shall be submitted by the OSA senior official who is responsible for ensuring OSA compliance with CMMC Program requirements.

(2) *Affirmation content.* Each CMMC affirmation shall include the following information:

(i) Name, title, and contact information for the affirming official; and

(ii) Affirmation statement attesting that the OSA has implemented and will maintain implementation of all applicable CMMC security requirements

for all information systems within the relevant CMMC Assessment Scope at the applicable CMMC Level.

(3) *Affirmation submission.* The affirming official shall submit a CMMC affirmation in the following instances:

(i) Upon completion of the assessment (conditional or final);

(ii) Annually thereafter; and

(iii) Following a POA&M closeout assessment, as applicable.

(b) *Submission procedures.* All affirmations shall be completed in SPRS. The Department will verify submission of the affirmation in SPRS to ensure compliance with CMMC solicitation or contract requirements.

(1) *CMMC Level 1 Self-Assessment.* At the completion of a self-assessment and annually thereafter, the affirming official shall submit a CMMC affirmation attesting to continuing compliance with all CMMC Level 1 security requirements.

(2) *CMMC Level 2 Self-Assessment.* At the completion of a self-assessment and annually thereafter, the affirming official shall submit a CMMC affirmation attesting to continuing compliance with all CMMC Level 2 security requirements. An affirmation shall also be submitted at the completion of a POA&M Closeout assessment.

(3) *CMMC Level 2 Certification Assessment.* At the completion of a C3PAO assessment and annually thereafter, the affirming official shall submit a CMMC affirmation attesting to continuing compliance with all CMMC Level 2 security requirements. An affirmation shall also be submitted at the completion of a POA&M Closeout assessment.

(4) *CMMC Level 3 Certification Assessment.* At the completion of a DCMA DIBCAC assessment and annually thereafter, the affirming official shall submit a CMMC affirmation attesting to continuing compliance with all CMMC Level 3 security requirements. This requirement is in addition to the ongoing requirement for Level 2 affirmation. An affirmation shall also be submitted at the completion of a POA&M Closeout assessment.

§ 170.23 Application to subcontractors.

(a) *Procedures.* CMMC Level requirements apply to prime contractors and subcontractors throughout the supply chain at all tiers that will process, store, or transmit FCI or CUI on contractor information systems in the performance of the contract or subcontract. Prime contractors shall comply and shall require subcontractor compliance throughout the supply

chain at all tiers with the applicable CMMC level for each subcontract as follows:

(1) If a subcontractor will only process, store, or transmit FCI (and not CUI) in performance of the contract, then CMMC Level 1 Self-Assessment is required for the subcontractor.

(2) If a subcontractor will process, store, or transmit CUI in performance of the subcontract, CMMC Level 2 Self-Assessment is the minimum requirement for the subcontractor.

(3) If a subcontractor will process, store, or transmit CUI in performance of the subcontract and the Prime contractor has a requirement of Level 2 Certification Assessment, then CMMC Level 2 Certification Assessment is the minimum requirement for the subcontractor.

(4) If a subcontractor will process, store, or transmit CUI in performance of the subcontract and the Prime contractor has a requirement of Level 3 Certification Assessment, then CMMC Level 2 Certification Assessment is the minimum requirement for the subcontractor.

(b) [Reserved].

§ 170.24 CMMC Scoring Methodology.

(a) *General.* This scoring methodology is designed to provide a measurement of an OSA's implementation status of the NIST SP 800–171 Rev 2 security requirements (incorporated by reference elsewhere in this part, see § 170.2) and the specified NIST SP 800–172 security requirements (incorporated by reference elsewhere in this part, see § 170.2). The CMMC Scoring Methodology is designed to credit partial implementation only in limited cases (e.g., multi-factor authentication, CMMC Level 2 security requirement IA.L2–3.5.3, a Derived Security Requirement).

(b) *Assessment findings.* Each security requirement assessed under the CMMC Scoring Methodology must result in one of three possible assessment findings, as follows:

(1) *MET.* All applicable objectives for the security requirement are satisfied based on evidence. All evidence must be in final form and not draft. Unacceptable forms of evidence include working papers, drafts, and unofficial or unapproved policies.

(2) *NOT MET.* One or more applicable objectives for the security requirement is not satisfied. During an assessment, for each security requirement objective marked NOT MET, the assessor will document why the evidence does not conform.

(3) *NOT APPLICABLE (N/A).* A security requirement and/or objective does not apply at the time of the CMMC

assessment. For example, CMMC security requirement SC.L1–3.13.5 “Public-Access System Separation” might be N/A if there are no publicly accessible systems within the CMMC Assessment Scope. During an assessment, an assessment objective assessed as N/A is equivalent to the same assessment objective being assessed as MET.

(c) *Scoring.* At each CMMC Level, security requirements are scored as follows:

(1) *CMMC Level 1.* All CMMC Level 1 security requirements must be fully implemented to be considered MET. No POA&M is permitted for CMMC Level 1, and self-assessment results are scored as MET or NOT MET in their entirety; therefore, no score is calculated, and no scoring methodology is needed.

(2) *CMMC Level 2 Scoring Methodology.* The maximum score achievable for a CMMC Level 2 assessment is equal to the total number of CMMC Level 2 security requirements. If all CMMC Level 2 security requirement objectives are MET, OSAs are awarded the maximum score. For each requirement objective NOT MET, the associated value of the security requirement is subtracted from the maximum score, which may result in a negative score.

(i) *Procedures (A) Scoring methodology for CMMC Level 2 assessment is based on all CMMC Level 2 security requirement objectives, including those NOT MET.*

(B) In the CMMC Level 2 Scoring Methodology, each security requirement has a value (e.g., 1, 3 or 5).

(1) For NIST SP 800–171 Rev 2 Basic and Derived Security Requirements that, if not implemented, could lead to significant exploitation of the network, or exfiltration of CUI, 5 points are subtracted from the maximum score. The Basic and Derived security requirements with a value of 5 points include:

(i) Basic Security Requirements: AC.L2–3.1.1, AC.L2–3.1.2, AT.L2–3.2.1, AT.L2–3.2.2, AU.L2–3.3.1, CM.L2–3.4.1, CM.L2–3.4.2, IA.L2–3.5.1, IA.L2–3.5.2, IR.L2–3.6.1, IR.L2–3.6.2, MA.L2–3.7.2, MP.L2–3.8.3, PS.L2–3.9.2, PE.L2–3.10.1, PE.L2–3.10.2, CA.L2–3.12.1, CA.L2–3.12.3, SC.L2–3.13.1, SC.L2–3.13.2,

SI.L2–3.14.1, SI.L2–3.14.2, and SI.L2–3.14.3.

(ii) Derived Security Requirements: AC.L2–3.1.12, AC.L2–3.1.13, AC.L2–3.1.16, AC.L2–3.1.17, AC.L2–3.1.18, AU.L2–3.3.5, CM.L2–3.4.5, CM.L2–3.4.6, CM.L2–3.4.7, CM.L2–3.4.8, IA.L2–3.5.10, MA.L2–3.7.5, MP.L2–3.8.7, RA.L2–3.11.2, SC.L2–3.13.5, SC.L2–3.13.6, SC.L2–3.13.15, SI.L2–3.14.4, and SI.L2–3.14.6.

(2) For Basic and Derived Security Requirements that, if not implemented, have a specific and confined effect on the security of the network and its data, 3 points are subtracted from the maximum score. The Basic and Derived security requirements with a value of 3 points include:

(i) Basic Security Requirements: AU.L2–3.3.2, MA.L2–3.7.1, MP.L2–3.8.1, MP.L2–3.8.2, PS.L2–3.9.1, RA.L2–3.11.1, and CA.L2–3.12.2.

(ii) Derived Security Requirements: AC.L2–3.1.5, AC.L2–3.1.19, MA.L2–3.7.4, MP.L2–3.8.8, SC.L2–3.13.8, SI.L2–3.14.5, and SI.L2–3.14.7.

(3) All remaining Derived Security Requirements, other than the exceptions noted, if not implemented, have a limited or indirect effect on the security of the network and its data. For these, 1 point is subtracted from the maximum score.

(4) Two Derived Security Requirements can be partially effective even if not completely or properly implemented, and the points deducted may be adjusted depending on how the security requirement is implemented.

(i) Multi-factor authentication (MFA) (CMMC Level 2 security requirement IA.L2–3.5.3) is typically implemented first for remote and privileged users (since these users are both limited in number and more critical) and then for the general user, so three (3) points are subtracted from the maximum score if MFA is implemented only for remote and privileged users. Five (5) points are subtracted from the maximum score if MFA is not implemented for any users.

(ii) FIPS-validated encryption (CMMC Level 2 security requirement SC.L2–3.13.11) is required to protect the confidentiality of CUI. If encryption is employed, but is not FIPS-validated, three (3) points are subtracted from the maximum score; if encryption is not

employed; five (5) points are subtracted from the maximum score.

(5) Future revisions of NIST SP 800–171 Rev 2 may add, delete, or substantively revise security requirements. When this occurs, a value is assigned by the Department to any new or modified security requirements in accordance with the scoring methodology in accordance with paragraph (c) of this section.

(6) OSAs must have a system security plan (CMMC Level 2 security requirement CA.L2–3.12.4) in place to describe each information system within the CMMC Assessment Scope, and a POA&M (CMMC Level 2 security requirement CA.L2–3.12.2) in place for each NOT MET security requirement in accordance with § 170.21.

(7) A POA&M addressing NOT MET security requirements is not a substitute for a completed requirement. Security requirements not implemented, whether described in a POA&M or not, is assessed as ‘NOT MET.’

(8) Specialized Assets (referred to as “enduring exceptions” in NIST SP 800–171 Rev 2) must be evaluated for their asset category per the CMMC scoping guidance for the level in question and handled accordingly (insert references L1–3).

(9) If an OSC previously received a favorable adjudication from the DoD CIO for an alternative security measure (in accordance with DFARS provision 252.204–7008 (48 CFR 252.204–7008) or DFARS clause 252.204–7012 (48 CFR 252.204–7012)), the DoD CIO adjudication must be included in the system security plan to receive consideration during an assessment. Implemented security measures adjudicated by the DoD CIO as equally effective is assessed as MET if there have been no changes in the environment.

(ii) *CMMC Level 2 Scoring Table.* CMMC Level 2 scoring has been assigned based on the methodology set forth in table 1 to this paragraph. Future revisions of NIST SP 800–171 Rev 2 may add, delete, or substantively revise security requirements. If this occurs, a value will be assigned by the Department to any new or modified security requirements in accordance with the table 1 scoring methodology:

TABLE 1 TO § 170.24(c)(2)(ii)—CMMC LEVEL 2 SCORING TABLE

CMMC Level 2 requirement categories	Point value subtracted from maximum score
<i>Basic Security Requirements:</i>	
If not implemented, could lead to significant exploitation of the network, or exfiltration of CUI	5
If not implemented, has specific and confined effect on the security of the network and its data	3

TABLE 1 TO § 170.24(c)(2)(ii)—CMMC LEVEL 2 SCORING TABLE—Continued

CMMC Level 2 requirement categories	Point value subtracted from maximum score
<i>Derived Security Requirements:</i>	
If not implemented, could lead to significant exploitation of the network, or exfiltration of CUI	5
If not completely or properly implemented, could be partially effective and points adjusted depending on how the security requirement is implemented:	
—Partially effective implementation—3 points.	
—Non-effective (not implemented at all)—5 points.	3 or 5
If not implemented, has specific and confined effect on the security of the network and its data	3
If not implemented, has a limited or indirect effect on the security of the network and its data	1

(3) *CMMC Level 3 Assessment scoring methodology.* CMMC Level 3 scoring does not utilize varying values like the scoring for CMMC Level 2. All CMMC Level 3 security requirements use a value of “1” point for each security requirement. As a result, the maximum score achievable for a CMMC Level 3 is equivalent to the total number of CMMC Level 3 security requirements. The maximum score is reduced by one (1) point for each security requirement NOT MET. The CMMC Level 3 scoring methodology reflects the fact that all CMMC Level 2 security requirements must already be MET (for the Level 3 CMMC Assessment Scope). A maximum CMMC Level 2 assessment score is required to be eligible for conduct of a

CMMC Level 3 Certification Assessment. The CMMC Level 3 assessment score is equal to the number of CMMC Level 3 security requirements that are assessed as MET.

Appendix A to Part 170—Guidance.

Guidance Documents include:

- (a) “CMMC Model Overview” available at <https://DoDcio.defense.gov/CMMC/>.
- (b) “CMMC Assessment Guide—Level 1” available at <https://DoDcio.defense.gov/CMMC/>.
- (c) “CMMC Assessment Guide—Level 2” available at <https://DoDcio.defense.gov/CMMC/>.
- (d) “CMMC Assessment Guide—Level 3” available at <https://DoDcio.defense.gov/CMMC/>.

(e) “CMMC Scoping Guide—Level 1” available at <https://DoDcio.defense.gov/CMMC/>.

(f) “CMMC Scoping Guide—Level 2” available at <https://DoDcio.defense.gov/CMMC/>.

(g) “CMMC Scoping Guide—Level 3” available at <https://DoDcio.defense.gov/CMMC/>.

(h) “CMMC Hashing Guide” available at <https://DoDcio.defense.gov/CMMC/>.

See these guidance documents in docket number DoD–2023–OS–0096 for specific details and to provide comments on the guidance.

Patricia L. Toppings,
OSD Federal Register Liaison Officer,
Department of Defense.

[FR Doc. 2023–27280 Filed 12–22–23; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE**Office of the Secretary****[Docket ID: DoD–2023–OS–0096]****Cybersecurity Maturity Model Certification (CMMC) Program Guidance**

AGENCY: Office of the Department of Defense Chief Information Officer (CIO), Department of Defense (DoD).

ACTION: Notice of availability: CMMC guidance.

SUMMARY: The Department of Defense announces the availability of eight guidance documents for the CMMC Program. These documents provide additional guidance for the CMMC model, assessments, scoring, and hashing.

DATES: Comments must be received by February 26, 2024.

ADDRESSES: You may use the following methods to submit comments on these guidance documents, identified by agency name, docket number DoD–2023–OS–0096, and title.

Comment Submission Methods include:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at <https://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Diane Knight, Office of the DoD CIO, 202–770–9100 or osd.mc-alex.dod-cio.mbx.cmmc-32cfr-rulemaking@mail.mil.

SUPPLEMENTARY INFORMATION:**CMMC Model Overview**

DoD–CIO–00001 (ZRIN 0790–ZA17)

This document focuses on the CMMC Model as set forth in 32 CFR 170.14 of the CMMC Program proposed rule (See docket DoD–2023–OS–0063 on *Regulations.gov*). The model incorporates the security requirements

from: (1) FAR 52.204–21, *Basic Safeguarding of Covered Contractor Information Systems*, (2) NIST SP 800–171, *Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations*, and (3) a selected set of the requirements from NIST SP 800–172, *Enhanced Security Requirements for Protecting Controlled Unclassified Information: A Supplement to NIST Special Publication 800–171*. The CMMC Program is designed to provide increased assurance to the DoD that defense contractors and subcontractors are compliant with information protection requirements for Federal Contract Information (FCI) and Controlled Unclassified Information (CUI) and are protecting such information at a level commensurate with risk from cybersecurity threats, including Advanced Persistent Threats (APTs).

CMMC Assessment Guide—Level 1

DoD–CIO–00002 (ZRIN 0790–ZA18)

This document provides guidance in the preparation for and execution of a Level 1 Self-Assessment under the CMMC Program as set forth in 32 CFR 170.15. CMMC Level 1 focuses on the protection of FCI, which is defined in 32 CFR 170.4 and 48 CFR 4.1901 as:

Federal contract information means information, not intended for public release, that is provided by or generated for the Government under a contract to develop or deliver a product or service to the Government, but not including information provided by the Government to the public (such as on public websites) or simple transactional information, such as necessary to process payments.

CMMC Level 1 is comprised of the 15 basic safeguarding requirements specified in Federal Acquisition Regulation (FAR) Clause 52.204–21.

CMMC Assessment Guide—Level 2

DoD–CIO–00003 (ZRIN 0790–ZA19)

This document provides guidance in the preparation for and execution of a Level 2 Self-Assessment or Level 2 Certification Assessment under the CMMC Program as set forth 32 CFR 170.16 and 170.17 respectively. An *Assessment* as defined in 32 CFR 170.4 means:

The testing or evaluation of security controls to determine the extent to which the controls are implemented correctly, operating as intended, and producing the desired outcome with respect to meeting the security requirements for an information system or organization as defined in 32 CFR 170.15 to 32 CFR 170.18. For CMMC Level 2 there are two types of assessments:

- *A Self-Assessment is the term for the activity performed by an entity to evaluate its*

own CMMC Level, as applied to Level 1 and some Level 2.

- *A CMMC Level 2 Certification Assessment is the term for the activity performed by a Certified Third-Party Assessment Organization (C3PAO) to evaluate the CMMC Level of an OSC.*

32 CFR 170.16(b) describes contract or subcontract eligibility for any contract with a CMMC Level 2 Self-Assessment requirement, and 32 CFR 170.17(b) describes contract or subcontract eligibility for any contract with a CMMC Level 2 Certification Assessment requirement. Level 2 Certification Assessment requires the OSA achieve either a Level 2 Conditional Certification Assessment or a Level 2 Final Certification Assessment, as described in 32 CFR 170.4, obtained through an assessment by an accredited Certified Third-Party Assessment Organization (C3PAO).

CMMC Assessment Guide—Level 3

DoD–CIO–00004 (ZRIN 0790–ZA20)

This document provides guidance in the preparation for and execution of a Level 3 Certification Assessment under the CMMC Program as set forth in 32 CFR 170.18. Certification at each CMMC level occurs independently. An *Assessment* as defined in 32 CFR 170.4 means:

The testing or evaluation of security controls to determine the extent to which the controls are implemented correctly, operating as intended, and producing the desired outcome with respect to meeting the security requirements for an information system, or organization as defined in 32 CFR 170.15 to 32 CFR 170.18.

A CMMC Level 3 Certification Assessment as defined in 32 CFR 170.4 is the term for the activity performed by the Department of Defense to evaluate the CMMC Level of an OSC. For CMMC Level 3, assessments are performed exclusively by the DoD.

An OSC seeking a CMMC Level 3 Certification Assessment must have first received a CMMC Level 2 Final Certification Assessment, as set forth in 32 CFR 170.18, for all applicable information systems within the CMMC Assessment Scope, and the OSC must implement the Level 3 requirements specified in 32 CFR 170.14(c)(4). This is followed by the CMMC Level 3 assessment conducted by the DoD.

OSCs may also use this guide to perform CMMC Level 3 self-assessment (for example, in preparation for an annual affirmation); however, they are not eligible to submit results from a self-assessment in support of a CMMC Level 3 Certification Assessment. Only the results from an assessment by the DoD are considered for award of a CMMC

Level 3 Certification Assessment. Level 3 reporting and affirmation requirements can be found in 32 CFR 170.18 and 32 CFR 170.22.

CMMC Scoping Guide—Level 1

DoD-CIO-00005 (ZRIN 0790-ZA21)

This document provides scoping guidance for Level 1 of CMMC as set forth in 32 CFR 170.19. Prior to a Level 1 CMMC Self-Assessment the OSA must specify the CMMC Assessment Scope. The CMMC Assessment Scope defines which assets within the OSA's environment will be assessed and the details of the self-assessment.

This guide is intended for OSAs that will be conducting a CMMC Level 1 self-assessment and the professionals or companies that will support them in those efforts.

CMMC Scoping Guide—Level 2

DoD-CIO-00006 (ZRIN 0790-ZA22)

This document provides scoping guidance for Level 2 of CMMC as set forth in 32 CFR 170.19. Prior to a Level 2 Self-Assessment or Level 2 Certification Assessment, the OSA must specify the CMMC Assessment Scope. The CMMC Assessment Scope defines which assets within the OSA's environment will be assessed and the details of the assessment.

This guide is intended for OSAs that will be conducting a CMMC Level 2

Self-Assessment in accordance with 32 CFR 170.16, OSCs that will be obtaining a CMMC Level 2 Certification Assessment in accordance with 32 CFR 170.17, and the professionals or companies that will support them in those efforts. OSCs are a subset of OSAs as all organizations will participate in an assessment, but self-assessment cannot result in certification.

CMMC Scoping Guide—Level 3

DoD-CIO-00007 (ZRIN 0790-ZA23)

This document provides scoping guidance for Level 3 of CMMC as set forth in 32 CFR 170.19. Prior to conducting a CMMC assessment, the Level 3 CMMC Assessment Scope must be defined as set forth in 32 CFR 170.19(d). The CMMC Assessment Scope defines which assets within the OSC's environment will be assessed and the details of the assessment.

When seeking a Level 3 Certification, the OSC must have a CMMC Level 2 Final Certification Assessment for the same scope as the Level 3 assessment. Any Level 2 Plan of Action and Milestones (POA&M as set forth in 32 CFR 170.4) items must be closed prior to the initiation of the CMMC Level 3 assessment. The CMMC Level 3 CMMC Assessment Scope may be a subset of the Level 2 CMMC Assessment Scope (*e.g.*, a Level 3 data enclave with greater restrictions and protections within the Level 2 data enclave).

This guide is intended for OSCs that will be obtaining a CMMC Level 3 assessment and the professionals or companies that will support them in those efforts.

CMMC Hashing Guide

DoD-CIO-00008 (ZRIN 0790-ZA24)

This guide assumes that the reader has a basic understanding of command line tools and scripting. During the performance of a CMMC assessment, the assessment team will collect objective evidence using a combination of three assessment methods:

- examination of artifacts,
- affirmations through interviews, and
- observations of actions.

Because these OSA artifacts may be proprietary, the assessment team will not take OSA artifacts offsite at the conclusion of the assessment. For the protection of all stakeholders, the OSA must retain the artifacts. This guide describes how to provide a cryptographic reference (or hash) for each artifact used in the assessment as discussed in 32 CFR 170.17 and 170.18.

Patricia L. Toppings,

*OSD Federal Register Liaison Officer,
Department of Defense.*

[FR Doc. 2023-27281 Filed 12-22-23; 8:45 am]

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Part III

United States Sentencing Commission

Sentencing Guidelines for United States Courts; Notice

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice and request for public comment and hearing.

SUMMARY: The United States Sentencing Commission is considering promulgating amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth several issues for comment, some of which are set forth together with the proposed amendments, and one of which (regarding retroactive application of proposed amendments) is set forth in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES:

Written Public Comment. Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than February 22, 2024. Any public comment received after the close of the comment period may not be considered.

Public Hearing. The Commission may hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding any public hearing that may be scheduled, including requirements for testifying and providing written testimony, as well as the date, time, location, and scope of the hearing, will be provided by the Commission on its website at www.ussc.gov.

ADDRESSES: There are two methods for submitting public comment.

Electronic Submission of Comments. Comments may be submitted electronically via the Commission's Public Comment Submission Portal at <https://comment.ussc.gov>. Follow the online instructions for submitting comments.

Submission of Comments by Mail. Comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle NE, Suite 2-500, Washington, DC 20002-8002, Attention: Public Affairs—Proposed Amendments.

FOR FURTHER INFORMATION CONTACT:

Jennifer Dukes, Senior Public Affairs Specialist, (202) 502-4597.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

Publication of a proposed amendment requires the affirmative vote of at least three voting members of the Commission and is deemed to be a request for public comment on the proposed amendment. See USSC Rules of Practice and Procedure 2.2, 4.4. In contrast, the affirmative vote of at least four voting members is required to promulgate an amendment and submit it to Congress. See *id.* 2.2; 28 U.S.C. 994(p).

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline, policy statement, or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

In summary, the proposed amendments and issues for comment set forth in this notice are as follows:

(1) A proposed amendment to § 2B1.1 (Theft, Property Destruction, and Fraud) that would create Notes to the loss table in § 2B1.1(b)(1) and move some of the general rules relating to loss from the commentary to the guideline itself as part of the Notes, as well as make corresponding changes to the Commentary of certain guidelines that refer to the loss rules in § 2B1.1, and a related issue for comment.

(2) A two-part proposed amendment relating to the provisions of § 4A1.2 (Definitions and Instructions for Computing Criminal History) that cover criminal history calculations for offenses committed prior to age eighteen and on § 5H1.1 (Age (Policy Statement)), including (A) three options for amending § 4A1.2 to change how sentences for offenses committed prior to age eighteen are considered in the calculation of a defendant's criminal history score, and related issues for comment; and (B) an amendment to § 5H1.1 to address unique sentencing considerations relating to youthful individuals, and related issues for comment.

(3) A proposed amendment to the *Guidelines Manual* that includes three options to address the use of acquitted conduct for purposes of determining a sentence, and related issues for comment.

(4) A two-part proposed amendment addressing certain circuit conflicts involving § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), including (A) two options for amending § 2K2.1(b)(4)(B)(i) to address a circuit conflict concerning whether a serial number must be illegible in order to apply the 4-level increase for a firearm that “had an altered or obliterated serial number,” and a related issue for comment; and (B) amendments to the Commentary to § 2K2.4 to address a circuit conflict concerning whether subsection (c) of § 3D1.2 (Groups of Closely Related Counts) permits grouping of a firearms count under 18 U.S.C. 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. 924(c) based on the drug trafficking count, and a related issue for comment.

(5) A multi-part proposed amendment in response to recently enacted legislation and miscellaneous guideline issues, including (A) amendments to Appendix A (Statutory Index) and the Commentary to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources) in response to the Safeguard Tribal Objects of Patrimony (“STOP”) Act of 2021, Public Law 117-258 (2022), and a related issue for comment; (B) amendments to Appendix A and § 2M5.1 (Evasion of

Export Controls; Financial Transactions with Countries Supporting International Terrorism) in response to the Export Control Reform Act of 2018, enacted as part of the John McCain National Defense Authorization Act for Fiscal Year 2019, Public Law 115–232 (2018), and to concerns raised by the Department of Justice and the Disruptive Technology Strike Force (an interagency collaboration between the Department of Justice’s National Security Division and the Department of Commerce’s Bureau of Industry and Security), and related issues for comment; (C) an amendment to subsection (b)(2)(B) of § 2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts) to reflect the enhanced penalty applicable to offenses under 31 U.S.C. 5322 and 5336; (D) amendments to Appendix A and the Commentary to § 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors) to replace references to 15 U.S.C. 3(b) with references to 15 U.S.C. 3(a); (E) two options for amending § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to address a miscellaneous issue regarding the application of the base offense levels at subsections (a)(1)–(a)(4); and (F) two options for amending § 4C1.1 (Adjustment for Certain Zero-Point Offenders) to address concerns raised by the Department of Justice relating to the scope of the definition of “sex offense” in subsection (b)(2).

(6) A two-part proposed amendment to make technical and other non-substantive changes to the *Guidelines Manual*, including (A) technical and conforming changes relating to § 4C1.1 (Adjustment for Certain Zero-Point Offenders); and (B) technical and clerical changes to several guidelines and their corresponding commentaries to add missing headings to application notes; provide stylistic consistency in how subdivisions are designated; provide consistency in the use of capitalization; correct certain references and typographical errors; and update an example in a Commentary that references 18 U.S.C. 924(c), which was amended by the First Step Act of 2018, Public Law 115–391 (Dec. 21, 2018).

(7) A two-part proposed amendment to the *Guidelines Manual*, including (A) request for public comment on whether any changes should be made to the

Guidelines Manual relating to the three-step process set forth in § 1B1.1 (Application Instructions) and the use of departures and policy statements relating to specific personal characteristics; and (B) amendments that would restructure the *Guidelines Manual* to simplify both (1) the current three-step process utilized in determining a sentence that is “sufficient, but not greater than necessary,” and (2) existing guidance in the *Guidelines Manual* regarding a court’s consideration of the individual circumstances of the defendant as well as certain offense characteristics.

In addition, the Commission requests public comment regarding whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. 994(u), any proposed amendment published in this notice should be included in subsection (d) of § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants. The Commission lists in § 1B1.10(d) the specific guideline amendments that the court may apply retroactively under 18 U.S.C. 3582(c)(2). The Background Commentary to § 1B1.10 lists the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under § 1B1.10(b) as among the factors the Commission considers in selecting the amendments included in § 1B1.10(d). To the extent practicable, public comment should address each of these factors.

The text of the proposed amendments and related issues for comment are set forth below. Additional information pertaining to the proposed amendments and issues for comment described in this notice may be accessed through the Commission’s website at www.ussc.gov. In addition, as required by 5 U.S.C. 553(b)(4), plain-language summaries of the proposed amendments are available at <https://www.ussc.gov/guidelines/amendments/proposed-2024-amendments-federal-sentencing-guidelines>.

Authority: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure 2.2, 4.3, 4.4.

Carlton W. Reeves,
Chair.

Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary

1. Rule for Calculating Loss

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission’s continued study of the *Guidelines Manual* to address case law concerning the validity and enforceability of guideline commentary. See U.S. Sent’g Comm’n, “Notice of Final Priorities,” 88 FR 60536 (Sept. 1, 2023).

In *Stinson v. United States*, 508 U.S. 36, 38 (1993), the Supreme Court held that commentary “that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” In recent years, however, the deference afforded to various guideline commentary provisions has been debated, particularly since *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), which limited deference to agency interpretation of regulations to situations in which the regulation is “genuinely ambiguous.” Applying *Kisor*, the Third Circuit recently held that Application Note 3(A) of the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud) is not entitled to deference. *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022).

Section 2B1.1 includes a loss table that increases the offense level based on the amount of loss resulting from an offense. USSG § 2B1.1(b)(1). Application Note 3(A) of the Commentary to § 2B1.1 provides a general rule for courts to use to calculate loss for purposes of the loss table. USSG § 2B1.1, comment. (n.3(A)). Under the rule, “loss is the greater of actual loss or intended loss.” *Id.* The commentary then defines the terms “actual loss,” “intended loss,” “pecuniary harm,” and “reasonably foreseeable pecuniary harm.” USSG § 2B1.1, comment. (n.3(A)(i)–(iv)). The commentary also provides that “[t]he court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.” USSG § 2B1.1, comment. (n.3(B)).

In *Banks*, the Third Circuit held that “the term ‘loss’ is unambiguous in the context of § 2B1.1”—meaning “actual loss”—and that “[b]ecause the commentary expands the definition of ‘loss’ by explaining that generally ‘loss

is the greater of actual loss or intended loss,' we accord the commentary no weight." *Banks*, 55 F.4th at 253, 258. To date, the Third Circuit is the only appellate court to reach this conclusion. However, the loss calculations for defendants in this circuit are now computed differently than in circuits that continue to apply Application Note 3(A).

The Commission estimates that approximately one-fifth of individuals sentenced under § 2B1.1 in fiscal year 2022 were sentenced using intended loss. This estimate is based on the Commission's review of a 30 percent representative sample of the 3,811 individuals sentenced under § 2B1.1 in fiscal year 2022 with a known, non-zero loss amount. Intended loss was used for sentencing in 19.8 percent of cases in the sample. Using these findings to extrapolate to all § 2B1.1 cases with a loss amount, the Commission estimates that approximately 750 individuals were sentenced using intended loss in fiscal year 2022. Of those 750 individuals, approximately 50 were sentenced in the Third Circuit prior to the *Banks* decision.

This proposed amendment would address the decision from the Third Circuit regarding the validity and enforceability of Application Note 3(A) of the Commentary to § 2B1.1 to ensure consistent loss calculation across circuits.

The proposed amendment would create Notes to the loss table in § 2B1.1(b)(1) and move the general rule establishing loss as the greater of actual loss or intended loss from the commentary to the guideline itself as part of the Notes. The proposed amendment would also move the rule providing for the use of gain as an alternative measure of loss, as well as the definitions of "actual loss," "intended loss," "pecuniary harm," and "reasonably foreseeable pecuniary harm" from the commentary to the Notes. In addition, the proposed amendment would make corresponding changes to the Commentary to §§ 2B2.3 (Trespass), 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions), and 8A1.2 (Application Instructions—Organizations), which calculate loss by reference to the Commentary to § 2B1.1.

An issue for comment is also provided.

Proposed Amendment: Section 2B1.1(b)(1) is amended by inserting the following at the end:

"*Notes to Table:

(A) *Loss*.—Loss is the greater of actual loss or intended loss.

(B) *Gain*.—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.

(C) For purposes of this guideline—

(i) 'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) 'Intended loss' (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) 'Pecuniary harm' means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) 'Reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense."

The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 3—by striking subparagraphs (A) and (B) as follows:

"(A) *General Rule*.—Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) *Actual Loss*.—'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) *Intended Loss*.—'Intended loss' (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

(iii) *Pecuniary Harm*.—'Pecuniary harm' means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

(iv) *Reasonably Foreseeable Pecuniary Harm*.—For purposes of this guideline, 'reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have

known, was a potential result of the offense.

(v) *Rules of Construction in Certain Cases*.—In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(I) *Product Substitution Cases*.—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(II) *Procurement Fraud Cases*.—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(III) *Offenses Under 18 U.S.C. 1030*.—In the case of an offense under 18 U.S.C. 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.

(B) *Gain*.—The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined."

inserting the following new subparagraph (A):

"(A) *Rules of Construction in Certain Cases*.—In the cases described in clauses (i) through (iii), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:

(i) *Product Substitution Cases*.—In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of

retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.

(ii) *Procurement Fraud Cases.*—In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.

(iii) *Offenses Under 18 U.S.C. 1030.*—In the case of an offense under 18 U.S.C. 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.”;

and by redesignating subparagraphs (C), (D), (E), and (F) as subparagraphs (B), (C), (D), and (E), respectively.

The Commentary to § 2B2.3 captioned “Application Notes” is amended in Note 2 by striking “the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud)” and inserting “§ 2B1.1 (Theft, Property Destruction, and Fraud) and the Commentary to § 2B1.1”.

The Commentary to § 2C1.1 captioned “Application Notes” is amended in Note 3 by striking “Application Note 3 of the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud)” and inserting “§ 2B1.1 (Theft, Property Destruction, and Fraud) and Application Note 3 of the Commentary to § 2B1.1”.

The Commentary to § 8A1.2 captioned “Application Notes” is amended in Note 3 by striking “the Commentary to § 2B1.1 (Theft, Property Destruction, and Fraud)” and inserting “§ 2B1.1 (Theft, Property Destruction, and Fraud) and the Commentary to § 2B1.1”.

Issue for Comment:

1. As part of the Commission's priority to address case law concerning the validity and enforceability of guideline commentary, the proposed amendment would address the Third Circuit's decision regarding the deference to be given to Application Note 3(A) of the Commentary to § 2B1.1 (Theft, Property Destruction, and

Fraud). *See United States v. Banks*, 55 F.4th 246 (3d Cir. 2022). The Commission's current priorities also include the “[e]xamination of the *Guidelines Manual*, including exploration of ways to simplify the guidelines and possible consideration of amendments that might be appropriate.” *See* U.S. Sent'g Comm'n, “Notice of Final Priorities,” 88 FR 60536 (Sept. 1, 2023). As part of that simplification priority, the Commission is considering conducting a comprehensive examination of § 2B1.1 during an upcoming amendment cycle.

The Commission seeks comment on whether it should adopt this proposed amendment addressing Application Note 3(A) of the Commentary to § 2B1.1 during this amendment cycle, or whether it should defer making changes to § 2B1.1 and its commentary until a future amendment cycle that may include a comprehensive examination of § 2B1.1.

2. Youthful Individuals

Synopsis of Proposed Amendment: In September 2023, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2024, an examination of the treatment of youthful offenders and offenses involving youths under the *Guidelines Manual*, including possible consideration of amendments that might be appropriate. U.S. Sent'g Comm'n, “Notice of Final Priorities,” 88 FR 60536 (Sept. 1, 2023). As part of this priority, the Commission is examining two provisions related to youthful individuals: (1) subsection (d) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), which covers criminal history calculations for offenses committed prior to age eighteen; and (2) § 5H1.1 (Age (Policy Statement)), a departure provision related to age, including youth. Section 4A1.2(d) is unchanged from the original guideline enacted in 1987. Section 5H1.1 was last amended in 2010.

This proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both parts, as they are not mutually exclusive. Part A addresses the computation of criminal history points for offenses committed prior to age eighteen. Part B addresses the sentencing of youthful individuals.

Computing Criminal History for Offenses Committed Prior to Age Eighteen

Under Chapter Four, Part A (Criminal History), certain sentences for offenses committed prior to age eighteen are considered in the calculation of a

defendant's criminal history score. The guidelines distinguish between an “adult sentence” in which the defendant committed the offense before age eighteen and was convicted as an adult, and a “juvenile sentence” resulting from a juvenile adjudication. *See* USSG § 4A1.2(d).

The Commentary to § 4A1.2 (Definitions and Instructions for Computing Criminal History) provides that, to avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a “juvenile,” the rules set forth in § 4A1.2(d) apply to all offenses committed prior to age eighteen. *See* USSG § 4A1.2, comment. (n.7). The Commentary also states that “[a]ttempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records,” and thus only certain offenses committed prior to age eighteen are counted. *Id.*

Courts assign three criminal history points if a defendant was convicted as an adult for an offense committed before age eighteen and received a sentence of imprisonment exceeding one year and one month, if the sentence was imposed, or the defendant was incarcerated, within fifteen years of the commencement of the instant offense. *See* USSG § 4A1.2(d)(1), (e). Courts assign two criminal history points for “each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense.” USSG § 4A1.2(d)(2)(A). One criminal history point is added for “each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense not covered in (A).” USSG § 4A1.2(d)(2)(B).

Juvenile offenses are also addressed in two other places in § 4A1.2. First, § 4A1.2(c)(2) provides a list of certain offenses that are “never counted” for purposes of the criminal history score, including “juvenile status offenses and truancy.” Second, § 4A1.2(f) provides that diversionary dispositions resulting from a finding or admission of guilt, or a plea of nolo contendere, are counted even if a conviction is not formally entered, but “diversion from juvenile court is not counted.”

With this proposed amendment, the Commission seeks to strike the right balance between various considerations related to the sentencing of youthful individuals, including difficulties in obtaining supporting documentation for juvenile adjudications and in assessing “confinement,” recent brain development research, demographic

disparities, higher rearrest rates for younger individuals, and protection of the public.

Juvenile Proceedings in General

Juvenile adjudications involve some procedural safeguards akin to adult criminal proceedings (e.g., right to counsel, privilege against self-incrimination), but not all criminal constitutional protections apply. For example, in most states, juveniles are not entitled to a jury trial, although some states provide juveniles with a jury trial upon request. Additionally, “[i]n 2019, there were 24 states with statutes allowing delinquency adjudication hearings to be generally open to the public,” while “[i]n the remaining states and the District of Columbia the public is restricted from attending delinquency adjudication hearings,” with possible limited exceptions. Charles Puzzanchera et al., Nat’l Ctr. for Juv. Just., Youth and the Juvenile Justice System: 2022 National Report 93 (2022). Dispositions of confinement and residential placement may also differ in manner and purpose from adult sentences of incarceration. Residential placement facilities vary in their degree of security and security features, with some having a “secure prison-like environment” and others “a more open (even home-like) setting.” *Id.* at 91. Almost all states and the District of Columbia have statutes or case law providing that a juvenile adjudication shall not be deemed a criminal conviction or impose any civil disabilities that ordinarily result from an adult conviction, though many states permit the use of juvenile adjudications to enhance a subsequent sentence.

With respect to records of juvenile proceedings, practices vary by state. Many states allow for sealing or expungement, though few states seal or expunge such records automatically, instead requiring a motion. *See, e.g.,* Riya Saha Shah, et al., Juv. L. Ctr., A National Review of State Laws on Confidentiality, Sealing and Expungement 36–39 (2014). States often include various eligibility requirements for sealing or expungement, such as that (1) a certain period of time has elapsed since the case concluded or the juvenile completed any sentence of supervision, (2) the person has not been convicted of certain types of offenses, such as drug or sex offenses or offenses against persons, and/or (3) the individual has reached a certain age. *Id.* at 32–35.

The determination of whether a person under the age of eighteen may be tried as an adult varies by jurisdiction and often may be based on certain offense types or a finding that the

individual would not benefit from the juvenile court. In 2019, 47 states allowed juvenile court judges to make the transfer decision, 27 states had statutory provisions that mandated transfer to criminal court for certain cases, and 14 states gave prosecutors discretion on where to file charges. Puzzanchera et al., *supra*, at 95–97. States vary with respect to the minimum age at which an individual can be transferred to criminal court to be tried as an adult; where specified, the minimum age ranges from ten to sixteen. *Id.* at 97–99. For juveniles who had been tried as adults, 35 states had “once an adult, always an adult” provisions requiring that they be prosecuted in criminal court for any subsequent offense. *Id.* at 95–96.

Sentencing of Youthful Individuals

Chapter Five, Part H (Specific Offender Characteristics) sets forth policy statements addressing the relevance of certain specific offender characteristics in sentencing. Specifically, § 5H1.1 (Age (Policy Statement)) provides, in relevant part, that “[a]ge (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.”

Studies on Age and Brain Development

Research has shown that brain development continues until the mid-20s on average, potentially contributing to impulsive actions and reward-seeking behavior, although a more precise age would have to be determined on an individualized basis. *See, e.g.,* U.S. Sent’g Comm’n, Youthful Offenders in the Federal System 6–7 (2017); Daniel Romer et al., *Beyond Stereotypes of Adolescent Risk Taking: Placing the Adolescent Brain in Developmental Context*, 27 Developmental Cognitive Neuroscience 19 (2017); Laurence Steinberg & Grace Icenogle, *Using Developmental Science to Distinguish Adolescents and Adults Under the Law*, 1 Ann. Rev. Developmental Psych. 21 (2019).

Studies on Age and Rearrest Rates

Research has shown a correlation between age and rearrest rates, with younger individuals being rearrested at higher rates, and sooner after release, than older individuals. *See* Ryan Cotter, Courtney Semisch & David Rutter, U.S. Sent’g Comm’n, Recidivism of Federal Offenders Released in 2010 (2021); *see*

also Kim Steven Hunt & Billy Easley II, U.S. Sent’g Comm’n, The Effects of Aging on Recidivism Among Federal Offenders (2017).

Part A of the Proposed Amendment

Part A of the proposed amendment sets forth three options to change how sentences for offenses committed prior to age eighteen are considered in the calculation of a defendant’s criminal history score.

Option 1 would amend § 4A1.2(d)(2)(A) to exclude juvenile sentences from receiving two criminal history points, limiting this provision to adult sentences of imprisonment of at least 60 days. As a result, juvenile sentences, including those that involved confinement, would receive at most one criminal history point under § 4A1.2(d)(2)(B). In addition, Option 1 would amend § 4A1.2(k)(2)(B) to explain how the applicable time period for revocations would work in light of the proposed changes. Finally, Option 1 would make conforming changes to the Commentary to §§ 4A1.2 and 4A1.1.

Option 2 would amend § 4A1.2(d) to exclude all juvenile sentences from being considered in the calculation of the criminal history score. It also includes bracketed language providing that such sentences may be considered for purposes of an upward departure under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). In addition, Option 2 would amend § 4A1.2(k)(2)(B) to explain how the applicable time period for revocations would work in light of the proposed changes. It also would amend § 4A1.2(c)(2) to delete the reference to “juvenile status offenses and truancy” and amend § 4A1.2(f) to delete the reference to “diversion from juvenile court.” Finally, Option 2 would make conforming changes to the Commentary to §§ 4A1.2 and 4A1.1.

Option 3 would amend § 4A1.2(d) to exclude all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of the criminal history score. It also includes bracketed language providing that such sentences may be considered for purposes of an upward departure under § 4A1.3. In addition, Option 3 would amend § 4A1.2(e) and (k) to delete all references to sentences resulting from offenses committed prior to age eighteen. It also would amend § 4A1.2(c)(2) to delete the reference to “juvenile status offenses and truancy” and amend § 4A1.2(f) to delete the reference to “diversion from juvenile court.” Additionally, Option 3 would

make conforming changes to the Commentary to §§ 4A1.2 and 4A1.1.

Finally, Option 3 would make changes to the Commentary to §§ 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), and 2L1.2 (Unlawfully Entering or Remaining in the United States), and to subsection (e)(4) of § 4B1.2 (Definitions of Terms Used in Section 4B1.1), to delete references to convictions for offenses committed prior to age eighteen being used to increase offense levels.

Issues for comment are provided.

Part B of the Proposed Amendment

Part B of the proposed amendment would amend the first sentence in § 5H1.1 to delete “(including youth)” and “if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.” Thus, the first sentence in § 5H1.1 would provide solely that “[a]ge may be relevant in determining whether a departure is warranted.” It would also add language specifically providing for a downward departure for cases in which the defendant was youthful at the time of the offense and set forth considerations for the court in determining whether a departure based on youth is warranted.

Issues for comment are provided.

(A) Computing Criminal History for Offenses Committed Prior to Age Eighteen

Proposed Amendment:

[Option 1 (Deleting the references to juvenile sentences that require a determination of “confinement”):

Section 4A1.2(d)(2)(A) is amended by striking: “add 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense” and inserting “add 2 points under § 4A1.1(b) for each adult sentence of imprisonment of at least sixty days that resulted in the defendant being incarcerated within five years of his commencement of the instant offense”.

Section 4A1.2(k)(2)(B) is amended by striking “in the case of any other confinement sentence for an offense committed prior to the defendant’s eighteenth birthday, the date of the

defendant’s last release from confinement on such sentence (see § 4A1.2(d)(2)(A))” and inserting “in the case of an adult term of imprisonment of at least sixty days for an offense committed prior to the defendant’s eighteenth birthday, the date of the defendant’s last release from incarceration on such sentence (see § 4A1.2(d)(2)(A))”.

The Commentary to § 4A1.2 captioned “Application Notes” is amended in Note 7 by striking “Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant’s commencement of the instant offense are counted” and inserting “Therefore, for offenses committed prior to age eighteen, only certain adult or juvenile sentences are counted”.

The Commentary to § 4A1.1 captioned “Application Notes” is amended in Note 2 by striking “An adult or juvenile sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant’s commencement of the instant offense” and inserting “An adult sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is counted only if the defendant’s incarceration resulting from such sentence extended into the five-year period preceding the defendant’s commencement of the instant offense”.]

[Option 2 (Deleting all references to juvenile sentences as part of the criminal history calculation rules):

Section 4A1.2(c)(2) is amended by striking “Juvenile status offenses and truancy”.

Section 4A1.2(d) is amended—
in paragraph (2)(A) by striking: “add 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense” and inserting “add 2 points under § 4A1.1(b) for each adult sentence of imprisonment of at least sixty days that resulted in the defendant being incarcerated within five years of his commencement of the instant offense”;

in paragraph (2)(B) by striking “adult or juvenile sentence” and inserting “adult sentence”;

and by inserting at the end the following new paragraph (3):

“(3) Sentences resulting from juvenile adjudications are not counted[, but may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))].”.

Section 4A1.2(f) is amended by striking “, except that diversion from juvenile court is not counted”.

Section 4A1.2(k)(2)(B) is amended by striking “in the case of any other confinement sentence for an offense committed prior to the defendant’s eighteenth birthday, the date of the defendant’s last release from confinement on such sentence (see § 4A1.2(d)(2)(A))” and inserting “in the case of an adult term of imprisonment of at least sixty days for an offense committed prior to the defendant’s eighteenth birthday, the date of the defendant’s last release from incarceration on such sentence (see § 4A1.2(d)(2)(A))”.

The Commentary to § 4A1.2 captioned “Application Notes” is amended in Note 7 by striking the following:

*“Offenses Committed Prior to Age Eighteen.—*Section 4A1.2(d) covers offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant’s commencement of the instant offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a ‘juvenile,’ this provision applies to all offenses committed prior to age eighteen.”;

and inserting the following:

*“Offenses Committed Prior to Age Eighteen.—*Section 4A1.2(d) covers offenses committed prior to age eighteen. Offenses prior to age eighteen are counted only if the defendant was convicted and sentenced as an adult. If the defendant was convicted as an adult for an offense committed before age eighteen and received a sentence exceeding one year and one month, § 4A1.2(e) provides the applicable time period for counting the sentence. All other adult sentences for offenses committed prior to age eighteen are counted in accordance with § 4A1.2(d)(2).”.

The Commentary to § 4A1.1 captioned “Application Notes” is amended—

in Note 2 by striking “An adult or juvenile sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant’s commencement of the instant offense” and inserting “An adult sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is counted only if the defendant’s incarceration resulting from such sentence extended into the five-year period preceding the defendant’s commencement of the instant offense”;

and in Note 3 by striking “An adult or juvenile sentence” and inserting “An adult sentence”.]

[Option 3 (*Deleting all criminal history rules requiring counting of offenses committed prior to age eighteen*):

Section 4A1.2(c)(2) is amended by striking “Juvenile status offenses and truancy”.

Section 4A1.2(d) is amended by striking the following:

“(1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under § 4A1.1(a) for each such sentence.

(2) In any other case,

(A) add 2 points under § 4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense;

(B) add 1 point under § 4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant’s commencement of the instant offense not covered in (A).”;

and inserting the following:

“Sentences resulting from offenses committed prior to age eighteen are not counted[, but may be considered under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))].”.

Section 4A1.2(e) is amended by striking paragraph (4) as follows:

“(4) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by § 4A1.2(d)(2).”.

Section 4A1.2(f) is amended by striking “, except that diversion from juvenile court is not counted”.

Section 4A1.2(k)(2) is amended by striking the following:

“Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in § 4A1.2(d)(2)

and (e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (*see* § 4A1.2(e)(1)); (B) in the case of any other confinement sentence for an offense committed prior to the defendant’s eighteenth birthday, the date of the defendant’s last release from confinement on such sentence (*see* § 4A1.2(d)(2)(A)); and (C) in any other case, the date of the original sentence (*see* § 4A1.2(d)(2)(B) and (e)(2)).”;

and inserting the following:

“Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in § 4A1.2(e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (*see* § 4A1.2(e)(1)); and (B) in any other case, the date of the original sentence (*see* § 4A1.2(e)).”.

The Commentary to § 4A1.2 captioned

“Application Notes” is amended—

in Note 7 by striking the following:

“*Offenses Committed Prior to Age Eighteen*.—Section 4A1.2(d) covers offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant’s commencement of the instant offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a ‘juvenile,’ this provision applies to all offenses committed prior to age eighteen.”;

and inserting the following:

“*Offenses Committed Prior to Age Eighteen*.—Sentences resulting from offenses committed prior to age eighteen are not counted. [Nonetheless, the criminal conduct underlying any conviction resulting from offenses committed prior to age eighteen may be considered pursuant to § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))].”;

and in Note 8 by striking “Section 4A1.2(d)(2) and (e) establishes the time

period within which prior sentences are counted. As used in § 4A1.2(d)(2) and (e), the term ‘commencement of the instant offense’ includes any relevant conduct” and inserting “Section 4A1.2(e) establishes the time period within which prior sentences are counted. As used in § 4A1.2(e), the term ‘commencement of the instant offense’ includes any relevant conduct”.

The Commentary to § 4A1.1 captioned

“Application Notes” is amended—

in note 1 by striking “A sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is counted under this subsection only if it resulted from an adult conviction” and inserting “A sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is not counted”;

in Note 2 by striking “An adult or juvenile sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant’s commencement of the instant offense” and inserting “A sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is not counted”;

and in Note 3 by striking “An adult or juvenile sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is counted only if imposed within five years of the defendant’s commencement of the current offense” and inserting “A sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is not counted”.

The Commentary to § 2K1.3 captioned “Application Notes” is amended in Note 2, in the paragraph that begins “‘Felony conviction’ means”, by striking “A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).”.

The Commentary to § 2K2.1 captioned “Application Notes” is amended in Note 1, in the paragraph that begins “‘Felony conviction’ means”, by striking “A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.*, a federal conviction for an offense committed prior to the

defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).”.

The Commentary to § 2L1.2 captioned “Application Notes” is amended in Note 1 by striking the following:

“*In General.*—

(A) *‘Ordered Deported or Ordered Removed from the United States for the First Time’.*—For purposes of this guideline, a defendant shall be considered ‘ordered deported or ordered removed from the United States’ if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation, or removal, regardless of whether the order was in response to a conviction. ‘For the first time’ refers to the first time the defendant was ever the subject of such an order.

(B) *Offenses Committed Prior to Age Eighteen.*—Subsections (b)(1), (b)(2), and (b)(3) do not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.”;

and inserting the following:

“‘*Ordered Deported or Ordered Removed from the United States for the First Time’.*—For purposes of this guideline, a defendant shall be considered ‘ordered deported or ordered removed from the United States’ if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation, or removal, regardless of whether the order was in response to a conviction. ‘For the first time’ refers to the first time the defendant was ever the subject of such an order.”.

Section 4B1.2(e)(4) is amended by striking “A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).”.]

Issues for Comment:

1. The Commission seeks general comment on juvenile court systems and sentencing of youthful individuals. In particular, the Commission requests input on: (a) how different jurisdictions sentence younger individuals (e.g., youthful rehabilitation statutes); (b) how judges make decisions regarding residential placement or confinement upon an adjudication of guilt; (c) the

factors that influence transfer to adult court for offenses committed prior to age eighteen; (d) racial disparities; and (e) practices related to expungement and sealing of records in different jurisdictions. For example, are there particular research studies, experts, or practitioners that the Commission should consult?

2. The Commission seeks comment on whether it should make any of the changes set forth in Part A of the proposed amendment with respect to juvenile sentences and sentences for offenses committed prior to age eighteen for purposes of Chapter Four, Part A (Criminal History). Should the Commission limit any of the options based on: (a) the type of crime involved in the offense committed prior to age eighteen; (b) the age of the individual at the time of the offense committed prior to age eighteen; or (c) any other factor? Should the Commission consider an alternative approach in accounting for offenses committed prior to age eighteen, such as a downward departure?

3. If the Commission were to promulgate Option 2 (exclude juvenile sentences) or Option 3 (exclude all sentences for offenses committed prior to age eighteen) in Part A of the proposed amendment, should the Commission provide that any such sentence may be considered for purposes of an upward departure under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) as provided in the bracketed language? If so, should the Commission limit the consideration of such departures to certain offenses?

4. Option 3 would amend subsection (d) of § 4A1.2 (Definitions and Instructions for Computing Criminal History) to exclude all sentences resulting from offenses committed prior to age eighteen from being considered in the calculation of the criminal history score. This change would impact the use of predicate offenses in multiple guidelines, including §§ 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), 2L1.2 (Unlawfully Entering or Remaining in the United States), and 4B1.2 (Definitions of Terms Used in Section 4B1.1). Some of these guideline provisions were promulgated in response to directives, such as 28 U.S.C. 994(h). The Commission invites comment on whether Option 3 exceeds

the Commission’s authority under 28 U.S.C. 994(h) or any other congressional directives.

5. If the Commission were to promulgate any of the options in Part A of the proposed amendment and amend subsection (d) of § 4A1.2 (Definitions and Instructions for Computing Criminal History), should the Commission make any changes to § 3B1.4 (Using a Minor to Commit a Crime)? If so, what changes should the Commission make? For example, should the Commission expand the scope of application or increase the magnitude of the adjustment? If so, how?

(B) Sentencing of Youthful Individuals

Proposed Amendment:

Section 5H1.1 is amended by striking the following:

“Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).”;

and inserting the following:

“Age may be relevant in determining whether a departure is warranted. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. A downward departure also may be warranted due to the defendant’s youthfulness at the time of the offense. In an appropriate case, the court may consider whether a form of punishment other than imprisonment might be sufficient to meet the purposes of sentencing. In determining whether a departure based on youth is warranted, and the extent of such departure, the court should consider the following:

(1) Scientific studies on brain development showing that psychosocial maturity, which involves impulse control, risk assessment, decision-making, and resistance to peer pressure, is generally not developed until the mid-20s.

(2) Research showing a correlation between age and rearrest rates, with younger individuals rearrested at higher

rates and sooner after release than older individuals.

Physical condition, which may be related to age, is addressed at § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).".

Issues for Comment:

1. The Commission seeks general comment on sentencing of younger individuals, including how to balance brain development research suggesting potentially lower culpability with research on higher rearrest rates and potential dangerousness. The Commission further seeks comment on any relevant developments in legal or scientific literature relating to the impact of brain development and age on youthful criminal behavior. For example, are there particular research studies, experts, or practitioners that the Commission should consult?

2. The Commission seeks comment on whether it should amend § 5H1.1 (Age (Policy Statement)) as set forth in Part B of the proposed amendment or otherwise change the provision in any other way with respect to youthful individuals. Should the Commission include additional or different factors for courts to consider in determining whether a downward departure based on youth may be warranted?

3. Acquitted Conduct

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission's consideration of possible amendments to the *Guidelines Manual* to prohibit the use of acquitted conduct in applying the guidelines. See U.S. Sent'g Comm'n, "Notice of Final Priorities," 88 FR 60536 (Sept. 1, 2023).

Acquitted conduct is not expressly addressed in the *Guidelines Manual*, except for a reference in the parenthetical summary of the holding in *United States v. Watts*, 519 U.S. 148 (1997). See USSG § 6A1.3, comment. However, consistent with the Supreme Court's holding in *Watts*, consideration of acquitted conduct is permitted under the guidelines through the operation of § 1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), in conjunction with § 1B1.4 (Information to be Used in Imposing Sentence) and § 6A1.3 (Resolution of Disputed Factors (Policy Statement)).

Section 1B1.3 sets forth the principles and limits of sentencing accountability for purposes of determining a defendant's guideline range, a concept referred to as "relevant conduct." Relevant conduct impacts nearly every aspect of guidelines application, including the determination of: base offense levels where more than one

level is provided, specific offense characteristics, and any cross references in Chapter Two (Offense Conduct); any adjustments in Chapter Three (Adjustment); and certain departures and adjustments in Chapter Five (Determining the Sentence).

Specifically, § 1B1.3(a)(1) provides that relevant conduct comprises "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," and all acts and omissions of others "in the case of a jointly undertaken criminal activity," that "occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."

Relevant conduct also includes, for some offense types, "all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction," "all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions," and "any other information specified in the applicable guideline." See USSG § 1B1.3(a)(2)–(a)(4). The background commentary to § 1B1.3 explains that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range."

The *Guidelines Manual* also includes Chapter Six, Part A (Sentencing Procedures) addressing sentencing procedures that are applicable in all cases. Specifically, § 6A1.3 provides for resolution of any reasonably disputed factors important to the sentencing determination. Section 6A1.3(a) provides, in pertinent part, that "[i]n resolving any dispute concerning a factor important to sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." The Commentary to § 6A1.3 instructs that "[i]n determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial" and that "[a]ny information may be considered" so long as it has sufficient indicia of reliability to support its probable accuracy. The Commentary cites to 18 U.S.C. 3661 and Supreme Court case law upholding the sentencing court's discretion in considering any information at sentencing, so long as it is proved by a

preponderance of the evidence. Consistent with the Supreme Court case law, the Commentary also provides that "[t]he Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."

In fiscal year 2022, nearly all sentenced individuals (62,529; 97.5%) were convicted through a guilty plea. The remaining 1,613 sentenced individuals (2.5% of all sentenced individuals) were convicted and sentenced after a trial, and 286 of those sentenced individuals (0.4% of all sentenced individuals) were acquitted of at least one offense or found guilty of only a lesser included offense.

The proposed amendment would amend the *Guidelines Manual* to address the use of acquitted conduct for purposes of determining a sentence. Three options are presented.

Option 1 would amend § 1B1.3 to add a new subsection (c) providing that acquitted conduct is not relevant conduct for purposes of determining the guideline range. It would define "acquitted conduct" as conduct [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. It brackets possible language that would exclude from the definition of "acquitted conduct" conduct establishing, in whole or in part, the instant offense of conviction that was admitted by the defendant during a guilty plea colloquy or found by the trier of fact beyond a reasonable doubt. The proposed amendment further brackets the possibility of clarifying that such conduct is excluded from the definition regardless of whether the conduct also underlies a charge of which the defendant has been acquitted.

Option 1 would also amend the Commentary to § 6A1.3 (Resolution of Disputed Factors (Policy Statement)) to make conforming revisions addressing the use of acquitted conduct for purposes of determining the guideline range.

Option 2 would amend the Commentary to § 1B1.3 to add a new application note providing that a downward departure may be warranted if the use of acquitted conduct has a disproportionate impact in determining the guideline range relative to the offense of conviction. It brackets the possibility of limiting the departure's application to cases in which the impact

is “extremely” disproportionate. It clarifies in a parenthetical that acquitted conduct is conduct [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

Option 3 would amend § 6A1.3 to add a new subsection (c) addressing the standard of proof required to resolve disputes involving sentencing factors. It provides that a preponderance of the evidence standard generally is appropriate to meet due process requirements and policy concerns in resolving such disputes. However, it further provides that acquitted conduct should not be considered unless it is established by clear and convincing evidence.

It would define “acquitted conduct” as conduct [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

Option 3 would also make conforming changes to the Commentary of §§ 6A1.3 and 1B1.3.

Issues for comment are also provided.

Proposed Amendment:

[Option 1 (Acquitted conduct excluded from guideline range):

Section 1B1.3 is amended—
in subsection (a), in the heading, by striking “*Chapters Two (Offense Conduct) and Three (Adjustments).*” and inserting “*Chapters Two (Offense Conduct) and Three (Adjustments).*—”;
in subsection (b), in the heading, by striking “*Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).*” and inserting “*Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).*—”;

and by inserting at the end the following new subsection (c):

“(c) *Acquitted Conduct.*—

(1) *Exclusion.*—Acquitted conduct is not relevant conduct for purposes of determining the guideline range.

(2) *Definition of Acquitted Conduct.*—‘Acquitted conduct’ means conduct (*i.e.*, any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

[‘Acquitted conduct’ does not include conduct that—

(A) was admitted by the defendant during a guilty plea colloquy; or

(B) was found by the trier of fact beyond a reasonable doubt;

to establish, in whole or in part, the instant offense of conviction[, regardless of whether such conduct also underlies a charge of which the defendant has been acquitted].]”.

The Commentary to § 6A1.3 is amended—

by striking “*see also United States v. Watts*, 519 U.S. 148, 154 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court’s consideration of acquitted conduct); *Witte v. United States*, 515 U.S. 389, 399–401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution);” and inserting “*Witte v. United States*, 515 U.S. 389, 397–401 (1995) (noting that sentencing courts have traditionally considered a wide range of information without the procedural protections of a criminal trial, including information concerning uncharged criminal conduct, in sentencing a defendant within the range authorized by statute);”;

by striking “*Watts*, 519 U.S. at 157” and inserting “*Witte*, 515 U.S. at 399–401”;

and by inserting at the end of the paragraph that begins “The Commission believes that use of a preponderance of the evidence standard” the following: “Acquitted conduct, however, is not relevant conduct for purposes of determining the guideline range. *See* subsection (c) of § 1B1.3 (Relevant Conduct). The court is not precluded from considering acquitted conduct in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. *See* § 1B1.4 (Information to be Used in Imposing a Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)).”.]

[Option 2 (Downward departure):

The Commentary to § 1B1.3 captioned “Application Notes” is amended by inserting at the end the following new Note 10:

“10. *Downward Departure Consideration for Acquitted Conduct.*—If the use of acquitted conduct (*i.e.*, conduct [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure) has [an extremely] [a] disproportionate impact in determining the guideline range relative to the

offense of conviction, a downward departure may be warranted.”.]

[Option 3 (Clear and convincing evidence standard):

Section 6A1.3 is amended—

in subsection (a) by inserting at the beginning the following new heading: “*Presentation of Information.*—”;

in subsection (b) by inserting at the beginning the following new heading: “*Sentencing Hearing.*—”;

and by inserting at the end the following new subsection (c):

“(c) *Standard of Proof.*—The use of a preponderance of the evidence standard generally is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case. However, the court shall not consider acquitted conduct unless such conduct is established by clear and convincing evidence.

For purposes of this guideline, ‘acquitted conduct’ means conduct (*i.e.*, any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.”.

The Commentary to § 6A1.3 is amended by striking the last paragraph as follows:

“The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.”.

The Commentary to § 1B1.3 captioned “Application Notes” is amended by inserting at the end the following new Note 10:

“10. *Acquitted Conduct.*—In accordance with § 6A1.3 (Resolution of Disputed Factors (Policy Statement)), a court may not consider acquitted conduct for purposes of determining the guideline range unless such conduct is established by clear and convincing evidence.”.]

Issues for Comment:

1. *Option 1* of the proposed amendment would provide that acquitted conduct is not relevant conduct for purposes of determining the guideline range. It clarifies that a court is not precluded from considering acquitted conduct in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. The Commission seeks comment on whether it should prohibit the consideration of acquitted conduct for purposes other than determining the guideline range.

For example, should the Commission prohibit a court from considering acquitted conduct in determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted? Should the Commission go further by prohibiting the consideration of acquitted conduct for all purposes when imposing a sentence? The Commission seeks comment on the interaction between these more expansive potential prohibitions and 18 U.S.C. 3661, which provides that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” The Commission further seeks comment on whether any of these more expansive potential prohibitions exceeds the Commission’s authority under 28 U.S.C. 994 or any other congressional directives.

The Commission further seeks comment on whether alternatively it should adopt a policy statement recommending against, rather than prohibiting, the consideration of acquitted conduct for certain sentencing steps. If so, what steps in the sentencing process should be included in such a policy statement? For example, should the policy statement recommend against the consideration of acquitted conduct for purposes of determining the guideline range, the sentence to impose within the guideline range, whether a departure from the guidelines is warranted, or any factor when imposing a sentence?

2. The proposed amendment would define “acquitted conduct” as “conduct (*i.e.*, any acts or omission) [underlying] [constituting an element of] a charge of which the defendant has been acquitted by the trier of fact in federal court or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure.” The Commission seeks comment on whether it should expand the proposed definition of “acquitted conduct” to also include acquittals from state, local, or tribal jurisdictions. Alternatively, should the Commission adopt the definition used in the “Prohibiting Punishment of Acquitted Conduct Act of 2023,” S. 2788, 118th Cong. (1st Sess. 2023)? That bill would define “acquitted conduct” as “(1) an act (A) for which a person was criminally charged and adjudicated not guilty after trial in a Federal, State, or Tribal court; or (B) in the case of a juvenile, that was charged and for which the juvenile was found not responsible after a juvenile adjudication

hearing; or (2) any act underlying a criminal charge or juvenile information dismissed (A) in a Federal court upon a motion for acquittal under rule 29 of the Federal Rules of Criminal Procedure; or (B) in a State or Tribal court upon a motion for acquittal or an analogous motion under the applicable State or Tribal rule of criminal procedure.”

3. Option 1 of the proposed amendment brackets language that would exclude from the definition of “acquitted conduct” conduct establishing, in whole or in part, the instant offense of conviction that was admitted by the defendant during a guilty plea colloquy or found by the trier of fact beyond a reasonable doubt. This exclusion is meant to address cases in which conduct underlying an acquitted charge overlaps with conduct that establishes the instant offense of conviction. The Commission seeks comment on whether such an exclusion is necessary to address “overlapping” conduct. If so, does the proposed exclusion adequately address overlapping conduct, or should the Commission provide additional or different guidance to address overlapping conduct? Alternatively, should the Commission add commentary to § 1B1.3 providing that courts should use their discretion under 18 U.S.C. 3553(a) when considering acquitted conduct in anomalous cases involving overlapping conduct, such as cases involving interrelated charges (*e.g.*, charges for inchoate offenses and the underlying offense)?

4. The Commission seeks comment on whether any or all of the options presented should be revised to specifically address acquittals based on reasons unrelated to the substantive evidence, such as jurisdiction, venue, or statute of limitations. If so, how? For example, should conduct underlying such acquittals be excluded from the definition of “acquitted conduct”?

4. Circuit Conflicts

Synopsis of Proposed Amendment: This proposed amendment addresses certain circuit conflicts involving § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). *See* U.S. Sent’g Comm’n, “Notice of Final Priorities,” 88 FR 60536 (Sept. 1, 2023) (identifying resolution of circuit conflicts as a priority). The proposed amendment contains two parts (Part A and Part B). The Commission is

considering whether to promulgate either or both parts, as they are not mutually exclusive.

Part A would amend § 2K2.1 to address a circuit conflict concerning whether a serial number must be illegible in order to apply the 4-level increase in § 2K2.1(b)(4)(B)(i) for a firearm that “had an altered or obliterated serial number.” Two options are presented. An issue for comment is also provided.

Part B would amend the Commentary to § 2K2.4 to address a circuit conflict concerning whether subsection (c) of § 3D1.2 (Groups of Closely Related Counts) permits grouping of a firearms count under 18 U.S.C. 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. 924(c) based on the drug trafficking count. An issue for comment is also provided.

(A) Circuit Conflict Concerning § 2K2.1(b)(4)(B)(ii)

Synopsis of Proposed Amendment: Subsection (b)(4) of § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an alternative enhancement for a firearm that was stolen, that had an altered or obliterated serial number, or that was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968). Specifically, subsection (b)(4)(A) provides for a 2-level increase where a firearm is stolen, while subsection (b)(4)(B) provides for a 4-level increase where (i) a firearm has an altered or obliterated serial number or (ii) the defendant knew that any firearm involved in the offense was not otherwise marked with a serial number (other than a firearm manufactured prior to the effective date of the Gun Control Act of 1968) or was willfully blind to or consciously avoided knowledge of such fact. The Commentary to § 2K2.1 provides that subsection (b)(4)(A) and (B)(i) apply regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number. USSG § 2K2.1, comment. (n.8(B)).

The circuits are split regarding whether a serial number must be illegible in order to apply the 4-level increase in § 2K2.1(b)(4)(B)(i) for a firearm that “had an altered or obliterated serial number.” The Ninth Circuit first analyzed the meaning of “altered or obliterated” and determined that “a firearm’s serial number is ‘altered or obliterated’ when it is materially changed in a way that makes

accurate information less accessible.” See *United States v. Carter*, 421 F.3d 909, 916 (9th Cir. 2005). Various circuits have cited this decision, with different conclusions on the extent of legibility.

The Sixth Circuit has determined that a serial number must be illegible, adopting a “naked eye test”, that is, “a serial number that is defaced but remains visible to the naked eye is not ‘altered or obliterated’ under the guideline.” *United States v. Sands*, 948 F.3d 709, 719 (6th Cir. 2020). This holding is based on the Sixth Circuit’s determination that “[a]ny person with basic vision and reading ability would be able to tell immediately whether a serial number is legible,” and may be less inclined to purchase a firearm without a legible serial number. *Id.* at 717. The Second Circuit has followed the Sixth Circuit in holding that “altered” means illegible for the same reasons. See *United States v. St. Hilaire*, 960 F.3d 61, 66 (2d Cir. 2020) (“We follow the Sixth Circuit, which defines ‘altered’ to mean illegible.” (citing *Sands*, 948 F.3d at 715, 719)).

By contrast, the Fourth, Fifth, and Eleventh Circuits have upheld the enhancement where a serial number is legible or “less legible.” See, e.g., *United States v. Millender*, 791 F. App’x 782 (11th Cir. 2019); *United States v. Harris*, 720 F.3d 499 (4th Cir. 2013); *United States v. Perez*, 585 F.3d 880 (5th Cir. 2009). The Fourth Circuit held that “a serial number that is made less legible is made different and therefore is altered for purposes of the enhancement.” *Harris*, 720 F.3d at 501. Similarly, the Fifth Circuit affirmed the enhancement where the damage did not render the serial number unreadable but “the serial number of the firearm [] had been materially changed in a way that made its accurate information less accessible.” *Perez*, 585 F.3d at 884. While the Eleventh Circuit reasoned that an interpretation where altered means illegible “would render ‘obliterated’ superfluous.” *Millender*, 791 App’x at 783.

Part A of the proposed amendment would amend § 2K2.1(b)(4) to include a definition for “altered or obliterated serial number” to address the circuit conflict. Two options are provided.

Option 1 would set forth a definition of “altered or obliterated serial number” that adopts an approach similar to the approach of the Second and Sixth Circuits. It would provide that such term “[ordinarily] means a serial number of a firearm that has been changed, modified, affected, defaced, scratched, erased, or replaced such that the original information is rendered

illegible or unrecognizable to the unaided eye.”

Option 2 would set forth a definition of “altered or obliterated serial number” that adopts an approach similar to the approach of the Fourth, Fifth, Ninth, and Eleventh Circuits. It would provide that such term “[ordinarily] means a serial number of a firearm that has been changed, modified, affected, defaced, scratched, erased, or replaced to make the [original] information less accessible, even if such information remains legible.”

An issue for comment is also provided.

Proposed Amendment:

[Option 1:

Section 2K2.1(b)(4) is amended by inserting after “4 levels.” the following: “For purposes of subsection (b)(4)(B)(i), an ‘altered or obliterated serial number’ [ordinarily] means a serial number of a firearm that has been changed, modified, affected, defaced, scratched, erased, or replaced such that the original information is rendered illegible or unrecognizable to the unaided eye.”.]

[Option 2:

Section 2K2.1(b)(4) is amended by inserting after “4 levels.” the following: “For purposes of subsection (b)(4)(B)(i), an ‘altered or obliterated serial number’ [ordinarily] means a serial number of a firearm that has been changed, modified, affected, defaced, scratched, erased, or replaced to make the [original] information less accessible, even if such information remains legible.”.]

Issue for Comment:

1. Part A of the proposed amendment sets forth two options to address the circuit conflict described in the synopsis above. The Commission seeks comment on whether it should address the circuit conflict in a manner other than the options provided in Part A of the proposed amendment. If so, how?

(B) Circuit Conflict Concerning the Interaction Between § 2K2.4 and § 3D1.2(c)

Synopsis of Proposed Amendment: Section 3D1.2 (Grouping of Closely Related Counts) addresses the grouping of closely related counts for purposes of determining the offense level when a defendant has been convicted on multiple counts. Subsection (c) states that counts are grouped together “[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.” The Commentary to § 3D1.2 further explains that “[s]ubsection (c) provides that

when conduct that represents a separate count, e.g., bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor.” USSG § 3D1.2, comment. (n.5).

Section 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) is the guideline applicable to certain statutes with mandatory minimum terms of imprisonment (e.g., 18 U.S.C. 924(c)). The guideline provides that if a defendant, whether or not convicted of another crime, was convicted of a violation of any of these statutes, the guideline sentence is the minimum term of imprisonment required by statute. See USSG § 2K2.4(a)–(b). Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) do not apply to that count of conviction. *Id.* In addition, the Commentary to § 2K2.4 provides that “[i]f a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense.” *Id.* comment. (n.4). The examples included in the application note specifically referenced 18 U.S.C. 924(c) (which penalizes the possession or use of a firearm during, and in relation to, an underlying “crime of violence” or “drug trafficking crime” by imposing a mandatory minimum penalty consecutive to the sentence for the underlying offense).

The circuits are split regarding whether § 3D1.2(c) permits grouping of a firearms count under 18 U.S.C. 922(g) with a drug trafficking count, where the defendant also has a separate count under 18 U.S.C. 924(c) based on the drug trafficking count. Ordinarily, the firearms and drug trafficking counts would group under § 3D1.2(c). The circuit conflict focuses on the presence of the count under 18 U.S.C. 924(c) and its interaction with the Commentary to § 2K2.4 cited above precluding application of the relevant specific offense characteristics where the conduct covered by any such enhancement forms the basis of the conviction under 18 U.S.C. § 924(c).

The Sixth, Eighth, and Eleventh Circuits have held that such counts can be grouped in this situation. See, e.g., *United States v. Gibbs*, 395 F. App’x 248, 250 (6th Cir. 2010) (“The district court properly grouped together Gibbs’s drug and felon-in-possession

offenses.”); *United States v. Bell*, 477 F.3d 607, 615–16 (8th Cir. 2007) (“the felon in possession count and the crack cocaine count should have been grouped together for sentencing purposes”); *United States v. King*, 201 F. App’x 715, 718 (11th Cir. 2006) (grouping permitted; felon-in-possession count “embodies conduct that is treated as a specific offense characteristic” to drug trafficking counts). These circuits held that grouping was permissible as the Chapter Two guidelines for the felon-in-possession conviction and drug conviction each include “conduct that is treated as specific offense characteristics in the other offense,” regardless of whether the enhancements are used due to the rules in § 2K2.4 related to 18 U.S.C. 924(c)). *Bell*, 477 F.3d at 615–16.

By contrast, the Seventh Circuit has held that there is no basis for grouping felon-in-possession and drug trafficking counts since grouping rules are to be applied only after the offense level for each count has been determined and “by virtue of § 2K2.4, [the counts] did not operate as specific offense characteristics of each other, and the enhancements in §§ 2D1.1(b)(1) and 2K2.1(b)(6)(B) did not apply.” *United States v. Sinclair*, 770 F.3d 1148, 1157–58 (7th Cir. 2014); see also *United States v. Lamon*, 893 F.3d 369, 371 (7th Cir. 2018) (declining to overturn *Sinclair* to rectify the circuit split; “the mere existence of a circuit split does not justify overturning precedent . . . especially true here, because in *Sinclair* we knew that we were creating the split, and in doing so weighed the impact that our contrary decision would have on uniformity among the circuits”). The Seventh Circuit further explained, “[w]ith this particular combination of offenses, the otherwise applicable basis for grouping the drug-trafficking and felon-in-possession counts dropped out of the case.” *Sinclair*, 770 F.3d at 1157–58.

Part B of the proposed amendment generally follows the Sixth, Eighth, and Eleventh Circuits’ approach. It would amend the Commentary to § 2K2.4 to restate the grouping rule in § 3D1.2(c) and provide an example stating that, in accordance with § 3D1.2(c), in case in which the defendant is convicted of a felon-in-possession count under 18 U.S.C. 922(g) and a drug trafficking count underlying a conviction under 18 U.S.C. 924(c), such counts shall be grouped.

An issue for comment is also provided.

Proposed Amendment: The Commentary to § 2K2.4 captioned

“Application Notes” is amended in Note 4 by striking the following:

“*Weapon Enhancement.*—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. 924(c) conviction.

A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under § 2D1.1(b)(2) (pertaining to use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under § 2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or § 2K2.1(b)(6)(B) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of

being a felon in possession under 18 U.S.C. 922(g), the enhancement under § 2K2.1(b)(6)(B) would not apply.

In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) (*i.e.*, the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a).”; and inserting the following:

“*Non-Applicability of Certain Enhancements.*—

(A) *In General.*—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. 924(c) conviction.

A sentence under this guideline also accounts for conduct that would subject the defendant to an enhancement under § 2D1.1(b)(2) (pertaining to use of violence, credible threat to use violence, or directing the use of violence). Do not apply that enhancement when determining the sentence for the underlying offense.

If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under § 2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or § 2K2.1(b)(6)(B) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. 922(g), the enhancement under § 2K2.1(b)(6)(B) would not apply.

(B) Impact on Grouping.—If two or more counts would otherwise group under subsection (c) of § 3D1.2 (Groups of Closely Related Counts), the counts are to be grouped together under § 3D1.2(c) despite the non-applicability of certain enhancements under Application Note 4(A). Thus, for example, in a case in which the defendant is convicted of a felon-in-possession count under 18 U.S.C. 922(g) and a drug trafficking count underlying a conviction under 18 U.S.C. 924(c), the counts shall be grouped pursuant to § 3D1.2(c). The applicable Chapter Two guidelines for the felon-in-possession count and the drug trafficking count each include ‘conduct that is treated as a specific offense characteristic’ in the other count, but the otherwise applicable enhancements did not apply due to the rules in § 2K2.4 related to 18 U.S.C. 924(c) convictions.

(C) Upward Departure Provision.—In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the

guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) (*i.e.*, the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a).”

Issue for Comment:

1. Part B of the proposed amendment would amend the Commentary to § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) to address the circuit conflict described in the synopsis above. It would amend Application Note 4 in the Commentary to § 2K2.4 to restate the grouping rule in subsection (c) of § 3D1.2 (Grouping of Closely Related Counts) and provide an example stating that, in accordance with § 3D1.2(c), in a case in which the defendant is convicted of a felon-in-possession count under 18 U.S.C. 922(g) and a drug trafficking count underlying a conviction under 18 U.S.C. 924(c), such counts shall be grouped. The Commission seeks comment on whether it should provide additional or different guidance to address this circuit conflict.

In the alternative, should the Commission address the circuit conflict in a manner other than the one provided in Part B of the proposed amendment? For example, should the Commission amend § 3D1.2 to provide additional or different guidance about how to apply § 3D1.2(c)?

5. Miscellaneous

Synopsis of Proposed Amendment:

This proposed amendment responds to recently enacted legislation and miscellaneous guideline issues. *See* U.S. Sent’g Comm’n, “Notice of Final Priorities,” 88 FR 60536 (Sept. 1, 2023) (identifying as priorities “[i]mplementation of any legislation warranting Commission action” and “[c]onsideration of other miscellaneous issues coming to the Commission’s attention”). The proposed amendment contains six parts (Parts A through F). The Commission is considering whether to promulgate any or all these parts, as they are not mutually exclusive.

Part A responds to the Safeguard Tribal Objects of Patrimony (“STOP”) Act of 2021, Public Law 117–258 (2022),

by amending Appendix A (Statutory Index) and the Commentary to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources). An issue for comment is also provided.

Part B responds to the Export Control Reform Act of 2018, enacted as part of the John McCain National Defense Authorization Act for Fiscal Year 2019, Public Law 115–232 (Aug. 13, 2018), and to concerns raised by the Department of Justice and the Disruptive Technology Strike Force (an interagency collaboration between the Department of Justice’s National Security Division and the Department of Commerce’s Bureau of Industry and Security), by amending Appendix A and § 2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism). Two issues for comment are also provided.

Part C responds to concerns raised by the Department of Justice relating to offenses under 31 U.S.C. 5322 and 5336 and § 2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts), by amending the specific offense characteristic at § 2S1.3(b)(2)(B) to reflect the enhanced penalty applicable to offenses under those statutes.

Part D responds to concerns raised by the Department of Justice relating to the statutes referenced in Appendix A to § 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), by amending Appendix A and the Commentary to § 2R1.1 to replace the reference to 15 U.S.C. 3(b) with a reference to 15 U.S.C. 3(a).

Part E addresses a miscellaneous issue regarding the application of the base offense levels at subsections (a)(1)–(a)(4) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). Two options are presented.

Part F responds to concerns raised by the Department of Justice relating to the scope of the definition of “sex offense” in subsection (b)(2) of § 4C1.1 (Adjustment for Certain Zero-Point Offenders). Two options are presented.

(A) Safeguard Tribal Objects of Patrimony (“STOP”) Act of 2021

Synopsis of Proposed Amendment:

Part A of the proposed amendment responds to the Safeguard Tribal Objects of Patrimony (“STOP”) Act of 2021, Public Law 117–258 (Dec. 21, 2022). The Act added two new criminal offenses at 25 U.S.C. 3073 (Export prohibitions; export certification system; international agreements). In addition, the Act increased the penalties for offenses under 18 U.S.C. 1170 (Illegal trafficking in Native American human remains and cultural items).

The first new offense, created by the Act and codified at 25 U.S.C. 3073(a)(1), prohibits exporting, attempting to export, or otherwise transporting from the United States any “Item Prohibited from Exportation,” and conspiring to engage in and concealing such activity. An “Item Prohibited from Exportation” means (A) a cultural item prohibited from being trafficked (including through sale, purchase, use for profit, or transport for sale or profit) by 18 U.S.C. 1170(b) or any other federal law or treaty; and (B) an archaeological resource prohibited from being trafficked (including through sale, purchase, exchange, transport, receipt, or offer to sell, purchase, or exchange, including in interstate or foreign commerce) by subsections (b) and (c) of 16 U.S.C. 470ee (Archaeological Resources Protection; Prohibited acts and criminal penalties) or any other federal law or treaty. 25 U.S.C. 3072(5). A violation of this offense, if the person knew, or should have known, that the item was taken, possessed, transported, or sold in violation of, or in a manner that is unlawful under, any federal law or treaty, is punishable by a maximum term of imprisonment of one year and one day for a first violation (and not more than ten years for a second or subsequent violation), a fine, or both. 25 U.S.C. 3073(a)(2).

The second new offense, codified at 25 U.S.C. 3073(b)(5)(A)(i), prohibits exporting, attempting to export, or otherwise transporting from the United States any “Item Requiring Export Certification” without first obtaining an export certification. An “Item Requiring Export Certification” means a cultural item and an archaeological resource but does not include any such item or resource for which an Indian Tribe or Native Hawaiian organization with a cultural affiliation with the item has provided a certificate authorizing exportation of the item. 25 U.S.C. 3072(6). A violation of this provision is subject to a civil penalty and any other applicable penalties under chapter 32B

(Safeguard Tribal Objects of Patrimony) of title 25, United States Code. 25 U.S.C. 3073(b)(5)(A)(ii).

In addition, the Act increased the maximum terms of imprisonment for offenses under 18 U.S.C. 1170. Section 1170(a) prohibits knowingly selling, purchasing, using for profit, or transporting for sale or profit, the human remains of a Native American without the right of possession to those remains. The Act increased the penalty for this offense from a maximum term of imprisonment of 12 months to one year and one day, changing its classification from a misdemeanor to a felony. It further increased the maximum term of imprisonment for a second or subsequent offense under section 1170(a) from five to ten years. The Act also increased the maximum term of imprisonment for a second or subsequent offense under 18 U.S.C. 1170(b) from five to ten years. Section 1170(b) prohibits knowingly selling, purchasing, using for profit, or transporting for sale or profit, any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act. Section 1170 offenses are currently referenced in Appendix A (Statutory Index) to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources). The maximum terms of imprisonment for offenses under 18 U.S.C. 1170, as revised by the Act, are still within the maximum penalty range of one year to 20 years for other offenses referenced to § 2B1.5.

Part A of the proposed amendment would amend Appendix A to reference the new offenses under 25 U.S.C. 3073 to § 2B1.5. The conduct prohibited by 25 U.S.C. 3073 is similar to the conduct prohibited by 18 U.S.C. 1170. Part A of the proposed amendment would also amend the Commentary to § 2B1.5 to reflect that 25 U.S.C. 3073 is referenced to the guideline. In addition, it would make additional technical changes to the Commentary to § 2B1.5, including specifying that 18 U.S.C. 666(a)(1)(A) is referenced to the guideline.

An issue for comment is also provided.

Proposed Amendment: Appendix A (Statutory Index) is amended by inserting before the line referenced to 25 U.S.C. 5306 the following new line reference:

“25 U.S.C. 3073 2B1.5”.

The Commentary to § 2B1.5 captioned “Statutory Provisions” is amended by

striking “16 U.S.C. 470aaa–5, 470ee, 668(a), 707(b); 18 U.S.C. 541–546, 554, 641, 661–662, 666, 668, 1163, 1168, 1170, 1361, 1369, 2232, 2314–2315” and inserting: “16 U.S.C. 470aaa–5, 470ee, 668(a), 707(b); 18 U.S.C. 541–546, 554, 641, 661–662, 666(a)(1)(A), 668, 1163, 1168, 1170, 1361, 1369, 2232, 2314–2315; 25 U.S.C. 3073. For additional statutory provision(s), see Appendix A (Statutory Index)”.

Issue for Comment:

1. In response to the Safeguard Tribal Objects of Patrimony (“STOP”) Act of 2021, Public Law 117–258 (2022), Part A of the proposed amendment would reference 25 U.S.C. 3073 to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources). The Commission seeks comment on whether any additional changes to the guidelines are required in response to the Act. Specifically, should the Commission amend § 2B1.5 to provide a higher or lower base offense level in response to the changes brought by the Act? If so, what should that base offense level be and why? Should the Commission add a specific offense characteristic to § 2B1.5 in response to the Act? If so, what should that specific offense characteristic provide and why?

(B) Evasion of Export Controls

Synopsis of Proposed Amendment:

Part B of the proposed amendment responds to the Export Control Reform Act of 2018, enacted as part of the John McCain National Defense Authorization Act for Fiscal Year 2019, Public Law 115–232 (Aug. 13, 2018), and to concerns raised by the Department of Justice and the Disruptive Technology Strike Force (an interagency collaboration between the Department of Justice’s National Security Division and the Department of Commerce’s Bureau of Industry and Security).

The Export Control Reform Act of 2018 repealed the Export Administration Act of 1979 (previously codified at 50 U.S.C. 4601–4623) regarding export controls of dual-use items. Dual-use items have both civilian and military applications and are subject to export licensing requirements. The Export Control Reform Act of 2018 also included new provisions, codified at 50 U.S.C. 4801–4826, relating to export controls for national security and foreign policy purposes, to further the policy of the United States “to restrict the export of items which would make a significant contribution to the military potential of any other country or

combination of countries which would prove detrimental to the national security of the United States” and “to restrict the export of items if necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations.” See 50 U.S.C. 4811. These new provisions authorize the Department of Commerce to develop the Export Administration Regulations, which establish the export controls governing dual-use and other items. In addition, the Export Control Reform Act of 2018 is the first export control statute to explicitly consider the economic security of the United States as a component or element of national security.

The Export Control Reform Act of 2018 maintained much of the dual-use export controls previously established under the Export Administration Act of 1979, but in a process that is still ongoing, the agencies charged with administering and enforcing the Act are still making significant changes to what items are controlled and have increased the overall restrictions on export licensing. In addition to the items and services already controlled by the Export Administration Regulations, the Export Control Reform Act of 2018 requires the President to establish an interagency process to identify “emerging and foundational technologies that are ‘essential to the national security of the United States’” but are not already included in the definition of “critical technologies” in the Foreign Investment Risk Review Modernization Act. See 50 U.S.C. 4817(a). Examples of “emerging technologies” include artificial intelligence and machine learning; quantum information and sensing technology; robotics; and biotechnology. “Foundational technologies” are described as technologies that may warrant stricter controls if an application or capability of that technology poses a national security threat. The Export Control Reform Act of 2018 also requires the Department of Commerce to “establish and maintain a list” of controlled items, foreign persons, and end uses determined to be a threat to national security and foreign policy. *Id.* § 4813.

The Export Control Reform Act of 2018 includes a criminal offense at new section 4819 (replacing repealed 50 U.S.C. 4610 (Violations)), which prohibits willfully committing, willfully attempting or conspiring to commit, or aiding and abetting a violation of the Act or of any regulation, order, license, or other authorization issued under the Act. Any such violation is punishable

by a fine of not more than \$1,000,000, a maximum term of imprisonment of 20 years, or both. See 50 U.S.C. 4819(b). Offenses under repealed section 4610 are currently referenced in Appendix A (Statutory Index) to § 2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism), which also appears to be the most analogous guideline for the offenses under new section 4819. The maximum term of imprisonment at new section 4819(b) is greater than the maximum penalties of five and ten years provided in the repealed section 4610 but is within the maximum penalty range of ten to 20 years for other offenses referenced to § 2M5.1.

In addition, the Department of Justice and the Disruptive Technology Strike Force recommended that the Commission consider amending § 2M5.1 to ensure that all controls related to national security are covered by the guideline provisions. See Annual Letter from the U.S. Department of Justice to the Commission (Aug. 1, 2023), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202308/88FR39907_public-comment_R.pdf#page=38; Letter from U.S. Department of Justice National Security Division & U.S. Department of Commerce Bureau of Industry and Security (Aug. 1, 2023), at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202308/88FR39907_public-comment_R.pdf#page=55. Both the Department of Justice and the Disruptive Technology Strike Force are concerned that, given the wide-range of national security-related controls in force, some courts have applied § 2M5.1 too narrowly.

The Department of Justice explained that under the Export Administration Regulations and the Commerce Control List (contained within the Export Administration Regulations) export controls related to national security can carry different designations correlating to the specific reason certain items (*i.e.*, commodities, software, technology) are subject to the nation’s export licensing authority and are thus controlled. One such designation is “NS” (National Security), while other designations include “MT” (Missile Technology), “RS,” (Regional Stability), “CB” (Proliferation of Chemical and Biological Weapons), “AT” (Anti-Terrorism), and “NP” (Nuclear Nonproliferation). The Department of Justice further clarified that other export controls comprise “the full spectrum of national security related controls,” including export controls to certain military end-users and foreign entities when they present an unacceptable

security risk to national security policy interests and export controls placed on certain goods and destinations based on sanctions and embargoes imposed by the President pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1705) or other specific acts of Congress.

According to the Department of Justice, because § 2M5.1(a)(1)(A) specifically refers to “national security controls,” some sentencing courts may erroneously conclude that only the goods controlled under the Commerce Control List’s “NS” designation, and not the goods controlled under separate sections of the Export Administration Regulations or the International Emergency Economic Powers Act, qualify for the higher alternative base offense level 26 at § 2M5.1(a)(1)(A). Both the Department of Justice and the Disruptive Technology Strike Force recommend replacing the term “national security controls” currently used at § 2M5.1(a)(1)(A) with the term “controls related to national security,” to ensure that the provision includes “the full spectrum” of national security-controls, including anti-terrorism, missile technology, regional stability, proliferation of chemical and biological weapons, nuclear nonproliferation, and military and weapons of mass destruction end-uses and end-users and entity-specific controls, and sanctions and embargoes.

Part B of the proposed amendment would amend Appendix A and the Commentary to § 2M5.1 to reflect the new United States Code section numbers relating to export controls for national security and foreign policy.

Additionally, Part B of the proposed amendment would amend § 2M5.1(a)(1)(A) in response to the concerns raised by the Department of Justice and the Disruptive Technology Strike Force. It would replace the term “national security controls” with “controls relating to national security [(including controls on emerging and foundational technologies)].”

Finally, Part B of the proposed amendment would make technical changes to the Commentary to § 2M5.1 by reorganizing the application notes and adding headings.

Two issues for comment are also provided.

Proposed Amendment: Appendix A (Statutory Index) is amended in the line referenced to 50 U.S.C. 4610 by striking “§ 4610” and inserting “§ 4819”.

Section 2M5.1(a)(1) is amended by striking “national security controls” and inserting “controls relating to national security [(including controls on

emerging and foundational technologies)]”.

The Commentary to § 2M5.1 captioned “Statutory Provisions” is amended by striking “50 U.S.C. 1705; 50 U.S.C. 4601–4623” and inserting “50 U.S.C. 1705, 4819”.

The Commentary to § 2M5.1 captioned “Application Notes” is amended—

by striking Notes 1 through 4 as follows:

“1. In the case of a violation during time of war or armed conflict, an upward departure may be warranted.

2. In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).

3. In addition to the provisions for imprisonment, 50 U.S.C. 4610 contains provisions for criminal fines and forfeiture as well as civil penalties. The maximum fine for individual defendants is \$250,000. In the case of corporations, the maximum fine is five times the value of the exports involved or \$1 million, whichever is greater. When national security controls are violated, in addition to any other sanction, the defendant is subject to forfeiture of any interest in, security of, or claim against: any goods or tangible items that were the subject of the violation; property used to export or attempt to export that was the subject of the violation; and any proceeds obtained directly or indirectly as a result of the violation.

4. For purposes of subsection (a)(1)(B), ‘a country supporting international terrorism’ means a country designated under section 6(j) of the Export Administration Act (50 U.S.C. 4605).”;

and by inserting the following new Notes 1, 2, and 3:

“1. *Definition*.—For purposes of subsection (a)(1)(B), ‘a country supporting international terrorism’ means a country designated under section 1754 of the Export Controls Act of 2018 (50 U.S.C. 4813).

2. *Additional Penalties*.—In addition to the provisions for imprisonment, 50 U.S.C. 4819 contains provisions for criminal fines and forfeiture as well as civil penalties.

3. *Departure Provisions*.—

(A) *In General*.—In determining the sentence within the applicable

guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).

(B) *War or Armed Conflict*.—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.”.

Issues for Comment:

1. In response to the Export Control Reform Act of 2018, enacted as part of the John McCain National Defense Authorization Act for Fiscal Year 2019, Public Law 115–232 (Aug. 13, 2018), Part B of the proposed amendment would amend Appendix A (Statutory Index) and the Commentary to § 2M5.1 (Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism). The current provisions of § 2M5.1, including the term “national security controls” used in subsection (a)(1), are mostly based on the statutory provisions of the Export Administration Act of 1979. As explained in the synopsis above, the Export Control Reform Act of 2018 repealed and replaced the 1979 Act and expanded the meaning of national security (to explicitly include the economic security of the United States as a component or element of national security), the types of items controlled (*e.g.*, emerging and foundational technologies), and the reasons for control (*e.g.*, persons and firms involved in activities contrary to national security or foreign policy interests). In addition, the agencies charged with administering and enforcing the Export Control Reform Act of 2018 are still making significant changes to what items are controlled and have increased the overall restrictions on export licensing. Accordingly, the Commission seeks general comment on whether any different or additional changes to the guidelines are required in response to the changes brought by the Export Control Reform Act of 2018.

Specifically, should the Commission revise the base offense levels at § 2M5.1(a)? If so, what revision should the Commission make and why? Should the Commission add additional specific offense characteristics to § 2M5.1? If so, what should any such specific offense characteristic provide and why? For example, should the Commission provide a definition of the term “controls relating to national security”? Should the Commission include in the

provisions of § 2M5.1 specific references to controls relating to foreign policy or economic interest of the United States or to certain end-users and entities?

2. Part B of the proposed amendment would also amend § 2M5.1 in response to the concerns raised by the Department of Justice and the Disruptive Technology Strike Force (an interagency collaboration between the Department of Justice’s National Security Division and the Department of Commerce’s Bureau of Industry and Security). The Commission invites general comment on the Department of Justice’s and Disruptive Technology Strike Force’s concerns discussed in the synopsis above. Are the changes to § 2M5.1 appropriate to address those concerns? Should the Commission provide additional or different guidance for applying § 2M5.1? Is there an alternative approach that the Commission should consider in response to the concerns raised by the Department of Justice and the Disruptive Technology Strike Force?

(C) Offenses Involving Records and Reports on Monetary Instruments Transactions

Synopsis of Proposed Amendment:

Part C of the proposed amendment responds to concerns raised by the Department of Justice relating to enhanced penalties under 31 U.S.C. 5322 (Criminal penalties) and covered by § 2S1.3 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts).

Section 5322 is a penalty provision for the substantive criminal offenses in subchapter II (Records and Reports on Monetary Instruments Transactions) of chapter 53 of title 31, United States Code. The provisions of this subchapter are the reporting requirements of the Bank Secrecy Act (BSA) and impose substantial compliance requirements on financial institutions. A simple violation of an offense in this subchapter is punishable by a five-year maximum term of imprisonment, a fine, or both under 31 U.S.C. 5322(a). However, if the offense also involved “violating another law of the United States or as part of a pattern of any illegal activity involving more than \$100,000 in a 12-month period,” the maximum term of imprisonment increases to ten years as provided for at 31 U.S.C. 5322(b). Notably, other penalty provisions in subchapter II of chapter 53 of title 31, United States

Code, increase the maximum term of imprisonment if the offense involved “violating another law of the United States or as part of a pattern of any illegal activity involving more than \$100,000 in a 12-month period.” See 31 U.S.C. 5324(d) and 5336(h).

The majority of the substantive criminal offenses in subchapter II of chapter 53 of title 31, United States Code, including 31 U.S.C. 5322, 5324 and 5336, are referenced in Appendix A (Statutory Index) to § 2S1.3. Relevant to this issue, § 2S1.3(b)(2) provides for a 2-level enhancement if “the defendant (A) was convicted of an offense under subchapter II of chapter 53 of title 31, United States Code; and (B) committed the offense as part of a pattern of unlawful activity involving more than \$100,000 in a 12-month period.” USSG § 2S1.3(b)(2).

During the 2022–2023 amendment cycle, the Department of Justice, in its letter addressing a proposed crime legislation amendment, noted that when the Commission promulgated § 2S1.3(b)(2) it did not include the additional factor set forth in 31 U.S.C. 5322(b) that qualifies a defendant for the enhanced penalty, which is when an individual commits an offense under subchapter II of chapter 53 of title 31, United States Code, “while violating another law of the United States.” At the time, the Commission expressed interest in addressing this miscellaneous issue during the 2023–2024 amendment cycle.

Part C of the proposed amendment would amend the specific offense characteristic at § 2S1.3(b)(2)(B) to reflect the additional enhanced penalty factor under 31 U.S.C. 5322(b), 5324(d), and 5336. Specifically, it would revise the 2-level enhancement at § 2S1.3(b)(2)(B) to also apply if the defendant committed the offense “while violating another law of the United States.”

Proposed Amendment: Section 2S1.3(b)(2)(B) is amended by striking “committed the offense as part of a pattern of unlawful activity” and inserting “committed the offense while violating another law of the United States or as part of a pattern of unlawful activity”.

(D) Antitrust Offenses

Synopsis of Proposed Amendment: Part D of the proposed amendment responds to concerns raised by the Department of Justice relating to the statutes referenced in Appendix A (Statutory Index) to § 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors).

Section 2R1.1 is intended to apply to antitrust offenses, particularly offenses relating to agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, “that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal *per se*, *i.e.*, without any inquiry in individual cases as to their actual competitive effect.” USSG § 2R1.1, comment. (backg’d.).

In the original 1987 *Guidelines Manual*, the only statute referenced in Appendix A to § 2R1.1 was 15 U.S.C. 1 (Trusts, etc., in restraint of trade illegal; penalty), a provision of the Sherman Antitrust Act of 1890 that prohibits any contract or combination in the form of a trust or otherwise (or any such conspiracy) in restraint of trade or commerce among the several states or with foreign nations. In 1990, the Commission amended Appendix A to reference 18 U.S.C. 1860 (Bids at land sales) to § 2R1.1. See Appendix C, amendment 359 (effective Nov. 1, 1990). Section 1860 prohibits bargaining, contracting, or agreeing, or attempting to bargain, contract, or agree with another person that such person shall not bid upon or purchase any parcel of lands of the United States offered at public sale. It also prohibits using intimidation, combination, or unfair management, to hinder, prevent, or attempt to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale.

In 2002, Congress amended 15 U.S.C. 3 to create a new criminal offense. See Section 14102 of the Antitrust Technical Corrections Act of 2002, Public Law 107–273 (Nov. 2, 2002). Prior to the Antitrust Technical Corrections Act of 2002, 15 U.S.C. 3 contained only one provision prohibiting any contract or combination in the form of trust or otherwise (or any such conspiracy) in restraint of trade or commerce in any territory of the United States or the District of Columbia. The Act redesignated the existing provision as subsection (a) and added a new criminal offense at a new subsection (b). Section 3(b) prohibits monopolization, attempts to monopolize, and combining or conspiring with another person to monopolize any part of the trade or commerce in or involving any territory of the United States or the District of Columbia. 15 U.S.C. 3(b).

In 2003, the Commission amended Appendix A to reference 15 U.S.C. 3(b) to § 2R1.1 and the Commentary to § 2R1.1 to reflect such reference. See Appendix C, amendment 661 (effective

Nov. 1, 2003). The Commission did not include a reference in Appendix A to the then newly redesignated 15 U.S.C. 3(a). Section 3(a) is not currently referenced in Appendix A to any guideline.

The Department of Justice has raised a concern that Appendix A and § 2R1.1 contain inaccurate references to 15 U.S.C. 3(b). According to the Department of Justice, both Appendix A and the Commentary to § 2R1.1 lists 15 U.S.C. 3(b) as a statutory provision covered by § 2R1.1 when, in fact, the guideline should instead cover 15 U.S.C. 3(a). The Department of Justice indicates that, other than 15 U.S.C. 3(b), the statutes currently referenced in Appendix A to § 2R1.1 cover offenses relating to agreements or combinations in restraint of trade or commerce. Section 3(b) offenses address conduct relating to the acquisition or maintenance of monopoly power in a relevant market, which may be committed by a single entity and does not depend on agreement among competitors. According to the Department of Justice, these types of monopolization offenses are beyond the scope of § 2R1.1, as described in the Background Commentary, thus maintaining the Appendix A reference to the guideline has the potential to sow confusion in antitrust prosecutions. The Department of Justice suggests that the Commission replace the reference to 15 U.S.C. 3(b) in Appendix A and § 2R1.1 with a reference to 15 U.S.C. 3(a), which is the provision in section 3 that addresses offenses relating to agreements in restraint of trade or commerce and is more similar to the other offenses already covered by § 2R1.1.

Part D of the proposed amendment would amend Appendix A and the Commentary to § 2R1.1 to replace the reference to 15 U.S.C. 3(b) with a reference to 15 U.S.C. 3(a). In addition, it would make technical changes to the Commentary to § 2R1.1, including the addition of headings to some application notes.

Proposed Amendment: Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 3(b) by striking “§ 3(b)” and inserting “§ 3(a)”.

The Commentary to § 2R1.1 captioned “Statutory Provisions” is amended by striking “§§ 1, 3(b)” and inserting “§§ 1, 3(a)”.

The Commentary to § 2R1.1 captioned “Application Notes” is amended—

in Note 3 by inserting at the beginning the following new heading: “*Fines for Organizations.*—”;

in Note 4 by inserting at the beginning the following new heading: “*Another Consideration in Setting Fine.*—”;

in Note 5 by inserting at the beginning the following new heading: “*Use of Alternatives Other Than Imprisonment.*—”;

in Note 6 by inserting at the beginning the following new heading:

“*Understatement of Seriousness.*—”;

and in Note 7 by inserting at the beginning the following new heading: “*Defendant with Previous Antitrust Convictions.*—”.

The Commentary to § 2R1.1 captioned “Background” is amended by striking “These guidelines apply” and inserting “This guideline applies”.

(E) Enhanced Penalties for Drug Offenders

Synopsis of Proposed Amendment: Part E of the proposed amendment addresses a miscellaneous issue regarding the application of the enhanced base offense levels at subsections (a)(1)–(a)(4) of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).

The most common drug offenses that carry mandatory minimum penalties are set forth in 21 U.S.C. 841 and 960. Under both provisions, the mandatory minimum penalties are tied to the quantity and type of controlled substance involved in an offense. Enhanced mandatory minimum penalties are set forth in 21 U.S.C. 841(b) and 960(b) for defendants whose instant offense resulted in death or serious bodily injury, or who have prior convictions for certain specified offenses. Greater enhanced mandatory minimum penalties are provided for those defendants whose instant offense resulted in death or serious bodily injury *and* who have a qualifying prior conviction.

Section 2D1.1 provides specific base offense levels to reflect this enhanced penalty structure at § 2D1.1(a)(1)–(a)(4). Section 2D1.1(a)(1)(A) provides for a base offense level of 43 if “the defendant is convicted under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. 960(b)(1) or (b)(2), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a serious drug felony or serious violent felony.” Similarly, § 2D1.1(a)(1)(B) provides for a base offense level of 43 if “the defendant is convicted under 21 U.S.C. 841(b)(1)(C) or 21 U.S.C. 960(b)(3) and the offense of conviction

establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense.” Each of the six statutory provisions enumerated within § 2D1.1(a)(1)(A) and (B) require a mandatory term of life imprisonment for any defendant who has a qualifying prior offense and whose instant offense involved a substance that resulted in death or serious bodily injury.

Section 2D1.1(a)(2) provides for a base offense level of 38 “if the defendant is convicted under 21 U.S.C. 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance.” Each of the six statutory provisions enumerated within § 2D1.1(a)(2) provides for a mandatory minimum term of imprisonment of not less than 20 years for a defendant whose instant offense involved a substance that resulted in death or serious bodily injury.

Section 2D1.1(a)(3) provides for a base offense level of 30 if “the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense.” Both statutory provisions enumerated within § 2D1.1(a)(3) provide for an increased statutory maximum term of imprisonment of 30 years for any defendant who has a qualifying prior offense and whose instant offense involved a substance that resulted in death or serious bodily injury.

Section 2D1.1(a)(4) provides for a base offense level of 26 if “if the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance.” Both statutory provisions enumerated within § 2D1.1(a)(4) provide for an increased statutory maximum term of imprisonment of 15 years for any defendant whose instant offense involved a substance that resulted in death or serious bodily injury.

The Commission has heard concerns that it is not clear whether the enhanced base offense levels at § 2D1.1(a)(1)–(a)(4) apply only when the defendant was convicted under the enhanced penalty provision of 21 U.S.C. 841 or 21 U.S.C. 960 because each statutory element was established, or whether they also apply whenever a defendant meets the

applicable requirements, regardless of whether the defendant was in fact convicted under the enhanced penalty provision.

Part E of the proposed amendment would amend § 2D1.1(a)(1)–(4) to address these concerns. Two options are provided.

Option 1 would amend § 2D1.1(a)(1)–(4) to provide that the base offense levels in those provisions apply only if the defendant was convicted under 21 U.S.C. 841 or 21 U.S.C. 960, and was subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because the specific statutory elements were established in accordance with the relevant provision in title 21, United States Code.

Option 2 would amend § 2D1.1(a)(1)–(4) so that the base offense levels in those provisions apply if the defendant was convicted under 21 U.S.C. 841 or 21 U.S.C. 960 and the offense involved the applicable requirements. However, § 2D1.1(a)(1) and (a)(3) would require that the fact that the offense was committed after one or more prior convictions for a serious drug felony, serious violent felony, or felony drug offense be established by the information filed by the government pursuant to 21 U.S.C. 851.

Proposed Amendment:

[Option 1:

Section 2D1.1(a) is amended by striking paragraphs (1) through (4) as follows:

“(1) 43, if—

(A) the defendant is convicted under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. 960(b)(1) or (b)(2), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a serious drug felony or serious violent felony; or

(B) the defendant is convicted under 21 U.S.C. 841(b)(1)(C) or 21 U.S.C. 960(b)(3) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) 30, if the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of

conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or

(4) 26, if the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or”;

and by inserting the following new paragraphs (1) through (4):

“(1) 43, if—

(A) the defendant (i) is convicted under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. 960(b)(1) or (b)(2); and (ii) is subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because (I) death or serious bodily injury resulted from the use of the substance; and (II) the defendant committed the offense after one or more prior convictions for a serious drug felony or serious violent felony, as established by the information filed by the government pursuant to 21 U.S.C. 851; or

(B) the defendant (i) is convicted under 21 U.S.C. 841(b)(1)(C) or 21 U.S.C. 960(b)(3); and (ii) is subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because (I) death or serious bodily injury resulted from the use of the substance; and (II) the defendant committed the offense after one or more prior convictions for a felony drug offense, as established by the information filed by the government pursuant to 21 U.S.C. 851; or

(2) 38, if the defendant (A) is convicted under 21 U.S.C. 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. 960(b)(1), (b)(2), or (b)(3); and (B) is subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because death or serious bodily injury resulted from the use of the substance; or

(3) 30, if the defendant (A) is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5); and (B) is subject to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because (i) death or serious bodily injury resulted from the use of the substance; and (ii) the defendant committed the offense after one or more prior convictions for a felony drug offense, as established by the information filed by the government pursuant to 21 U.S.C. 851; or

(4) 26, if the defendant (A) is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5); and (B) is subject

to a statutorily enhanced sentence under title 21, United States Code, for the offense of conviction because death or serious bodily injury resulted from the use of the substance; or”.]

[Option 2:

Section 2D1.1(a) is amended by striking paragraphs (1) through (4) as follows:

“(1) 43, if—

(A) the defendant is convicted under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. 960(b)(1) or (b)(2), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a serious drug felony or serious violent felony; or

(B) the defendant is convicted under 21 U.S.C. 841(b)(1)(C) or 21 U.S.C. 960(b)(3) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) 30, if the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or

(4) 26, if the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or”;

and by inserting the following new paragraphs (1) through (4):

“(1) 43, if—

(A) (i) the defendant is convicted under 21 U.S.C. 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. 960(b)(1) or (b)(2); (ii) the offense involved death or serious bodily injury resulting from the use of the substance; and (iii) the defendant committed the offense after one or more prior convictions for a serious drug felony or serious violent felony, as established by the information filed by the government pursuant to 21 U.S.C. 851; or

(B) (i) the defendant is convicted under 21 U.S.C. 841(b)(1)(C) or 21 U.S.C. 960(b)(3); (ii) the offense

involved death or serious bodily injury resulting from the use of the substance; and (iii) the defendant committed the offense after one or more prior convictions for a felony drug offense, as established by the information filed by the government pursuant to 21 U.S.C. 851; or

(2) 38, if (A) the defendant is convicted under 21 U.S.C. 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. 960(b)(1), (b)(2), or (b)(3); and (B) the offense involved death or serious bodily injury resulting from the use of the substance; or

(3) 30, if (A) the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5); (B) the offense involved death or serious bodily injury resulting from the use of the substance; and (C) the defendant committed the offense after one or more prior convictions for a felony drug offense, as established by the information filed by the government pursuant to 21 U.S.C. 851; or

(4) 26, if (A) the defendant is convicted under 21 U.S.C. 841(b)(1)(E) or 21 U.S.C. 960(b)(5); and (B) the offense involved death or serious bodily injury resulting from the use of the substance; or”.]

(F) “Sex Offense” Definition in § 4C1.1

Synopsis of Proposed Amendment:

Part F of the proposed amendment responds to concerns raised by the Department of Justice relating to the scope of the definition of “sex offense” in subsection (b)(2) of § 4C1.1 (Adjustment for Certain Zero-Point Offenders).

In 2023, the Commission added a new Chapter Four guideline, at § 4C1.1 (Adjustment for Certain Zero-Point Offenders), providing a decrease of 2 levels from the offense level determined under Chapters Two and Three for “zero-point” offenders who meet certain criteria. *See* USSG App. C, amendment 821 (effective Nov. 1, 2023). The 2-level adjustment for defendants with zero criminal history points at § 4C1.1 applies only if none of the exclusionary criteria set forth in subsections (a)(1) through (a)(10) apply. Among the exclusionary criteria is subsection (a)(5), requiring that “the [defendant’s] instant offense of conviction is not a sex offense.” Section 4C1.1(b)(2) defines “sex offense” as “(A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. 1591;

or (B) an attempt or a conspiracy to commit any offense described in subparagraphs (A)(i) through (iv) of this definition.”

The Department of Justice has raised a concern that the current definition of “sex offense” is too restrictive because it applies only to offenses perpetrated against minors. The Department of Justice first raised this issue during the 2022–2023 amendment cycle. In its letter addressing the proposed amendment on sexual abuse offenses, the Department of Justice noted that the restrictive definition of “sex offense” in the then-proposed § 4C1.1 would run counter to the Commission’s then-proposed amendment to increase the base offense level from level 14 to level 18 at § 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts; Criminal Sexual Abuse of an Individual in Federal Custody).

Part F of the proposed amendment would amend § 4C1.2(b)(2) to broaden the definition of “sex offense.” Two options are provided.

Option 1 would revise the current definition of “sex offense” at § 4C1.1(b)(2) to also cover sexual abuse offenses against wards and individuals in federal custody under 18 U.S.C. 2243(b) and (c).

Option 2 would expand the definition of “sex offense” at § 4C1.1(b)(2) to cover all offenses described in the listed provisions instead of only to offenses perpetrated against minors.

Proposed Amendment:

[Option 1:

Section 4C1.1(b)(2) is amended by striking “‘Sex offense’ means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. 1591; or (B) an attempt or a conspiracy to commit any offense described in subparagraphs (A)(i) through (iv) of this definition”; and inserting: “‘Sex offense’ means (A) an offense under 18 U.S.C. 2243(b) or (c); (B) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. 1591; or (C) an attempt or a conspiracy to commit any offense described in subparagraphs (A) and (B) of this definition”.]

[Option 2:

Section 4C1.1(b)(2) is amended by striking “‘Sex offense’ means (A) an offense, perpetrated against a minor, under”; and inserting “‘Sex offense’ means (A) an offense under”.]

6. Technical

Synopsis of Proposed Amendment: This proposed amendment would make technical and other non-substantive changes to the *Guidelines Manual*. The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both parts, as they are not mutually exclusive.

Technical and Conforming Changes Relating to § 4C1.1

In 2023, the Commission added a new Chapter Four guideline, at § 4C1.1 (Adjustment for Certain Zero-Point Offenders), providing a decrease of 2 levels from the offense level determined under Chapters Two and Three for “zero-point” offenders who meet certain criteria. *See* USSG App. C, amendment 821 (effective Nov. 1, 2023). Part A of the proposed amendment would make technical and conforming changes relating to § 4C1.1.

First, Part A of the proposed amendment would amend § 4C1.1. The 2-level adjustment for defendants with zero criminal history points at § 4C1.1 applies only if none of exclusionary criteria set forth in subsections (a)(1) through (a)(10) applies. Among the exclusionary criteria is subsection (a)(10), requiring that “the defendant did not receive an adjustment under § 3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848.” Several provisions in § 4C1.1 track similar language found in the safety valve criteria at 18 U.S.C. 3553(f). In particular, § 4C1.1(a)(10) mirrors 18 U.S.C. 3553(f)(4), which provides as a requirement that “the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act.”

Historically, courts have generally interpreted 18 U.S.C. 3553(f)(4) as excluding a defendant from safety valve eligibility if such defendant had either an aggravating role or were engaged in a continuing criminal enterprise, given the otherwise exclusionary language beginning each phrase of subsection (f)(4) (*i.e.*, “the defendant was not . . .” and “. . . was not engaged in”). The Sixth and the Seventh Circuits have squarely addressed this issue and held

that defendants are ineligible for safety valve relief if they either have an aggravating role or engaged in a continuing criminal enterprise, but that it is not required to demonstrate both. *See, e.g., United States v. Bazell*, 80 F.3d 1140, 1143 (6th Cir. 1996); *United States v. Draheim*, 958 F.3d 651, 660 (7th Cir. 2020).

The Commission intended § 4C1.1(b)(10) to track the safety valve criteria at 18 U.S.C. 3553(f)(4) and be applied by courts in the same way—namely, that a defendant is ineligible for the adjustment if the defendant meets either of the disqualifying conditions in the provision. Nevertheless, since promulgation of new § 4C1.1, several stakeholders have raised the question of whether the “and” in the subsection (a)(10) is conjunctive or disjunctive.

To address the confusion caused by the use of the word “and” in that provision, Part A of the proposed amendment would make technical changes to § 4C1.1 to divide subsection (a)(10) into two separate provisions, clarifying the Commission’s intention that a defendant is ineligible for the adjustment if the defendant meets either of the disqualifying conditions listed in the provision.

Finally, Part A of the proposed amendment would make conforming changes relating to § 4C1.1 by adding necessary references to new Chapter Four, Part C (Adjustment for Certain Zero-Point Offenders) in subsection (a)(6) of § 1B1.1 (Application Instructions), the Introductory Commentary to Chapter Two (Offense Conduct), and the Commentary to §§ 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 3D1.5 (Determining the Total Punishment). These guidelines and commentaries refer to the order in which the chapters of the *Guidelines Manual* should be applied.

Additional Technical and Clerical Changes

Part B of the proposed amendment would make technical and clerical changes to—

(1) the Commentary to § 1B1.1 (Application Instructions), to add headings to some application notes, provide stylistic consistency in how subdivisions are designated, and correct a typographical error;

(2) § 2B1.1 (Theft, Property Destruction, and Fraud), to provide consistency in the use of capitalization and how subdivisions are designated, and to correct a reference to the term “equity security”;

(3) the Commentary to § 2B1.6 (Aggravated Identity Theft), to correct

some typographical errors and provide stylistic consistency in how subdivisions are designated;

(4) § 2B3.1 (Robbery), to provide stylistic consistency in how subdivisions are designated and add headings to the application notes in the Commentary;

(5) § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), to provide stylistic consistency in how subdivisions are designated and add headings to some application notes in the Commentary;

(6) § 2C1.8 (Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property), to provide consistency in the use of capitalization;

(7) § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses)), to provide stylistic consistency in how subdivisions are designated, make clerical changes to some controlled substances references in the Drug Conversion Tables at Application Note 8(D) and the Typical Weight Per Unit Table at Application Note 9, and correct a reference to a statute in the Background commentary;

(8) the Background Commentary to § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy), to correct a reference to a statute;

(9) the Commentary to § 2D1.5 (Continuing Criminal Enterprise; Attempt or Conspiracy), to add headings to application notes and correct a reference to a statutory provision;

(10) § 2E2.1 (Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means), to provide stylistic consistency in how subdivisions are designated and add headings to the application notes in the Commentary;

(11) § 2E3.1 (Gambling Offenses; Animal Fighting Offenses), to provide stylistic consistency in how subdivisions are designated and correct a reference to a statutory provision in the Commentary;

(12) § 2H2.1 (Obstructing an Election or Registration), to provide stylistic consistency in how subdivisions are designated and add a heading to the application note in the Commentary;

(13) § 2K1.4 (Arson; Property Damage by Use of Explosives), to provide

stylistic consistency in how subdivisions are designated;

(14) the Commentary to § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), to correct some typographical errors;

(15) the Commentary to § 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), to provide consistency in the use of capitalization and how subdivisions are designated;

(16) § 3B1.1 (Aggravating Role), to provide stylistic consistency in how subdivisions are designated, add headings to the application notes in the Commentary, and correct a typographical error;

(17) the Commentary to § 3D1.1 (Procedure for Determining Offense Level on Multiple Counts), to add a heading to an application note;

(18) § 4A1.1 (Criminal History Category), to provide stylistic consistency in how subdivisions are designated and correct the headings of the application notes in the Commentary;

(19) § 4A1.2 (Definitions and Instructions for Computing Criminal History), to provide stylistic consistency in how subdivisions are designated;

(20) the Commentary to § 5G1.2 (Sentencing on Multiple Counts of Conviction), to provide stylistic consistency in how subdivisions are designated, fix typographical errors in the Commentary, and update an example that references 18 U.S.C. 924(c) (which was amended by the First Step Act of 2018, Pub. L. 115–391 (2018));

(21) the Commentary to § 5K1.1 (Substantial Assistance to Authorities (Policy Statement)), to add headings to application notes and correct a typographical error;

(22) § 5K2.0 (Grounds for Departure (Policy Statement)), to correct a typographical error and provide stylistic consistency in how subdivisions are designated;

(23) § 5E1.2 (Fines for Individual Defendants), to provide stylistic consistency in how subdivisions are designated;

(24) § 5F1.6 (Denial of Federal Benefits to Drug Traffickers and Possessors), to provide consistency in the use of capitalization and add a heading to an application note in the Commentary;

(25) § 6A1.5 (Crime Victims' Rights (Policy Statement)), to provide consistency in the use of capitalization; and

(26) the Commentary to § 8B2.1 (Effective Compliance and Ethics

Program), to provide consistency in the use of capitalization.

(A) Technical and Conforming Changes Relating to § 4C1.1

Proposed Amendment: Section 4C1.1(a) is amended—

in paragraph (9) by striking “and”;
by striking paragraph (10) as follows:
“(10) the defendant did not receive an adjustment under § 3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848;”;

and by inserting at the end the following new paragraphs (10) and (11):
“(10) the defendant did not receive an adjustment under § 3B1.1 (Aggravating Role); and

(11) the defendant was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. 848;”.

Section 1B1.1(a)(6) is amended by striking “Part B of Chapter Four” and inserting “Parts B and C of Chapter Four”.

Chapter Two is amended in the Introductory Commentary by striking “Chapter Four, Part B (Career Offenders and Criminal Livelihood)” and inserting “Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)”.

The Commentary to § 3D1.1 captioned “Background” is amended by striking “Chapter Four, Part B (Career Offenders and Criminal Livelihood)” and inserting “Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)”.

The Commentary to § 3D1.5 is amended by striking “Chapter Four, Part B (Career Offenders and Criminal Livelihood)” and inserting “Chapter Four, Parts B (Career Offenders and Criminal Livelihood) and C (Adjustment for Certain Zero-Point Offenders)”.

(B) Additional Technical and Clerical Changes

Proposed Amendment: The

Commentary to § 1B1.1 captioned “Application Notes” is amended—

in Note 1 by inserting at the beginning the following new heading: “*Frequently Used Terms Defined.*—”;

in Note 1(F) by striking “subdivision” and inserting “clause”;

in Note 2 by inserting at the beginning the following new heading: “*Definition of Additional Terms.*—”; and by striking “case by case basis” and inserting “case-by-case basis”;

in Note 3 by inserting at the beginning the following new heading: “*List of Statutory Provisions.*—”;

in Note 4 by inserting at the beginning the following new heading:

“Cumulative Application of Multiple Adjustments.—”;

in Note 4(A) by striking “subdivisions” and inserting “subparagraphs”;

and in Note 5 by inserting at the beginning the following new heading: *“Two or More Guideline Provisions Equally Applicable.—”*.

Section 2B1.1(b)(7) is amended by striking “Federal” and inserting “federal”; and by striking “Government” both places such term appears and inserting “government”.

Section 2B1.1(b)(17) is amended by striking “subdivision” both places such term appears and inserting “subparagraph”.

Section 2B1.1(b)(19)(B) is amended by striking “subdivision” and inserting “subparagraph”.

Section 2B1.1(c) is amended by striking “subdivision” and inserting “paragraph”.

The Commentary to 2B1.1 captioned “Application Notes” is amended—

in Note 1 by striking “‘Equity securities’” and inserting “‘Equity security’”;

in Note 3(A) by striking “subdivision” and inserting “subparagraph”;

in Note 3(A)(v) by striking “subdivisions” and inserting “subclauses”;

in Note 3(F) by striking “subdivision (A)” and inserting “subparagraph (A)”;

in Note 3(F)(i) by striking “this subdivision” and inserting “this clause”;

in Note 3(F)(viii) by striking “a Federal health care offense” and inserting “a federal health care offense”; and by striking “Government health care program” both places such term appears and inserting “government health care program”;

and in Note 4(C)(ii) by striking “subdivision” and inserting “subparagraph”.

The Commentary to § 2B6.1 captioned “Application Notes” is amended in Note 1 by striking “United State Code” both places such term appears and inserting “United States Code”; and by striking “subdivision” and inserting “subparagraph”.

Section 2B3.1(b)(3) is amended by striking “subdivisions” both places such term appears and inserting “subparagraphs”; and by striking “cumulative adjustments from (2) and (3)” and inserting “cumulative adjustments from application of paragraphs (2) and (3)”.

The Commentary to § 2B3.1 captioned “Application Notes” is amended—

in Note 1 by inserting at the beginning the following new heading: *“Definitions.—”*;

in Note 2 by inserting at the beginning the following new heading: *“Dangerous Weapon.—”*;

in Note 3 by inserting at the beginning the following new heading: *“Definition of ‘Loss’.—”*;

in Note 4 by inserting at the beginning the following new heading:

“Cumulative Application of Subsections (b)(2) and (b)(3).—”;

in Note 5 by inserting at the beginning the following new heading: *“Upward Departure Provision.—”*;

and in Note 6 by inserting at the beginning the following new heading: *“‘A Threat of Death’.—”*.

Section 2B3.2(b)(3)(B) is amended by striking “subdivisions” and inserting “clauses”.

Section 2B3.2(b)(4) is amended by striking “subdivisions” both places such term appears and inserting “subparagraphs”; and by striking “cumulative adjustments from (3) and (4)” and inserting “cumulative adjustments from application of paragraphs (3) and (4)”.

The Commentary to § 2B3.2 captioned “Application Notes” is amended—

in Note 2 by inserting at the beginning the following new heading: *“Threat of Injury or Serious Damage.—”*;

in Note 3 by inserting at the beginning the following new heading: *“Offenses Involving Public Officials and Other Extortion Offenses.—”*;

in Note 4 by inserting at the beginning the following new heading:

“Cumulative Application of Subsections (b)(3) and (b)(4).—”;

in Note 5 by inserting at the beginning the following new heading: *“Definition of ‘Loss to the Victim’.—”*;

in Note 6 by inserting at the beginning the following new heading:

“Defendant’s Preparation or Ability to Carry Out a Threat.—”;

in Note 7 by inserting at the beginning the following new heading: *“Upward Departure Based on Threat of Death or Serious Bodily Injury to Numerous Victims.—”*;

and in Note 8 by inserting at the beginning the following new heading: *“Upward Departure Based on Organized Criminal Activity or Threat to Family Member of Victim.—”*.

Section 2C1.8(b)(3) is amended by striking “Federal” and inserting “federal”.

The Commentary to § 2C1.8 captioned “Application Notes” is amended in Note 2 by striking “Federal” both places such term appears and inserting “federal”; and by striking “Presidential” and inserting “presidential”.

Section 2D1.1(b)(14)(C)(ii) is amended by striking “subdivision” and inserting “subparagraph”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended—

in Note 8(D)—

under the heading relating to LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors), by striking the following:

“1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) = 680 gm

1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) = 2.5 kg

1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) = 1.67 kg

1 gm of 3,4-Methylenedioxyamphetamine (MDA) = 500 gm

1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) = 500 gm

1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) = 500 gm”; and inserting the following:

“1 gm of 1-Piperidinocyclohexanecarbonitrile (PCC) = 680 gm

1 gm of 2,5-Dimethoxy-4-methylamphetamine (DOM) = 1.67 kg

1 gm of 3,4-Methylenedioxyamphetamine (MDA) = 500 gm

1 gm of 3,4-Methylenedioxymethamphetamine (MDMA) = 500 gm

1 gm of 3,4-Methylenedioxy-N-ethylamphetamine (MDEA) = 500 gm

1 gm of 4-Bromo-2,5-Dimethoxyamphetamine (DOB) = 2.5 kg”;

and under the heading relating to Schedule III Substances (except ketamine), by striking “1 unit of a Schedule III Substance” and inserting “1 unit of a Schedule III Substance (except Ketamine)”;

and in Note 9, under the heading relating to Hallucinogens, by striking the following:

“2,5-Dimethoxy-4-methylamphetamine (STP, DOM)* 3 mg

MDA 250 mg

MDMA 250 mg

Mescaline 500 mg

PCP* 5 mg”;

and inserting the following:

“2,5-Dimethoxy-4-methylamphetamine (STP, DOM)* 3 mg

3,4-Methylenedioxyamphetamine (MDA) 250 mg

3,4-Methylenedioxymethamphetamine (MDMA) 250 mg

Mescaline 500 mg

Phencyclidine (PCP)* 5 mg”.

The Commentary to § 2D1.1 captioned “Background” is amended by striking “Section 6453 of the Anti-Drug Abuse Act of 1988” and inserting “section 6453 of Public Law 100–690”.

The Commentary to § 2D1.2 captioned “Background” is amended by striking “Section 6454 of the Anti-Drug Abuse Act of 1988” and inserting “section 6454 of Public Law 100–690”.

The Commentary to § 2D1.5 captioned “Application Notes” is amended—
in Note 1 by inserting at the beginning the following new heading:

“Inapplicability of Chapter Three Adjustment.—”;

in Note 2 by inserting at the beginning the following new heading: *“Upward Departure Provision.—”*;

in Note 3 by inserting at the beginning the following new heading:

“‘Continuing Series of Violations’.—”;

and in Note 4 by inserting at the beginning the following new heading: *“Multiple Counts.—”*.

The Commentary to § 2D1.5 captioned “Background” is amended by striking “Title 21 U.S.C. 848” and inserting “Section 848 of title 21, United States Code.”.

Section 2E2.1(b)(2) is amended by striking “subdivisions” both places such term appears and inserting “subparagraphs”; and by striking “the combined increase from (1) and (2)” and inserting “the combined increase from application of paragraphs (1) and (2)”.

The Commentary to § 2E2.1 captioned “Application Notes” is amended—
in Note 1 by inserting at the beginning the following new heading:

“Definitions.—”;

and in Note 2 by inserting at the beginning the following new heading: *“Interpretation of Specific Offense Characteristics.—”*.

Section 2E3.1(a)(1) is amended by striking “subdivision” and inserting “paragraph”.

The Commentary to § 2E3.1 captioned “Application Notes” is amended in Note 1 by striking “§ 2156(g)” and inserting “§ 2156(f)”.

Section 2H2.1(a)(2) is amended by striking “in (3)” and inserting “in paragraph (3)”.

The Commentary to § 2H2.1 captioned “Application Notes” is amended in Note 1 by inserting at the beginning the following new heading: *“Upward Departure Provision.—”*.

Section 2K1.4(b)(2) is amended by striking “under (a)(4)” and inserting “under subsection (a)(4)”.

The Commentary to § 2K2.4 captioned “Application Notes” is amended in Note 1 by striking “United State Code” both place such term appears and inserting “United States Code”.

The Commentary to § 2S1.1 captioned “Application Notes” is amended—
in Note 1 by striking “Federal” and inserting “federal”;

and in Note 4(B)(vi) by striking “subdivisions” and inserting “clauses”.

Section 3B1.1(c) is amended by striking “in (a) or (b)” and inserting “in subsection (a) or (b)”.

The Commentary to § 3B1.1 captioned “Application Notes” is amended—

in Note 1 by inserting at the beginning the following new heading: *“Definition of ‘Participant’.—”*;

in Note 2 by inserting at the beginning the following new heading: *“Organizer, Leader, Manager, or Supervisor of One or More Participants.—”*;

in Note 3 by inserting at the beginning the following new heading: *“‘Otherwise Extensive’.—”*;

and in Note 4 by inserting at the beginning the following new heading: *“Factors to Consider.—”*; and by striking “decision making” and inserting “decision-making”.

The Commentary to § 3D1.1 captioned “Application Notes” is amended in Note 2 by inserting at the beginning the following new heading: *“Application of Subsection (b).—”*.

Section 4A1.1(b) is amended by striking “in (a)” and inserting “in subsection (a)”.

Section 4A1.1(c) is amended by striking “in (a) or (b)” and inserting “in subsection (a) or (b)”.

Section 4A1.1(d) is amended by striking “under (a), (b), or (c)” and inserting “under subsection (a), (b), or (c)”.

The Commentary to § 4A1.1 captioned “Application Notes” is amended—

in Note 1, in the heading, by striking *“§ 4A1.1(a).”* and inserting *“§ 4A1.1(a).—”*;

in Note 2, in the heading, by striking *“§ 4A1.1(b).”* and inserting *“§ 4A1.1(b).—”*;

in Note 3, in the heading, by striking *“§ 4A1.1(c).”* and inserting *“§ 4A1.1(c).—”*;

in Note 4, in the heading, by striking *“§ 4A1.1(d).”* and inserting *“§ 4A1.1(d).—”*;

and in Note 5, in the heading, by striking *“§ 4A1.1(e).”* and inserting *“§ 4A1.1(e).—”*.

Section 4A1.2(a)(2) is amended by striking “by (A) or (B)” and inserting “by subparagraph (A) or (B)”.

Section 4A1.2(d)(2)(B) is amended by striking “in (A)” and inserting “in subparagraph (A)”.

Section 5E1.2(c)(2) is amended by striking “in (4)” and inserting “in paragraph (4)”.

Section 5F1.6 is amended by striking “Federal” and inserting “federal”.

The Commentary to 5F1.6 captioned “Application Notes” is amended in Note 1 by inserting at the beginning the following new heading: *“Definition of ‘Federal Benefit’.—”*.

The Commentary to § 5G1.2 captioned “Application Notes” is amended—

in Note 1 by striking “See Note 3” and inserting “See Application Note 3”.

in Note 2(A) by striking “subdivision” and inserting “subparagraph”;

in Note 4(B)(i) by striking “a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. 841(b)(1)(C) (20 year statutory maximum)” and inserting “a drug trafficking offense (5-year mandatory minimum), and one count of violating 21 U.S.C. 841(b)(1)(C) (20-year statutory maximum)”;

in Note 4(B)(ii) by striking “one count of 18 U.S.C. 924(c) (5 year mandatory minimum), and one count of violating 21 U.S.C. 841(b)(1)(C) (20 year statutory maximum)” and inserting “one count of 18 U.S.C. 924(c) (5-year mandatory minimum), and one count of violating 21 U.S.C. 841(b)(1)(C) (20-year statutory maximum)”;

and in Note 4(B)(iii) by striking the following:

“The defendant is convicted of two counts of 18 U.S.C. 924(c) (5 year mandatory minimum on first count, 25 year mandatory minimum on second count) and one count of violating 18 U.S.C. 113(a)(3) (10 year statutory maximum). Applying § 4B1.1(c), the court determines that a sentence of 460 months is appropriate (applicable guideline range of 460–485 months). The court then imposes (I) a sentence of 60 months on the first 18 U.S.C. 924(c) count; (II) a sentence of 300 months on the second 18 U.S.C. 924(c) count; and (III) a sentence of 100 months on the 18 U.S.C. 113(a)(3) count. The sentence on each count is imposed to run consecutively to the other counts.”;

and inserting the following:

“The defendant is convicted of two counts of 18 U.S.C. 924(c) (5-year mandatory minimum on each count) and one count of violating 18 U.S.C. 113(a)(3) (10-year statutory maximum). Applying § 4B1.1(c), the court determines that a sentence of 262 months is appropriate (applicable guideline range of 262–327 months). The court then imposes (I) a sentence of 82 months on the first 18 U.S.C. 924(c) count; (II) a sentence of 60 months on the second 18 U.S.C. 924(c) count; and (III) a sentence of 120 months on the 18 U.S.C. 113(a)(3) count. The sentence on each count is imposed to run consecutively to the other counts.”.

The Commentary to § 5K1.1 captioned “Application Notes” is amended—

in Note 1 by inserting at the beginning the following new heading: *“Sentence Below Statutorily Required Minimum Sentence.—”*;

in Note 2 by inserting at the beginning the following new heading: *“Interaction*

with *Acceptance of Responsibility Reduction.*—”;

and in Note 3 by inserting at the beginning the following new heading: “*Government’s Evaluation of Extent of Defendant’s Assistance.*—”.

The Commentary to § 5K1.1 captioned “Background” is amended by striking “*in camera*” and inserting “*in camera*”.

Section 5K2.0(e) is amended by striking “*in camera*” and inserting “*in camera*”.

The Commentary to § 5K2.0 captioned “Application Notes” is amended in Note 3(C) by striking “subdivision” and inserting “subparagraph”.

Section 6A1.5 is amended by striking “Federal” and inserting “federal”.

The Commentary to § 8B2.1 captioned “Application Notes” is amended in Note 4(A) by striking “any Federal, State,” and inserting “any federal, state,”.

7. Simplification of Three-Step Process

Synopsis of Proposed Amendment: In September 2023, the Commission identified as one of its policy priorities for the amendment cycle ending May 1, 2024, the “exploration of ways to simplify the guidelines and possible consideration of amendments that might be appropriate.” U.S. Sent’g Comm’n, “Notice of Final Priorities,” 88 FR 60536 (Sept. 1, 2023). Consistent with this priority, the Commission is publishing these issues for comment and proposed amendment to inform the Commission’s consideration of these issues.

The Three-Step Process in the Guidelines Manual

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) (the “Act”) provides for the development of guidelines that will further the basic purposes of criminal sentencing: deterrence, incapacitation, retribution, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process. The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to establish categories of offenses and categories of defendants for use in prescribing guideline ranges that specify an appropriate sentence and to consider whether, and to what extent, specific offense-based and offender-based factors are relevant to sentencing. See 28 U.S.C. 994(c) and (d). In relation to the establishment of categories of defendants, the Act placed several limitations upon the Commission’s ability to consider certain personal and

individual characteristics in establishing the guidelines and policy statements. See 28 U.S.C. 994(d), (e).

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the portion of 18 U.S.C. 3553 making the guidelines mandatory was unconstitutional. The Court has further explained that the guideline range, which reflects the defendant’s criminal conduct and the defendant’s criminal history, should continue to be “the starting point and the initial benchmark” in sentencing proceedings. See *Gall v. United States*, 552 U.S. 38, 49 (2007); see also *Peugh v. United States*, 569 U.S. 530 (2013) (noting that “the post-Booker federal sentencing system adopted procedural measures that make the guidelines the ‘lodestone’ of sentencing”). After determining the kinds of sentence and guideline range, however, the court must also fully consider the factors in 18 U.S.C. 3553(a), including, among other factors, “the nature and circumstances of the offense and the history and characteristics of the defendant,” to determine a sentence that is sufficient but not greater than necessary.

In the wake of *Booker* and other cases, § 1B1.1 (Application Instructions) sets forth the instructions for determining the applicable guideline range and type of sentence to impose, in accordance with the *Guidelines Manual*. It sets forth a three-step process for determining the sentence to be imposed, which is reflected in the three main subdivisions of § 1B1.1 (subsections (a) through (c)). The three-step process can be summarized as follows: (1) the court calculates the applicable guideline range and determines the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution; (2) the court considers policy statements and guideline commentary relating to departures and specific personal characteristics that might warrant consideration in imposing the sentence; and (3) the court considers the applicable factors in 18 U.S.C. 3553(a) in deciding what sentence to impose (whether within the applicable guideline range, or whether as a departure or as a variance (or as both)).

The first step in the three-step process, as set forth in § 1B1.1(a), requires the court to calculate the applicable guideline range and determine the kind of sentence by applying Chapters Two (Offense Conduct), Three (Adjustments), and Four (Criminal History and Criminal Livelihood), and Parts B through G of Chapter Five (Determining the Sentence).

The second step in the three-step process, as set forth in § 1B1.1(b), requires the court to consider “Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.” Authorized grounds for departures based on various circumstances of the offense, specific personal characteristics of the offender, and certain procedural history of the case are described throughout the *Guidelines Manual*: several Chapter Two offense guidelines and Chapter Eight organizational guidelines contain departure provisions within their corresponding Commentary; grounds for departure based on criminal history are provided in Chapter Four; and Chapter Five sets forth various policy statements with additional grounds for departure. Chapter Five, Part H, addresses the relevance of certain specific personal characteristics in sentencing by allocating them into three general categories. The first category includes specific personal characteristics that Congress has prohibited from consideration or that the Commission has determined should be prohibited. See, e.g., USSG § 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)). The second category includes specific personal characteristics that Congress directed the Commission to ensure are reflected in the guidelines and policy statements as generally inappropriate in recommending a term of imprisonment or length of a term of imprisonment. See, e.g., §§ 5H1.2 (Employment Record); 5H1.6 (Family Ties and Responsibilities (Policy Statement)). The third category includes specific personal characteristics that Congress directed the Commission to consider in the guidelines only to the extent that they have relevance to sentencing. See, e.g., USSG §§ 5H1.1 (Age (Policy Statement)); 5H1.3 (Mental and Emotional Conditions (Policy Statement)).

The third step in the three-step process, as set forth in § 1B1.1(c), requires the court to “consider the applicable factors in 18 U.S.C. 3553(a) taken as a whole.” Specifically, section 3553(a) provides:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. 3553(a).

Post-*Booker*, courts have been using departures provided under step two of the three-step process with less frequency in favor of variances. Given this trend, the Commission has identified the reconceptualization of the three-step process as one potential method of simplifying the guidelines.

Proposed Amendment

The proposed amendment contains two parts. Part A contains issues for comment on whether any changes should be made to the *Guidelines Manual* relating to the three-step process set forth in § 1B1.1 and the use of departures and policy statements relating to specific personal characteristics. Part B contains a proposed amendment that would restructure the *Guidelines Manual* to simplify both (1) the current three-step process utilized in determining a sentence that is “sufficient, but not greater than necessary,” and (2) existing guidance in the *Guidelines Manual* regarding a court’s consideration of the individual circumstances of the defendant as well as certain offense characteristics. The proposed amendment set forth in Part B also seeks to better address the distinction between the statutory limitations on the Commission’s ability to consider certain offense characteristics and individual circumstances in recommending a term of imprisonment or length of imprisonment, and the requirement that the court consider a broad range of individual and offense characteristics in determining an appropriate sentence pursuant to 18 U.S.C. 3553(a).

The proposed amendment would make changes to better align the requirements placed on the court and acknowledge the growing shift away from the use of departures provided for within the *Guidelines Manual* in the wake of *Booker* and subsequent decisions. See *United States v. Booker*, 543 U.S. 220 (2005); *Irizarry v. United States*, 553 U.S. 708 (2008) (holding that Rule 32(h) of the Federal Rules of Criminal Procedure, which requires a court to give “reasonable notice” that the court is contemplating a “departure” from the recommended guideline range on a ground not identified for departure in the presentence report or in a party’s prehearing submission, does not apply to a “variance” from a recommended guideline range).

The proposed amendment would revise Chapter One in multiple ways. First, it would delete the “Original Introduction to the Guidelines Manual”

currently contained in Chapter One, Part A. This introduction would be published as a historical background in Appendix B (Selected Sentencing Statutes) of the *Guidelines Manual*. Second, the proposed amendment would revise the application instructions provided in § 1B1.1 to reflect the simplification of the three-step process into two steps. Additionally, the definition of “departures” is removed from the application notes to § 1B1.1, and the Background Commentary is revised accordingly.

Consistent with the revised approach, the proposed amendment would reclassify most “departures” currently provided throughout the *Guidelines Manual*. Under the new approach, current departure provisions would be retained in more generalized language. Instead of being identified as departures, they would be generally reclassified as “Additional Considerations” that may be relevant to the court’s determination under 18 U.S.C. 3553(a). Changes would be made throughout the *Guidelines Manual* by revising the departure provisions currently contained in commentary to various guidelines. Such provisions would be maintained in a new section to the commentary titled “Additional Considerations” and are intended to retain, to the extent possible, the guidance and considerations provided by the deleted provisions and to be neutral as to the scope and content of the conduct covered.

The proposed amendment would also retitle Chapter Five to reflect its focus on the rules pertaining to the calculation of the guideline range, specifically to better reflect the chapter’s purpose in the introductory commentary noting that “a sentence is within the guidelines if it complies with each applicable section of this chapter.” All current provisions contained in Chapter Five, Part H (Specific Offender Characteristics) would be deleted. Similarly, most of the provisions in Chapter Five, Part K (Departures), would be deleted. Only the provisions pertaining to substantial assistance would be retained, while the provision pertaining to early disposition programs would be moved to a new Part F in Chapter Three.

The proposed amendment would also create a new Chapter Six (renumbering existing chapters accordingly) to facilitate the court’s consideration of 18 U.S.C. 3553(a). The new chapter is divided into three guidelines. The first generally reflects the court’s consideration of the section 3553(a) factors and specifically references those

factors. The second and third guidelines compile factors which generally are not considered in the calculation of the guideline range in Chapters Two through Five, but which may be relevant to the court's consideration of "the nature and circumstances of the offense and the history and characteristics of the defendant" pursuant to 18 U.S.C. 3553(a)(1). These factors set forth reasons from former Parts H and K of Chapter Five, including factors that are generally not considered in the calculation of the guideline range in Chapters Two through Five, but which courts regularly consider pursuant to section 3553(a). While the list of factors is provided to both facilitate the court's consideration and to assist with the collection of data by the Commission, the proposed amendment includes language recognizing that the nature, extent, and significance of specific personal characteristics can involve a range of considerations that are difficult or impossible to quantify for purposes of establishing the guideline ranges. As such, the new chapter notes that the factors identified are not weighted in any manner or intended to be comprehensive or to otherwise infringe upon the court's unique position to determine the most appropriate sentence.

The issues for comment set forth below are informed by the proposed amendment contained in Part B. In addition to receiving input from the issues for comment below, the Commission anticipates both general comment on Part B of the proposed amendment and welcomes line edits on the specific changes proposed.

(A) Issues for Comment

1. Part B of the proposed amendment would reconceptualize and simplify the three-step process, as set forth in § 1B1.1 (Application Instructions), to streamline the application of the *Guidelines Manual* and to better reflect the interaction between 18 U.S.C. 3553(a) and the guidelines. It would do so by removing the second step in the three-step process, as set forth in § 1B1.1(b), requiring the court to consider the departure provisions set forth throughout the *Guidelines Manual* and the policy statements contained in Chapter Five, Part H, relating to specific personal characteristics. The *Guidelines Manual* currently contains more than two hundred departure provisions in Chapter Five, Part K, and the commentary to various guidelines elsewhere in the Manual. Chapter Five, Part H, contains twelve policy statements addressing the relevance of certain specific personal characteristics

in sentencing. The Commission invites general comment on whether the Commission should reconceptualize and simplify the three-step process in this manner. If so, what, if any, revisions would be appropriate to further the Commission's goal to reconceptualize and simplify the three-step process? If not, are there any other approaches that the Commission should consider to reconceptualize and simplify the three-step process, and if so, what are they?

2. The Commission seeks comment on whether revising the three-step process either in general or as implemented in any particular provision in Part B of the proposed amendment, is consistent with 28 U.S.C. 994 and 995 and all other provisions of federal law. In particular, the Commission seeks comment regarding whether providing guidance to the courts regarding consideration of the other factors in 18 U.S.C. 3553(a), including providing examples of factors that may be relevant to the court's determination of the appropriate sentence, is consistent with the Commission's authority. Similarly, the Commission seeks comment on whether revising the three-step process is consistent with other congressional directives to the Commission.

3. The proposed amendment contained in Part B would continue to account for factors contained in most of the two hundred departure provisions in Chapter Five, Parts H and K, and the commentary to various guidelines in different ways. If the Commission were to remove the second step in the three-step process, as proposed in Part B, should the Commission continue to account for these factors? If so, how and why? Should the Commission account for these factors in the manner set forth in Part B of the proposed amendment? If not, should the Commission consider a different approach? For example, should the Commission remove some or all of the specific factors and rely on a more general policy statement referencing the sentencing factors in 18 U.S.C. § 3553(a)? What should such a policy statement specifically provide? What factors should be retained or removed, and why?

4. The proposed amendment would create a new Chapter Six (and renumber existing chapters accordingly) that consolidate in three policy statements many of the factors contained in Chapter Five, Parts H and K. The new Chapter Six set forth in Part B of the proposed amendment would facilitate the court's consideration of 18 U.S.C. 3553(a). The new chapter is divided into three guidelines, § 6A1.1 through § 6A1.3. New § 6A1.1 generally reflects

the court's consideration of the section 3553(a) factors and specifically references those factors. New §§ 6A1.2 and 6A1.3 compile factors which generally are not considered in the calculation of the guideline range in Chapters Two through Five, but which may be relevant to the court's consideration of "the nature and circumstances of the offense and the history and characteristics of the defendant" pursuant to 18 U.S.C. 3553(a)(1). New § 6A1.2 enumerates certain personal characteristics, while § 6A1.3 provides a list of offense characteristics along with some guidance for consideration of the court. The Commission does not intend to expand the list of personal and offense characteristics beyond those set forth in the proposed amendment. The Commission does, however, seek comment on whether the policy statement compiling factors relating to personal characteristics in § 6A1.2 should include more specific guidance to the court regarding when and under what types of circumstances any such characteristic may be relevant to the court's sentencing determination in a manner that is more similar to new § 6A1.3. Similarly, should the Commission provide different guidance regarding the offense characteristics in § 6A1.3? If so, what guidance should the Commission provide for both personal characteristics and offense characteristics, and why? If not, how should the Commission lay out such characteristics and why?

5. In addition to new Chapter Six, Part B of the proposed amendment would reclassify most "departures" currently provided throughout the *Guidelines Manual*. Instead of being identified as departures, they would be generally reclassified in the corresponding Chapter Two provisions as "Additional Offense Specific Considerations" that may be relevant to the court's determination under 18 U.S.C. 3553(a). Under the new approach, the current departure provisions would be retained in more generalized language but are intended to be neutral as to the scope and content of the conduct covered by the existing departures. The Commission seeks comment on whether some or all of the factors contained in the commentary to various guidelines should be consolidated in the new Chapter Six. If so, which factors should be moved into new Chapter Six, and why? Which factors should be retained in their current guideline or policy statement, and why?

The Commission further seeks comment regarding whether any revisions made in reclassifying

departures as “Additional Considerations” unintentionally remove guidance and considerations provided by the deleted provisions or unintentionally expand or contract the scope and content of those provisions.

6. If the Commission were to remove or limit the departure provisions in the *Guidelines Manual*, how should the Commission continue to account for sentencing considerations for substantial assistance to authorities and refusal to assist authorities, currently provided for in §§ 5K1.1 (Substantial Assistance to Authorities (Policy Statement)) and 5K1.2 (Refusal to Assist (Policy Statement))?

7. If the Commission were to remove or limit the departure provisions in the *Guidelines Manual*, how should the Commission continue to account for sentencing considerations relating to early disposition programs, currently provided for in § 5K3.1 (Early Disposition Programs (Policy Statement))?

8. The Commission seeks general comment on whether the proposed changes to the *Guidelines Manual*, as set forth in Part B of the proposed amendment, would make it easier for courts to report the reasons for their sentences and allow possible improvements in data collection on all of the factors courts consider when imposing a sentence consistent with 18 U.S.C. 3553(a). What, if any, changes to the proposed amendment would enhance such reporting and data collection efforts? What changes should the Commission consider, in conjunction with the Judicial Conference of the United States, to the Statement of Reasons form if the proposed amendment is adopted?

(B) Proposed Amendment

Chapter One is amended by striking Part A as follows:

“Part A—Introduction and Authority Introductory Commentary

Subparts 1 and 2 of this Part provide an introduction to the *Guidelines Manual* describing the historical development and evolution of the federal sentencing guidelines. Subpart 1 sets forth the original introduction to the *Guidelines Manual* as it first appeared in 1987, with the inclusion of amendments made occasionally thereto between 1987 and 2000. The original introduction, as so amended, explained a number of policy decisions made by the United States Sentencing Commission (“Commission”) when it promulgated the initial set of guidelines and therefore provides a useful

reference for contextual and historical purposes. Subpart 2 further describes the evolution of the federal sentencing guidelines after the initial guidelines were promulgated.

Subpart 3 of this Part states the authority of the Commission to promulgate federal sentencing guidelines, policy statements, and commentary.

1. Original Introduction to the Guidelines Manual

The following provisions of this Subpart set forth the original introduction to this manual, effective November 1, 1987, and as amended through November 1, 2000:

1. Authority

The United States Sentencing Commission (“Commission”) is an independent agency in the judicial branch composed of seven voting and two non-voting, *ex officio* members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.

The guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code.

2. The Statutory Mission

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of ‘bank robbery/committed with a gun/\$2500 taken.’ An offender characteristic category might be ‘offender with one prior conviction not resulting in imprisonment.’ The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. Where the guidelines call for imprisonment, the

range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. 994(b)(2).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.

The Commission’s initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. 994(p).

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.

3. The Basic Approach (Policy Statement)

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act’s basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in

sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior. There is a tension, however, between the mandate of uniformity and the mandate of proportionality. Simple uniformity—sentencing every offender to five years—destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.

A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context

specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected; and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.

The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system. Moreover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system having numerous subcategories, would be required to make a host of decisions regarding whether the underlying facts were sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.

In view of the arguments, it would have been tempting to retreat to the simple, broad category approach and to grant courts the discretion to select the proper point along a broad sentencing range. Granting such broad discretion, however, would have risked correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.

In the end, there was no completely satisfying solution to this problem. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary

powers of the sentencing court. Any system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of 'just deserts.' Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical 'crime control' considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take

such unusual cases into account by departing from the guidelines.

The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.

4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.

(a) Real Offense vs. Charge Offense Sentencing

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ('charge offense' sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken \$50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process

given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

In its initial set of guidelines submitted to Congress in April 1987, the Commission moved closer to a charge offense system. This system, however, does contain a significant number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and adjustments.

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of \$10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of \$30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission will closely monitor charging and plea agreement practices and will make appropriate adjustments should they become necessary.

(b) Departures

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds 'an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the

Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.’ 18 U.S.C. 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), § 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), the last sentence of § 5K2.12 (Coercion and Duress), and § 5K2.19 (Post-Sentencing Rehabilitative Efforts) * list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

* *Note:* Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. (See USSG App. C, amendment 768.)

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts’ legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission’s data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the

case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (e.g., physical injury) may infrequently occur in connection with a particular crime (e.g., fraud). Such rare occurrences are precisely the type of events that the courts’ departure powers were designed to cover—unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures ‘unreasonable’ where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

(c) *Plea Agreements*

Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts urged the Commission not to attempt any major reforms of the plea agreement process on the grounds that any set of guidelines that threatened to change pre-guidelines practice radically also threatened to make the federal system unmanageable. Others argued that guidelines that failed to control and limit plea agreements would leave untouched a ‘loophole’ large enough to undo the good that sentencing guidelines would bring.

The Commission decided not to make major changes in plea agreement

practices in the initial guidelines, but rather to provide guidance by issuing general policy statements concerning the acceptance of plea agreements in Chapter Six, Part B (Plea Agreements). The rules set forth in Fed. R. Crim. P. 11(e) govern the acceptance or rejection of such agreements. The Commission will collect data on the courts’ plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements and whether plea agreement practices are undermining the intent of the Sentencing Reform Act. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate. Importantly, if the policy statements relating to plea agreements are followed, circumvention of the Sentencing Reform Act and the guidelines should not occur.

The Commission expects the guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. In the event a prosecutor and defense attorney explore the possibility of a negotiated plea, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which courts will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation.

(d) *Probation and Split Sentences*

The statute provides that the guidelines are to ‘reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense’ 28 U.S.C. 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission’s view are ‘serious.’

The Commission’s solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly

when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention.* The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.**

* *Note:* The Commission expanded Zones B and C of the Sentencing Table in 2010 to provide a greater range of sentencing options to courts with respect to certain offenders. (See USSG App. C, amendment 738.) In 2018, the Commission added a new application note to the Commentary to § 5C1.1 (Imposition of a Term of Imprisonment), stating that if a defendant is a ‘nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment.’ (See USSG App. C, amendment 801.) In 2023, the Commission added a new Chapter Four guideline, at § 4C1.1 (Adjustment for Certain Zero-Point Offenders), providing a decrease of 2 levels from the offense level determined under Chapters Two and Three for ‘zero-point’ offenders who meet certain criteria. In addition, the Commission further amended the Commentary to § 5C1.1 to address the alternatives to incarceration available to ‘zero-point’ offenders by revising the application note in § 5C1.1 that addressed ‘nonviolent first offenders’ to focus on ‘zero-point’ offenders. (See USSG App. C, amendment 821.)

** *Note:* Although the Commission had not addressed ‘single acts of aberrant behavior’ at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (See USSG App. C, amendment 603.)

(e) *Multi-Count Convictions*

The Commission, like several state sentencing commissions, has found it particularly difficult to develop guidelines for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The difficulty is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to sentences of life imprisonment—sentences that neither just deserts nor crime control theories of punishment would justify.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment for multiple offenses that are the subjects of separate counts.

These rules are set out in Chapter Three, Part D (Multiple Counts). They essentially provide: (1) when the conduct involves fungible items (e.g., separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount; (2) when nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction. The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures.

(f) *Regulatory Offenses*

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not

only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These statutes pose two problems: first, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it could not comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses were particularly important in light of the need for enforcement of the general regulatory scheme. The Commission addressed these offenses in the initial guidelines.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses that divides them into four categories. First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper handling of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense provides a low base offense level (e.g., 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level. A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will have the same offense level as the substantive offense.

(g) Sentencing Ranges

In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's Supplementary Report on the Initial Sentencing Guidelines (1987) contains a comparison between estimates of pre-guidelines sentencing practice and sentences under the guidelines.

While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons received probation under pre-guidelines practice, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who received probation from those who received more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a pre-guidelines sentencing practice of very wide variability in which some defendants received probation while others received several years in prison for the same offense. Moreover, inasmuch as those who pleaded guilty under pre-guidelines practice often received lesser sentences, the guidelines permit the court to impose lesser sentences on those defendants who accept responsibility for their misconduct. For defendants who provide substantial assistance to the government in the investigation or prosecution of others, a downward departure may be warranted.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the Anti-Drug Abuse Act of 1986 and the career offender provisions of the Sentencing Reform Act of 1984 (28 U.S.C. 994(h)), required the Commission to promulgate guidelines that will lead to substantial prison population increases. These increases will occur irrespective of the guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum or career offender sentences), are projected to lead to an increase in prison

population that computer models, produced by the Commission and the Bureau of Prisons in 1987, estimated at approximately 10 percent over a period of ten years.

(h) The Sentencing Table

The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each level in the table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether \$10,000 or \$11,000 was obtained as a result of a fraud. At the same time, the levels work to increase a sentence proportionately. A change of six levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months (28 U.S.C. 994(b)(2)), permit courts to exercise the greatest permissible range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the court within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation over which category an offender fell within would become more likely. Where a table has many small monetary distinctions, it minimizes the likelihood of litigation because the precise amount of money involved is of considerably less importance.

5. A Concluding Note

The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions

relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from pre-guidelines sentencing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

Finally, the guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in the guidelines. Their exclusion does not reflect any judgment regarding their seriousness and they will be addressed as the Commission refines the guidelines over time.

2. Continuing Evolution and Role of the Guidelines

The Sentencing Reform Act of 1984 changed the course of federal sentencing. Among other things, the Act created the United States Sentencing Commission as an independent agency in the Judicial Branch, and directed it to develop guidelines and policy statements for sentencing courts to use when sentencing offenders convicted of federal crimes. Moreover, it empowered the Commission with ongoing responsibilities to monitor the guidelines, submit to Congress appropriate modifications of the guidelines and recommended changes in criminal statutes, and establish education and research programs. The mandate rested on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior.

This statement finds resonance in a line of Supreme Court cases that, taken together, echo two themes. The first

theme is that the guidelines are the product of a deliberative process that seeks to embody the purposes of sentencing set forth in the Sentencing Reform Act, and as such they continue to play an important role in the sentencing court's determination of an appropriate sentence in a particular case. The Supreme Court alluded to this in *Mistretta v. United States*, 488 U.S. 361 (1989), which upheld the constitutionality of both the federal sentencing guidelines and the Commission against nondelegation and separation of powers challenges. Therein the Court stated:

Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate. Although Congress has delegated significant discretion to the Commission to draw judgments from its analysis of existing sentencing practice and alternative sentencing models, . . . [w]e have no doubt that in the hands of the Commission 'the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose' of the Act.

Id. at 379 (internal quotation marks and citations omitted).

The continuing importance of the guidelines in federal sentencing was further acknowledged by the Court in *United States v. Booker*, 543 U.S. 220 (2005), even as that case rendered the guidelines advisory in nature. In *Booker*, the Court held that the imposition of an enhanced sentence under the federal sentencing guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant violated the Sixth Amendment. The Court reasoned that an advisory guideline system, while lacking the mandatory features that Congress enacted, retains other features that help to further congressional objectives, including providing certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities, and maintaining sufficient flexibility to permit individualized sentences when warranted. The Court concluded that an advisory guideline system would 'continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.' *Id.* at 264–65. An advisory guideline system continues to assure transparency by requiring that sentences

be based on articulated reasons stated in open court that are subject to appellate review. An advisory guideline system also continues to promote certainty and predictability in sentencing, thereby enabling the parties to better anticipate the likely sentence based on the individualized facts of the case.

The continuing importance of the guidelines in the sentencing determination is predicated in large part on the Sentencing Reform Act's intent that, in promulgating guidelines, the Commission must take into account the purposes of sentencing as set forth in 18 U.S.C. 3553(a). *See* 28 U.S.C. 994(f), 991(b)(1). The Supreme Court reinforced this view in *Rita v. United States*, 551 U.S. 338 (2007), which held that a court of appeals may apply a presumption of reasonableness to a sentence imposed by a district court within a properly calculated guideline range without violating the Sixth Amendment. In *Rita*, the Court relied heavily on the complementary roles of the Commission and the sentencing court in federal sentencing, stating:

[T]he presumption reflects the nature of the Guidelines-writing task that Congress set for the Commission and the manner in which the Commission carried out that task. In instructing both the *sentencing judge* and the *Commission* what to do, Congress referred to the basic sentencing objectives that the statute sets forth in 18 U.S.C. 3553(a) The provision also tells the sentencing judge to 'impose a sentence sufficient, but not greater than necessary, to comply with' the basic aims of sentencing as set out above. Congressional statutes then tell the *Commission* to write Guidelines that will carry out these same § 3553(a) objectives.

Id. at 347–48 (emphasis in original). The Court concluded that '[t]he upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale[.]' *id.* at 348, and that the Commission's process for promulgating guidelines results in 'a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice.' *Id.* at 350.

Consequently, district courts are required to properly calculate and consider the guidelines when sentencing, even in an advisory guideline system. *See* 18 U.S.C. 3553(a)(4), (a)(5); *Booker*, 543 U.S. at 264 ('The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.'). *Rita*, 551 U.S. at 351 (stating that a district court should begin

all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall v. United States*, 552 U.S. 38, 49 (2007) ('As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.'). The district court, in determining the appropriate sentence in a particular case, therefore, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. 3553(a). *See Rita*, 551 U.S. at 351. The appellate court engages in a two-step process upon review. The appellate court 'first ensure[s] that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . [and] then consider[s] the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard[.] . . . tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range.' *Gall*, 552 U.S. at 51.

The second and related theme resonant in this line of Supreme Court cases is that, as contemplated by the Sentencing Reform Act, the guidelines are evolutionary in nature. They are the product of the Commission's fulfillment of its statutory duties to monitor federal sentencing law and practices, to seek public input on the operation of the guidelines, and to revise the guidelines accordingly. As the Court acknowledged in *Rita*:

The Commission's work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence). The judges will set forth their reasons. The Courts of Appeals will determine the reasonableness of the resulting sentence. The Commission will collect and examine the results. In doing so, it may obtain advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others. And it can revise the Guidelines accordingly.

Rita, 551 U.S. at 350; *see also Booker*, 543 U.S. at 264 ('[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.'). *Gall*, 552 U.S. at 46 ('[E]ven though the

Guidelines are advisory rather than mandatory, they are, as we pointed out in *Rita*, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.’).

Provisions of the Sentencing Reform Act promote and facilitate this evolutionary process. For example, pursuant to 28 U.S.C. 994(x), the Commission publishes guideline amendment proposals in the **Federal Register** and conducts hearings to solicit input on those proposals from experts and other members of the public. Pursuant to 28 U.S.C. 994(o), the Commission periodically reviews and revises the guidelines in consideration of comments it receives from members of the federal criminal justice system, including the courts, probation officers, the Department of Justice, the Bureau of Prisons, defense attorneys and the federal public defenders, and in consideration of data it receives from sentencing courts and other sources. Statutory mechanisms such as these bolster the Commission’s ability to take into account fully the purposes of sentencing set forth in 18 U.S.C. 3553(a)(2) in its promulgation of the guidelines.

Congress retains authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines. As the Supreme Court noted in *Kimbrough v. United States*, 552 U.S. 85 (2007), ‘Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guideline sentences for serious recidivist offenders ‘at or near’ the statutory maximum.’ *Id.* at 103; 28 U.S.C. 994(h).

As envisioned by Congress, implemented by the Commission, and reaffirmed by the Supreme Court, the guidelines are the product of a deliberative and dynamic process that seeks to embody within federal sentencing policy the purposes of sentencing set forth in the Sentencing Reform Act. As such, the guidelines continue to be a key component of federal sentencing and to play an important role in the sentencing court’s determination of an appropriate sentence in any particular case.

3. Authority

§ 1A3.1. Authority

The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated

by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.”;

and inserting the following:

“Part A—Introduction and Authority

Introductory Commentary

The United States Sentencing Commission (‘Commission’) is an independent agency in the judicial branch composed of seven voting and two non-voting, *ex officio* members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes. This Part provides the statutory authority and mission of the Commission to promulgate federal sentencing guidelines, policy statements, and commentary.

Further information describing the historical development and evolution of the federal sentencing guidelines is set forth in Appendix D of the Guidelines Manual.

1. Authority

§ 1A1.1. Authority

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.”.

Section 1B1.1(a) is amended—by inserting at the beginning the following new heading: “*Step One:*

Calculation of Guideline Range and Determination of Sentencing Requirements and Options under the Guidelines Manual.—”;

in paragraph 5 by striking “Apply the adjustment as appropriate for the defendant’s acceptance of responsibility from Part E of Chapter Three” and inserting “Apply the adjustment for the defendant’s acceptance of responsibility and the reduction pursuant to an early disposition program, as appropriate, from Parts E and F of Chapter Three”;

in paragraph 6 by striking “Part B” and inserting “Parts B and C”;

and by inserting at the end the following new paragraph 9:

“(9) Apply, as appropriate, Part K of Chapter Five.”.

Section 1B1.1 is amended by striking subsections (b) and (c) as follows:

“(b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. *See* 18 U.S.C. 3553(a)(5).

(c) The court shall then consider the applicable factors in 18 U.S.C. 3553(a) taken as a whole. *See* 18 U.S.C. 3553(a).”;

and inserting the following new subsection (b):

“(b) *Step Two: Consideration of Factors Set Forth in 18 U.S.C. 3553(a) and Related Guidance.*—The court shall then consider as a whole the additional factors identified in 18 U.S.C. 3553(a) and the guidance provided in Chapter Six to determine the sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. 3553(a)(2). *See* 18 U.S.C. 3553(a).”.

The Commentary to § 1B1.1 captioned “Application Notes” is amended in Note 1—

by striking subparagraph (F) as follows:

“(F) ‘Departure’ means (i) for purposes other than those specified in subdivision (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. ‘Depart’ means grant a departure.

‘Downward departure’ means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence. ‘Depart downward’ means grant a downward departure.

‘Upward departure’ means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. ‘Depart upward’ means grant an upward departure.”;

and by redesignating subparagraphs (G) through (M) as subparagraphs (F) through (L), respectively.

The Commentary to § 1B1.1 captioned “Background” is amended by striking the following:

“The court must impose a sentence ‘sufficient, but not greater than necessary,’ to comply with the purposes of sentencing set forth in 18 U.S.C. 3553(a)(2). *See* 18 U.S.C. 3553(a). Subsections (a), (b), and (c) are structured to reflect the three-step process used in determining the particular sentence to be imposed. If, after step (c), the court imposes a sentence that is outside the guidelines framework, such a sentence is considered a ‘variance’. *See Irizarry v. United States*, 553 U.S. 708, 709–16 (2008) (describing within-range sentences and departures as ‘sentences imposed under the framework set out in the Guidelines’).”;

and inserting the following:

“The court must impose a sentence ‘sufficient, but not greater than necessary,’ to comply with the purposes of sentencing set forth in 18 U.S.C. 3553(a)(2). *See* 18 U.S.C. 3553(a). This guideline is structured to reflect the advisory sentencing scheme established following the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), by setting forth both essential steps of the court’s inquiry in making this determination.

District courts are required to properly calculate and consider the guidelines when sentencing. *See* 18 U.S.C. 3553(a)(4), (a)(5); *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.”); *Rita v. United States*, 551 U.S. 338, 351 (2007) (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall v. United States*, 552 U.S. 38, 49 (2007) (“As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial

benchmark.”); *Peugh v. United States*, 569 U.S. 530 (2013) (noting that “the post-Booker federal sentencing system adopted procedural measures that make the guidelines the ‘lodestone’ of sentencing”). Step one sets forth the steps for properly calculating the guidelines.

District courts are then required to fully and carefully consider the additional factors set forth in 18 U.S.C. 3553(a), which include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. 3553(a)(2); (3) the kinds of sentence available; (4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (5) the need to provide restitution to any victims of the offense. *See Rita*, 551 U.S. at 351. Step two, as set forth in subsection (b), reflects this step of the sentencing process and also instructs courts to consider guidance provided by the Commission in Chapter Six.”.

The Commentary to § 1B1.2 captioned “Application Notes” is amended in Note 1 by striking “the court would be forced to use an artificial guideline and then depart from it” and inserting “the court would be forced to use an artificial guideline and then impose a sentence that is greater than the otherwise applicable guideline range”; by striking “the probation officer might need to calculate the robbery guideline to assist the court in determining the appropriate degree of departure” and inserting “the probation officer might need to calculate the robbery guideline to assist the court in determining an appropriate sentence”; and by striking “Chapter Six, Part B (Plea Agreements)” and inserting “Chapter Seven, Part B (Plea Agreements)”.

Section 1B1.3(b) is amended in the heading by striking “*Five (Determining the Sentence)*” and inserting “*Five (Determining the Sentencing Range and Options Under the Guidelines)*”.

The Commentary to § 1B1.3 captioned “Application Notes” is amended—in Note 3(B) by striking “The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant’s culpability; in such a case, an upward departure may be warranted.”;

and in Note 6(B) by striking “In a case in which creation of risk is not adequately taken into account by the applicable offense guideline, an upward

departure may be warranted. *See generally* § 1B1.4 (Information to be Used in Imposing Sentence); § 5K2.0 (Grounds for Departure).”.

The Commentary to § 1B1.3 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The conduct of members of a conspiracy prior to the defendant joining the conspiracy, which is not otherwise considered as part of the defendant’s relevant conduct.

(B) The applicable guideline does not adequately account the risk or danger of harm created.

See §§ 6A1.1; 6A1.3.”.

Section 1B1.4 is amended—in the heading by striking “(*Selecting a Point Within the Guideline Range or Departing from the Guidelines*)”; and by striking “In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted” and inserting “In determining the sentence to impose”.

The Commentary to 1B1.4 captioned “Background” is amended by striking the following:

“This section distinguishes between factors that determine the applicable guideline sentencing range (§ 1B1.3) and information that a court may consider in imposing a sentence within that range. The section is based on 18 U.S.C. 3661, which recodifies 18 U.S.C. 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to depart from the guidelines. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for an upward departure. Some policy statements do, however, express a Commission policy

that certain factors should not be considered for any purpose, or should be considered only for limited purposes. *See, e.g.*, Chapter Five, Part H (Specific Offender Characteristics).”;

and inserting the following:

“This section distinguishes between factors that determine the applicable guideline sentencing range (§ 1B1.3) and information that a court may consider in imposing a sentence. The section is based on 18 U.S.C. 3661, which recodifies 18 U.S.C. 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines may provide a reason for sentencing at the top of, or above, the guideline range. Chapter Six, Part A (Consideration of Factors in 18 U.S.C. 3553(a)) details factors which generally are not considered in the calculation of the guideline range, but which courts regularly consider pursuant to 18 U.S.C. 3553(a).”.

Section 1B1.7 is amended by striking “the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines” and inserting “the commentary may suggest additional considerations for the court to take into account in determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a)”; and by striking “such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines” and inserting “such commentary may provide guidance in determining the appropriate sentence to impose”.

Section 1B1.8(b)(5) is amended by striking “in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under § 5K1.1 (Substantial Assistance to Authorities)” and inserting “in determining whether, or to what extent, to impose a sentence that is below the otherwise applicable guideline range pursuant to a government motion under § 5K1.1 (Substantial Assistance to Authorities)”.

The Commentary to § 1B1.8 captioned “Application Notes” is amended in Note 1 by striking “Although the

guideline itself affects only the determination of the guideline range, the policy of the Commission, as a corollary, is that information prohibited from being used to determine the applicable guideline range shall not be used to depart upward. In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, and to what extent, a downward departure is warranted pursuant to a government motion under § 5K1.1 (Substantial Assistance to Authorities); *e.g.*, a court may refuse to depart downward on the basis of such information.” and inserting “Although the guideline itself affects only the determination of the guideline range, the policy of the Commission, as a corollary, is that information prohibited from being used to determine the applicable guideline range shall not be used to increase a defendant’s applicable guideline range. In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, or to what extent, to impose a sentence that is below the otherwise applicable guideline range pursuant to a government motion under § 5K1.1 (Substantial Assistance to Authorities). For example, a court may refuse to impose a sentence that is below the otherwise applicable guideline range on the basis of such information.”.

The Commentary to § 1B1.10 captioned “Application Notes” is amended—

in Note 1(A) by striking “(*i.e.*, the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance)” and inserting “(*i.e.*, the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of the remaining provisions in § 1B1.1)”;

and in Note 3 by striking “representing a downward departure of 20 percent” and inserting “representing a reduction of 20 percent”; and by striking “authorizing, upon government motion, a downward departure based on the defendant’s substantial assistance” and inserting “authorizing the court, upon government motion, to impose a sentence that is below the otherwise applicable guideline range based on the defendant’s substantial assistance”.

Section 1B.12 is amended by striking “sufficient to warrant an upward departure from that guideline range”

and inserting “sufficient to warrant imposing a sentence that exceeds that guideline range”.

Chapter Two is amended in the Introductory Commentary by inserting after “adjust the offense level upward or downward.” the following:

“Additionally, each guideline may identify certain conduct not fully accounted for in the base offense level or specific offense characteristics that the district court may choose to consider pursuant to the additional factors set forth in 18 U.S.C. 3553(a) and the guidance set forth in Chapter Six (Determining the Sentence Imposed).”; and by striking “Chapter Four, Part B (Career Offenders and Criminal Livelihood); and Chapter Five, Part K (Departures)” and inserting: “and Chapter Four, Part B (Career Offenders and Criminal Livelihood). Additionally, Chapter Six, Part A (Consideration of Factors in 18 U.S.C. 3553(a)) sets forth other factors that a court may nevertheless consider in determining the appropriate sentence in a particular case pursuant to 18 U.S.C. 3553(a)”.

The Commentary to § 2A1.1 captioned “Application Notes” is amended in Note 2 by striking the following:

“Imposition of Life Sentence.—

(A) *Offenses Involving Premeditated Killing.*—In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. A downward departure would not be appropriate in such a case. A downward departure from a mandatory statutory term of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant’s substantial assistance, as provided in 18 U.S.C. 3553(e).

(B) *Felony Murder.*—If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. For example, a downward departure may be warranted if in robbing a bank, the defendant merely passed a note to the teller, as a result of which the teller had a heart attack and died. The extent of the departure should be based upon the defendant’s state of mind (*e.g.*, recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, departure below the minimum guideline sentence provided for second degree murder in § 2A1.2 (Second Degree Murder) is not likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.”;

and inserting the following:
“*Offenses Involving Premeditated Killing.*—In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. If a mandatory statutory term of life imprisonment applies, a lesser term of imprisonment is permissible only in cases in which the government files a motion pertaining to the defendant’s substantial assistance, as provided in 18 U.S.C. 3553(e).”

The Commentary to § 2A1.1 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Defendant’s Intent in Felony Murder Case.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant did not intentionally or knowingly cause death in the course of the commission of a felony (e.g., defendant passed a note to a bank teller in the course of a robbery causing the teller to have a heart attack) may be relevant. *See* §§ 6A1.1; 6A1.3.”

The Commentary to § 2A1.2 is amended—

by striking the Commentary captioned “Application Note” in its entirety as follows:

“*Application Note:*

1. *Upward Departure Provision.*—If the defendant’s conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted. *See* § 5K2.8 (Extreme Conduct).”;
and by inserting at the end the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Extreme Conduct.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant’s conduct was unusually heinous, cruel, brutal, or degrading to the victim may be relevant. *See* §§ 6A1.1; 6A1.3.”

The Commentary to § 2A2.1 captioned “Application Notes” is amended—in the caption by striking “Notes” and inserting “Note”;

and by striking Note 2 as follows:

“2. *Upward Departure Provision.*—If the offense created a substantial risk of death or serious bodily injury to more than one person, an upward departure may be warranted.”

The Commentary to § 2A2.1 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Substantial Risk of Death or Serious Bodily Injury to Multiple*

Victims.—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense created a substantial risk of death or serious bodily injury to more than one person may be relevant. *See* §§ 6A1.1; 6A1.3.”

The Commentary to § 2A2.4 captioned “Application Notes” is amended by striking Note 3 as follows:

“3. *Upward Departure Provision.*—The base offense level does not assume any significant disruption of governmental functions. In situations involving such disruption, an upward departure may be warranted. *See* § 5K2.7 (Disruption of Governmental Function).”

The Commentary to § 2A2.4 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Disruption of Governmental Function.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant’s conduct resulted in a significant disruption of a governmental function may be relevant. *See* §§ 6A1.1; 6A1.3.”

The Commentary to § 2A3.1 captioned “Application Notes” is amended by striking Note 6 as follows:

“6. *Upward Departure Provision.*—If a victim was sexually abused by more than one participant, an upward departure may be warranted. *See* § 5K2.8 (Extreme Conduct).”

The Commentary to § 2A3.1 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Victim Sexually Abused by More Than One Participant.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that a victim was sexually abused by more than one participant may be relevant. *See* §§ 6A1.1; 6A1.3.”

The Commentary to § 2A3.2 captioned “Application Notes” is amended by striking Note 6 as follows:

“6. *Upward Departure Consideration.*—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.”

The Commentary to § 2A3.2 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Underrepresentation of Seriousness of the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense level determined under this guideline substantially underrepresents the seriousness of the offense (e.g., the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography) may be relevant. *See* §§ 6A1.1; 6A1.3.”

The Commentary to § 2A3.6 captioned “Application Notes” is amended by striking Note 4 as follows:

“4. *Upward Departure.*—In a case in which the guideline sentence is determined under subsection (a), a sentence above the minimum term required by 18 U.S.C. 2250(d) is an upward departure from the guideline sentence. A departure may be warranted, for example, in a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.”

The Commentary to § 2A3.6 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Characteristic:*

1. *Sex Offense Against or Serious Bodily Injury to a Minor.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that a sex offense was committed against a minor, or resulted in serious bodily injury to a minor, may be relevant. *See* §§ 6A1.1; 6A1.3.”

The Commentary to § 2A5.3 captioned “Application Notes” is amended—in the caption by striking “Notes” and inserting “Note”;

and by striking Note 2 as follows:

“2. If the conduct intentionally or recklessly endangered the safety of the aircraft or passengers, an upward departure may be warranted.”

The Commentary to § 2A5.3 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Endangering the Safety of the Aircraft or Passengers.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the conduct intentionally or recklessly endangered the safety of the aircraft or passengers may be relevant. *See* §§ 6A1.1; 6A1.3.”

The Commentary to § 2A6.1 captioned “Application Notes” is amended by striking Note 4 as follows:

“4. *Departure Provisions.*—

(A) *In General.*—The Commission recognizes that offenses covered by this guideline may include a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level. Factors not incorporated in the guideline may be considered by the court in determining whether a departure from the guidelines is warranted. See Chapter Five, Part K (Departures).

(B) *Multiple Threats, False Liens or Encumbrances, or Victims; Pecuniary Harm.*—If the offense involved (i) substantially more than two threatening communications to the same victim, (ii) a prolonged period of making harassing communications to the same victim, (iii) substantially more than two false liens or encumbrances against the real or personal property of the same victim, (iv) multiple victims, or (v) substantial pecuniary harm to a victim, an upward departure may be warranted.”.

The Commentary to § 2A6.1 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Multiple Victims or Multiple Harms to Same Victim.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved (A) substantially more than two threatening communications to the same victim, (B) a prolonged period of making harassing communications to the same victim, (C) substantially more than two false liens or encumbrances against the real or personal property of the same victim, (D) multiple victims, or (E) substantial pecuniary harm to a victim, may be relevant. See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2A6.2 captioned “Application Notes” is amended by striking Note 5 as follows:

“5. If the defendant received an enhancement under subsection (b)(1) but that enhancement does not adequately reflect the extent or seriousness of the conduct involved, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant stalked the victim on many occasions over a prolonged period of time.”.

The Commentary to § 2A6.2 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Aggravating Factor Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense level determined under this guideline does not adequately reflect the extent or seriousness of the conduct involved (e.g., that the defendant stalked the victim on many occasions over a prolonged period of time) may be relevant. See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2B1.1 captioned “Application Notes” is amended—

in Note 8(A) by striking “If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.”;

in Note 14(B)(i) by striking “§ 8A1.1 (Applicability of Chapter Eight)” and inserting “§ 9A1.1 (Applicability of Chapter Nine)”;

and by striking Note 21 as follows:

“21. *Departure Considerations.*—

(A) *Upward Departure*

Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

(i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.

(ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in an 18 U.S.C. 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted. An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed. Similarly, an upward departure would be warranted in a case involving conduct described in 18 U.S.C. 670 if the offense resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.

(iii) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).

(iv) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such as a risk of a significant disruption of a national financial market.

(v) In a case involving stolen information from a ‘protected computer’, as defined in 18 U.S.C. 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.

(vi) In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:

(I) The offense caused substantial harm to the victim’s reputation, or the victim suffered a substantial inconvenience related to repairing the victim’s reputation.

(II) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual’s name.

(III) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual’s identity.

(B) *Upward Departure for Debilitating Impact on a Critical Infrastructure.*—An upward departure would be warranted in a case in which subsection (b)(19)(A)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.

(C) *Downward Departure Consideration.*—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.

For example, a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims. In such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.

(D) *Downward Departure for Major Disaster or Emergency Victims.*—If (i) the minimum offense level of level 12 in subsection (b)(12) applies; (ii) the defendant sustained damage, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. 5122; and (iii) the benefits received illegally were only an extension or overpayment of benefits received legitimately, a downward departure may be warranted.”.

The Commentary to § 2B1.1 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“Additional Offense Specific Considerations:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense level determined under this guideline substantially understates the seriousness of the offense.

(B) A primary objective of the offense was an aggravating, non-monetary objective (e.g., to inflict emotional harm).

(C) The offense caused or risked substantial non-monetary harm (e.g., physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest).

(D) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss.

(E) The offense created a risk of substantial loss beyond the loss determination, such as a significant disruption of a national financial market.

(F) The offense caused substantial harm to the victim’s reputation, or the victim suffered a substantial inconvenience related to repairing the victim’s reputation.

(G) The application of a particular enhancement is premised upon alternative factors and more than one of the enumerated factors applied (e.g., § 2B1.1(b)(9)).

(H) The information stolen as part of the offense was stolen in furtherance of a broader criminal purpose.

See §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense level determined under this guideline substantially overstates the seriousness of the offense.

(B) The offense produces an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims.

(C) The defendant had little or no gain as related to the loss.

(D) The defendant took steps (such as voluntary reporting or cessation, or payment of restitution) to mitigate the harm from the offense.

See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2B1.5 captioned “Application Notes” is amended by striking Note 9 as follows:

“9. Upward Departure Provision.—

There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if (A) in addition to cultural heritage resources or paleontological resources, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources) or paleontological resources; or (B) the offense involved a cultural heritage resource that has profound significance to cultural identity (e.g., the Statue of Liberty or the Liberty Bell).”.

The Commentary to § 2B1.5 is amended by inserting at the end the following new Commentary:

“Additional Offense Specific Consideration:

1. *Cultural Heritage Resources.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense level determined under this guideline substantially understates the seriousness of the offense may be relevant.

(B) The offense also involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources) or paleontological resources.

(C) The offense involved a cultural heritage resource that has profound significance to cultural identity (e.g., the Statue of Liberty or the Liberty Bell).

See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2B2.1 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“Additional Offense Specific Characteristic:

1. *Use of a Weapon.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved the use of a weapon may be relevant. See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2B2.1 captioned “Background” is amended by striking “Weapon use would be a ground for upward departure.”.

The Commentary to § 2B3.1 captioned “Application Notes” is amended—by striking Note 5 as follows:

“5. If the defendant intended to murder the victim, an upward departure may be warranted; see § 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder).”;

and by renumbering Note 6 as Note 5.

The Commentary to § 2B3.1 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“Additional Offense Specific Consideration:

1. *Intent to Murder Victim.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant intended to murder the victim may be relevant. See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2B3.2 captioned “Application Notes” is amended by striking Notes 7 and 8 as follows:

“7. If the offense involved the threat of death or serious bodily injury to numerous victims (e.g., in the case of a plan to derail a passenger train or poison consumer products), an upward departure may be warranted.

8. If the offense involved organized criminal activity, or a threat to a family member of the victim, an upward departure may be warranted.”.

The Commentary to § 2B3.2 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“Additional Offense Specific Considerations:

1. *Threat of Death or Serious Bodily Injury to Numerous Victims.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved the threat of death or serious bodily injury to numerous victims (e.g., in the case of a plan to derail a passenger train or poison consumer products) may be relevant. See §§ 6A1.1; 6A1.3.

2. *Organized Criminal Activity.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a),

evidence that the offense involved organized criminal activity may be relevant. *See* §§ 6A1.1; 6A1.3.”.

Section 2B4.1(c)(1) is amended by striking “§ 8C2.4” and inserting “§ 9C2.4”.

The Commentary to § 2B5.3 captioned “Application Notes” is amended by striking Note 5 as follows:

“5. *Departure Considerations*.—If the offense level determined under this guideline substantially understates or overstates the seriousness of the offense, a departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a departure may be warranted:

(A) The offense involved substantial harm to the reputation of the copyright or trademark owner.

(B) The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.

(C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.

(D) The offense resulted in death or serious bodily injury.”.

The Commentary to § 2B5.3 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“*Additional Offense Specific Consideration*:

1. *Additional Factors Relating to the Offense*.—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense involved substantial harm to the reputation of the copyright or trademark owner.

(B) The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.

(C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.

(D) The offense resulted in death or serious bodily injury.

See §§ 6A1.1; 6A1.3.”.

Section 2C1.1(d)(1) is amended by striking “§ 8C2.4” and inserting “§ 9C2.4”.

The Commentary to § 2C1.1 captioned “Application Notes” is amended—

in Note 5 by striking “Chapter Three, Parts A–D” and inserting “Chapter Three, Parts A–E”;

and by striking Note 7 as follows:

“7. *Upward Departure Provisions*.—In some cases the monetary value of the unlawful payment may not be known or may not adequately reflect the seriousness of the offense. For example, a small payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes or the destruction of evidence in a major narcotics case. In part, this issue is addressed by the enhancements in § 2C1.1(b)(2) and (c)(1), (2), and (3). However, in cases in which the seriousness of the offense is still not adequately reflected, an upward departure is warranted. *See* Chapter Five, Part K (Departures).

In a case in which the court finds that the defendant’s conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. *See* § 5K2.7 (Disruption of Governmental Function).”.

The Commentary to § 2C1.1 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“*Additional Offense Specific Considerations*:

1. *Monetary Value of the Unlawful Payment*.—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the monetary value of the unlawful payment is not known or evidence that the monetary value of the unlawful payment does not adequately reflect the seriousness of the offense may be relevant. *See* §§ 6A1.1; 6A1.3.

2. *Systematic or Pervasive Corruption of Governmental Function*.—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant’s conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government may be relevant. *See* §§ 6A1.1; 6A1.3.”.

Section 2C1.2(c)(1) is amended by striking “§ 8C2.4” and inserting “§ 9C2.4”.

The Commentary to § 2C1.8 captioned “Application Notes” is amended by striking Note 4 as follows:

“4. *Departure Provision*.—In a case in which the defendant’s conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted.”.

The Commentary to § 2C1.8 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Consideration*:

1. *Systematic or Pervasive Corruption of Governmental Function*.—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant’s conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2D1.1 captioned “Application Notes” is amended—

in Note 2 by striking the following:

“An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.”;

in Note 10 by striking the following:

“In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.”;

in Note 18(A) by striking “In some cases, the enhancement under subsection (b)(14)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted.”;

in Note 22 by striking the following:

“*Application of Subsection (e)(1)*.—(A) *Definition*.—For purposes of this guideline, ‘sexual offense’ means a ‘sexual act’ or ‘sexual contact’ as those terms are defined in 18 U.S.C. 2246(2) and (3), respectively.

(B) *Upward Departure Provision*.—If the defendant committed a sexual offense against more than one individual, an upward departure would be warranted.”;

and inserting the following:

“*Application of Subsection (e)(1)*.—For purposes of this guideline, ‘sexual offense’ means a ‘sexual act’ or ‘sexual contact’ as those terms are defined in 18 U.S.C. 2246(2) and (3), respectively.”;

in Note 24 by striking “a lower sentence imposed (including a downward departure)” and inserting “a lower sentence imposed”;

and by striking Note 27 as follows:

“27. *Departure Considerations*.—(A) *Downward Departure Based on Drug Quantity in Certain Reverse Sting Operations*.—If, in a reverse sting (an

operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

(B) *Upward Departure Based on Drug Quantity.*—In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38. Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38, an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.

(C) *Upward Departure Based on Unusually High Purity.*—Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, methamphetamine, hydrocodone, or oxycodone for which the guideline itself provides for the consideration of purity (see the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant's role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.

(D) *Departure Based on Potency of Synthetic Cathinones.*—In addition to providing converted drug weights for specific controlled substances and groups of substances, the Drug Conversion Tables provide converted drug weights for certain classes of controlled substances, such as synthetic cathinones. In the case of a synthetic cathinone that is not specifically

referenced in this guideline, the converted drug weight for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially lesser or greater quantity of a synthetic cathinone is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone in the class, such as methcathinone or alpha-PVP. In such a case, a departure may be warranted. For example, an upward departure may be warranted in cases involving MDPV, a substance of which a lesser quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone. In contrast, a downward departure may be warranted in cases involving methylone, a substance of which a greater quantity is usually needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone.

(E) *Departures for Certain Cases involving Synthetic Cannabinoids.*—

(i) *Departure Based on Concentration of Synthetic Cannabinoids.*—Synthetic cannabinoids are manufactured as powder or crystalline substances. The concentrated substance is then usually sprayed on or soaked into a plant or other base material, and trafficked as part of a mixture. Nonetheless, there may be cases in which the substance involved in the offense is a synthetic cannabinoid not combined with any other substance. In such a case, an upward departure would be warranted.

There also may be cases in which the substance involved in the offense is a mixture containing a synthetic cannabinoid diluted with an unusually high quantity of base material. In such a case, a downward departure may be warranted.

(ii) *Downward Departure Based on Potency of Synthetic Cannabinoids.*—In the case of a synthetic cannabinoid that is not specifically referenced in this guideline, the converted drug weight for the class should be used to determine the appropriate offense level. However, there may be cases in which a substantially greater quantity of a synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class, such as JWH-018 or AM-2201. In such a case, a downward departure may be warranted.”

The Commentary to § 2D1.1 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“*Additional Offense Specific Considerations:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) *Sophisticated Manner.*—The mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

(B) *Drug Quantity.*—The drug quantity used to determine the base offense level substantially exceeds the quantity for the highest offense level established for that particular controlled substance.

(C) *Unusual High Purity.*—The offense involved trafficking in controlled substances, compounds, or mixtures of unusually high purity, except in the case of PCP, amphetamine, methamphetamine, hydrocodone, or oxycodone, for which the guideline itself provides for the consideration of purity (see the Notes to Drug Quantity Table).

(D) *Environmental Harm or Other Threat to Public Health or Safety.*—The seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel) is understated based upon scope or impact of the discharge, emission, or release of a hazardous or toxic substance.

(E) *LSD.*—The potential harm of liquid D-Lysergic Acid Diethylamide/Lysergide (LSD) (*i.e.*, LSD that has not been placed onto a carrier medium) is understated as a result of using the weight of the LSD alone to calculate the offense level.

(F) *Potency of Synthetic Cathinone.*—The potency of a synthetic cathinone is understated because a substantially lesser quantity of a synthetic cathinone is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone in the class.

(G) *Unusually High Concentration of Synthetic Cannabinoid.*—A synthetic cannabinoid is sprayed on or soaked into a plant or other base material in an unusually high concentration or is trafficked in a pure form as opposed to being combined with another substance. See §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) *Reversed Sting.*—The offense involved a reverse sting (*i.e.*, an operation in which a government agent

sells or negotiates to sell a controlled substance to a defendant) in which the government agent set a price for the controlled substance that was substantially below the market value resulting in the defendant purchasing a significantly greater quantity than available resources would have otherwise allowed.

(B) *Potency of Synthetic Cathinone or Synthetic Cannabinoid*.—The potency of a synthetic cathinone or synthetic cannabinoid is overstated because a substantially greater quantity of the synthetic cathinone or synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cathinone or synthetic cannabinoid in the class.

(C) *Synthetic Cannabinoid Diluted*.—The substance involved in the offense is a mixture containing a synthetic cannabinoid diluted with an unusually high quantity of base material.

See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2D1.5 captioned “Application Notes” is amended—

by striking Note 2 as follows:

“2. If as part of the enterprise the defendant sanctioned the use of violence, or if the number of persons managed by the defendant was extremely large, an upward departure may be warranted.”;

and by renumbering Notes 3 and 4 as Notes 2 and 3, respectively.

The Commentary to § 2D1.5 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“*Additional Offense Specific Consideration*:

1. *Aggravating Factors Relating to the Offense*.—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant sanctioned the use of violence as part of the enterprise, or that the number of persons managed by the defendant was extremely large, may be relevant. See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2D1.7 is amended—

by striking the Commentary captioned “Application Note” in its entirety as follows:

“*Application Note*:

1. The typical case addressed by this guideline involves small-scale trafficking in drug paraphernalia (generally from a retail establishment that also sells items that are not unlawful). In a case involving a large-scale dealer, distributor, or manufacturer, an upward departure may be warranted. Conversely, where the offense was not committed for pecuniary gain (e.g., transportation for

the defendant’s personal use), a downward departure may be warranted.”;

and by inserting at the end the following new Commentary:

“*Additional Offense Specific Considerations*:

1. *Aggravating Factor for Large-Scale Trafficking*.—The typical case addressed by this guideline involves small-scale trafficking in drug paraphernalia (generally from a retail establishment that also sells items that are not unlawful). In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved a large-scale dealer, distributor, or manufacturer may be relevant. See §§ 6A1.1; 6A1.3.

2. *Offense Not Committed for Pecuniary Gain*.—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense was not committed for pecuniary gain (e.g., transportation for the defendant’s personal use) may be relevant. See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2D1.11 captioned “Application Notes” is amended—

in Note 1 by striking subparagraph (C) as follows:

“(C) *Upward Departure*.—In a case involving two or more chemicals used to manufacture different controlled substances, or to manufacture one controlled substance by different manufacturing processes, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense.”;

and in Note 4 by striking “In some cases, the enhancement under subsection (b)(3) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted.”.

The Commentary to § 2D1.11 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“*Additional Offense Specific Consideration*:

1. *Aggravating Factors Relating to the Offense*.—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense level determined under this guideline does not adequately address the seriousness of the offense because the offense involved two or more chemicals used to manufacture different controlled substances, or to manufacture one

controlled substance by different manufacturing processes.

(B) The seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel) is understated based upon scope or impact of the discharge, emission, or release of a hazardous or toxic substance.

See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2D1.12 captioned “Application Notes” is amended—

by striking Note 1 as follows:

“1. If the offense involved the large-scale manufacture, distribution, transportation, exportation, or importation of prohibited flasks, equipment, chemicals, products, or material, an upward departure may be warranted.”;

by redesignating Notes 2, 3, and 4 as Notes 1, 2, and 3, respectively;

and in Note 2 (as so redesignated) by striking “In some cases, the enhancement under subsection (b)(2) may not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted.”.

The Commentary to § 2D1.12 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Consideration*:

1. *Aggravating Factors Relating to the Offense*.—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense involved the large-scale manufacture, distribution, transportation, exportation, or importation of prohibited flasks, equipment, chemicals, products, or material.

(B) The seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel) is understated based upon scope or impact of the discharge, emission, or release of a hazardous or toxic substance.

See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2D2.1 is amended—

by striking the Commentary captioned “Application Note” in its entirety as follows:

“*Application Note*:

1. The typical case addressed by this guideline involves possession of a controlled substance by the defendant for the defendant’s own consumption.

Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted.”;

and by inserting before the Commentary captioned “Background” the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Intended Consumption by Another.*—The typical case addressed by this guideline involves possession of a controlled substance by the defendant for the defendant’s own consumption. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence establishing intended consumption by a person other than the defendant may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2D2.3 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“*Additional Offense Specific Considerations:*

1. *Numerous Persons.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in the death or serious bodily injury of a large number of persons may be relevant. *See* §§ 6A1.1; 6A1.3.

2. *Risk to Passengers.*—This guideline assumes that the offense involved the operation of a common carrier carrying a number of passengers (e.g., a bus). In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that no or only a few passengers were placed at risk may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2D2.3 captioned “Background” is amended by striking “The offense levels assume that the offense involved the operation of a common carrier carrying a number of passengers, e.g., a bus. If no or only a few passengers were placed at risk, a downward departure may be warranted. If the offense resulted in the death or serious bodily injury of a large number of persons, such that the resulting offense level under subsection (b) would not adequately reflect the seriousness of the offense, an upward departure may be warranted.”.

The Commentary to § 2E1.1 captioned “Application Notes” is amended—in Note 1 by striking “Chapter Three, Parts A, B, C, and D” and inserting “Chapter Three, Parts A, B, C, D, and E”;

and in Note 4 by striking “If this treatment produces an anomalous result in a particular case, a guideline departure may be warranted.”.

The Commentary to § 2E1.2 captioned “Application Notes” is amended in

Note 1 by striking “Chapter Three, Parts A, B, C, and D” and inserting “Chapter Three, Parts A, B, C, D, and E”.

The Commentary to § 2E3.1 captioned “Application Notes” is amended—in the caption by striking “Notes” and inserting “Note”;

and by striking Note 2 as follows:

“2. *Upward Departure Provision.*—

The base offense levels provided for animal fighting ventures in subsection (a)(1) and (a)(3) reflect that an animal fighting venture involves one or more violent fights between animals and that a defeated animal often is severely injured in the fight, dies as a result of the fight, or is killed afterward.

Nonetheless, there may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. For example, an upward departure may be warranted if (A) the offense involved extraordinary cruelty to an animal beyond the violence inherent in such a venture (such as by killing an animal in a way that prolongs the suffering of the animal); or (B) the offense involved animal fighting on an exceptional scale (such as an offense involving an unusually large number of animals).”.

The Commentary to § 2E3.1 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Extraordinary Cruelty or Exceptional Scale.*—The base offense levels provided for animal fighting ventures in subsections (a)(1) and (a)(3) reflect that an animal fighting venture involves one or more violent fights between animals and that a defeated animal often is severely injured in the fight, dies as a result of the fight, or is killed afterward. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense involved extraordinary cruelty to an animal beyond the violence inherent in such a venture (such as by killing an animal in a way that prolongs the suffering of the animal).

(B) The offense involved animal fighting on an exceptional scale (such as an offense involving an unusually large number of animals).

See §§ 6A1.1; 6A1.3.”.

Section 2E5.1(c)(1) is amended by striking “§ 8C2.4” and inserting “§ 9C2.4”.

The Commentary to § 2G1.1 captioned “Application Notes” is amended—in Note 2 by striking “Subsection (b)(1) provides an enhancement for

fraud or coercion that occurs as part of the offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. *See* Chapter Five, Part K (Departures)” and inserting “Subsection (b)(1) provides an enhancement for fraud or coercion that occurs as part of the offense”;

and by striking Note 6 as follows:

“6. *Upward Departure Provision.*—If the offense involved more than ten victims, an upward departure may be warranted.”.

The Commentary to § 2G1.1 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in bodily injury or involved more than ten victims may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2G1.3 captioned “Application Notes” is amended by striking Note 7 as follows:

“7. *Upward Departure Provision.*—If the offense involved more than ten minors, an upward departure may be warranted.”.

The Commentary to § 2G1.3 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *More than Ten Minors.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved more than ten minors may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2G2.1 captioned “Application Notes” is amended by striking Note 8 as follows:

“8. *Upward Departure Provision.*—An upward departure may be warranted if the offense involved more than 10 minors.”.

The Commentary to § 2G2.1 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *More than Ten Minors.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved more than ten minors may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2G2.2 captioned “Application Notes” is amended—

in Note 6(B)(i) by striking “If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.”;

in Note 6(B)(ii) by striking “If the length of the visual depiction is substantially more than 5 minutes, an upward departure may be warranted.”; and by striking Note 9 as follows:

“9. *Upward Departure Provision.*—If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.”.

The Commentary to § 2G2.2 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The number of images involved in the offense substantially underrepresents the number of minors depicted.

(B) The length of any video, video-clip, movie, or visual depiction involved in the offense is substantially more than 5 minutes.

(C) The defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) did not apply or subsection (b)(5) did apply but the enhancement does not adequately reflect the seriousness of the abuse or exploitation.

See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2H2.1 is amended—

by striking the Commentary captioned “Application Note” in its entirety as follows:

“*Application Note:*

1. If the offense resulted in bodily injury or significant property damage, or involved corrupting a public official, an upward departure may be warranted. See Chapter Five, Part K (Departures).”; and by inserting before the

Commentary captioned “Background” the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Bodily Injury or Significant Property Damage.*—In determining the appropriate sentence to impose

pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in bodily injury or significant property damage may be relevant. See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2H3.1 captioned “Application Notes” is amended by striking Note 5 as follows:

“5. *Upward Departure.*—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. The following are examples of cases in which an upward departure may be warranted:

(A) The offense involved personal information, means of identification, confidential phone records information, or tax return information of a substantial number of individuals.

(B) The offense caused or risked substantial non-monetary harm (e.g., physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of privacy interest) to individuals whose private or protected information was obtained.”.

The Commentary to § 2H3.1 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense involved personal information, means of identification, confidential phone records information, or tax return information of a substantial number of individuals.

(B) The offense caused or risked substantial non-monetary harm (e.g., physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of privacy interest) to individuals whose private or protected information was obtained.

See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2H4.1 captioned “Application Notes” is amended by striking Notes 3 and 4 as follows:

“3. If the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude, an upward departure may be warranted.

4. In a case in which the defendant was convicted under 18 U.S.C. 1589(b) or 1593A, a downward departure may be warranted if the defendant benefitted from participating in a venture described in those sections without knowing that (i.e., in reckless disregard of the fact that) the venture had engaged in the criminal activity described in those sections.”.

The Commentary to § 2H4.1 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Considerations:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude may be relevant. See §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that a defendant convicted under 18 U.S.C. 1589(b) or 1593A benefitted from participating in a venture described in those sections without knowing that (i.e., in reckless disregard of the fact that) the venture had engaged in the criminal activity described in those sections may be relevant. See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2J1.2 captioned “Application Notes” is amended—

by striking Note 4 as follows:

“4. *Upward Departure*

Considerations.—If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures). In a case involving an act of extreme violence (for example, retaliating against a government witness by throwing acid in the witness’s face) or a particularly serious sex offense, an upward departure would be warranted.”;

and by redesignating Note 5 as Note 4.

The Commentary to § 2J1.2 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved any of the following may be relevant:

(A) A weapon was used, or bodily injury or significant property damage resulted.

(B) The offense involved an act of extreme violence (for example, retaliating against a government witness by throwing acid in the witness’s face) or a particularly serious sex offense.

See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2J1.3 captioned “Application Notes” is amended—

by striking Note 4 as follows:

“4. If a weapon was used, or bodily injury or significant property damage

resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).”;

and by redesignating Note 5 as Note 4.

The Commentary to § 2J1.3 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Weapon Used or Bodily Injury or Significant Property Damage Resulted.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that a weapon was used, or bodily injury or significant property damage resulted, may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2J1.6 captioned “Application Notes” is amended—

by striking Note 4 as follows:

“4. If a defendant is convicted of both the underlying offense and the failure to appear count, and the defendant committed additional acts of obstructive behavior (e.g., perjury) during the investigation, prosecution, or sentencing of the instant offense, an upward departure may be warranted. The upward departure will ensure an enhanced sentence for obstructive conduct for which no adjustment under § 3C1.1 (Obstructing or Impeding the Administration of Justice) is made because of the operation of the rules set out in Application Note 3.”;

and by redesignating Note 5 as Note 4.

The Commentary to § 2J1.6 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Additional Acts of Obstructive Behavior.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a) in a case where the defendant is convicted of both the underlying offense and the failure to appear count, evidence that the defendant committed additional acts of obstructive behavior (e.g., perjury) during the investigation, prosecution, or sentencing of the instant offense may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2K1.3 captioned “Application Notes” is amended—

by striking Note 10 as follows:

“10. An upward departure may be warranted in any of the following circumstances: (A) the quantity of explosive materials significantly exceeded 1000 pounds; (B) the explosive materials were of a nature more volatile or dangerous than dynamite or conventional powder

explosives (e.g., plastic explosives); (C) the defendant knowingly distributed explosive materials to a person under twenty-one years of age; or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals.”;

by redesignating Note 11 as Note 10; and in Note 10 (as so redesignated) by striking “However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.”.

The Commentary to § 2K1.3 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved any of the following may be relevant:

(A) The quantity of explosive materials significantly exceeded 1000 pounds.

(B) The explosive materials were of a nature more volatile or dangerous than dynamite or conventional powder explosives (e.g., plastic explosives).

(C) The defendant knowingly distributed explosive materials to a person under twenty-one years of age.

(D) The offense posed a substantial risk of death or bodily injury to multiple individuals.

(E) The defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives).

See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2K1.4 captioned “Application Notes” is amended by striking Note 3 as follows:

“3. *Upward Departure Provision.*—If bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).”.

The Commentary to § 2K1.4 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“*Additional Offense Specific Consideration:*

1. *Bodily Injury Resulted.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in bodily injury may be relevant. *See* §§ 6A1.1; 6A1.3.”.

Section 2K2.1(b)(9)(B) is amended by striking “subsection (b) of § 4A1.3

(Departures Based on Inadequacy of Criminal History Category)” and inserting “§ 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category)”.

The Commentary to § 2K2.1 captioned “Application Notes” is amended—

in Note 7 by striking “In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. *See also* §§ 5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).”;

by striking Note 11 as follows:

“11. *Upward Departure Provisions.*—

An upward departure may be warranted in any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable (‘plastic’) firearms (defined at 18 U.S.C. 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals (*see* Application Note 7).”;

by redesignating Notes 12, 13, and 14 as Notes 11, 12, and 13, respectively;

in Note 12 (as so redesignated)—

by striking subparagraph (B) as follows:

“(B) *Upward Departure Provision.*—If the defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms, an upward departure may be warranted.”;

and by redesignating subparagraph (C) as subparagraph (B);

and in Note 13 (as so redesignated)—

by striking subparagraph (D) as follows:

“(D) *Upward Departure Provision.*—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.”;

and by redesignating subparagraph (E) as subparagraph (D).

The Commentary to § 2K2.1 is amended by inserting at the end the following new Commentary:

“Additional Offense Specific Consideration:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense level determined under this guideline does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created.

(B) The offense posed a substantial risk of death or bodily injury to multiple individuals.

(C) The number of firearms involved in the offense substantially exceeded 200.

(D) The defendant transported, transferred, sold, or otherwise disposed of, or purchased or received with intent to transport, transfer, sell, or otherwise dispose of, substantially more than 25 firearms.

(E) The offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, or non-detectable (‘plastic’) firearms (defined at 18 U.S.C. 922(p)).

(F) The offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. 921(a)(17)(B)).

(G) The defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives).

See §§ 6A1.1; 6A1.3.”

The Commentary to § 2K2.4 captioned “Application Notes” is amended—

in Note 2 by striking the following:

“Application of Subsection (b).—

(A) *In General.*—Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (e.g., not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. 924(c) and 929(a) also requires that a term of imprisonment imposed under that section shall run consecutively to any other term of imprisonment.

(B) *Upward Departure Provision.*—In a case in which the guideline sentence is determined under subsection (b), a sentence above the minimum term

required by 18 U.S.C. 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant’s criminal history in a case in which the defendant is convicted of an 18 U.S.C. 924(c) or § 929(a) offense but is not determined to be a career offender under § 4B1.1.”;

and inserting the following:

“Application of Subsection (b).—

Sections 924(c) and 929(a) of title 18, United States Code, provide mandatory minimum terms of imprisonment (e.g., not less than five years). Except as provided in subsection (c), in a case in which the defendant is convicted under 18 U.S.C. 924(c) or § 929(a), the guideline sentence is the minimum term required by the relevant statute. Each of 18 U.S.C. 924(c) and 929(a) also requires that a term of imprisonment imposed under that section shall run consecutively to any other term of imprisonment.”;

and in Note 4 by striking the following:

“In a few cases in which the defendant is determined not to be a career offender, the offense level for the underlying offense determined under the preceding paragraphs may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) (i.e., the guideline range that would have resulted if the enhancements for possession, use, or discharge of a firearm had been applied). In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a).”

The Commentary to § 2K2.4 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“Additional Offense Specific Consideration:

1. *Seriousness of the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the minimum term required by 18 U.S.C. 924(c) or § 929(a) understates the seriousness of the offense involved (e.g., the underlying offense determined under this guideline

results in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. 844(h), § 924(c), or § 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted had otherwise applicable Chapter Two enhancements for possession, use, or discharge of a firearm been applied) may be relevant. See §§ 6A1.1; 6A1.3.”

The Commentary to § 2K2.5 captioned “Application Notes” is amended by striking Note 4 as follows:

“4. Where the firearm was brandished, discharged, or otherwise used, in a federal facility, federal court facility, or school zone, and the cross reference from subsection (c)(1) does not apply, an upward departure may be warranted.”

The Commentary to § 2K2.5 is amended by inserting at the end the following new Commentary:

“Additional Offense Specific Consideration:

1. *Firearm Brandished, Discharged, or Otherwise Used.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a) in a case where the cross reference from subsection (c)(1) does not apply, evidence that the firearm was brandished, discharged, or otherwise used, in a federal facility, federal court facility, or school zone may be relevant. See §§ 6A1.1; 6A1.3.”

The Commentary to § 2L1.1 captioned “Application Notes” is amended—

in Note 4 by striking “Application Note 1(M) of § 1B1.1” and inserting “Application Note 1(L) of § 1B1.1”;

and by striking Note 7 as follows:

“7. *Upward Departure Provisions.*—An upward departure may be warranted in any of the following cases:

(A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.

(B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. 1182(a)(3).

(C) The offense involved substantially more than 100 aliens.”

The Commentary to § 2L1.1 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“Additional Offense Specific Consideration:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence

that the offense involved any of the following may be relevant:

(A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.

(B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. 1182(a)(3).

(C) The offense involved substantially more than 100 aliens.

See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2L1.2 captioned “Application Notes” is amended by striking Notes 6, 7, and 8 as follows:

“6. *Departure Based on Seriousness of a Prior Offense.*—There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is too remote to receive criminal history points (see § 4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. In such a case, a departure may be warranted.

7. *Departure Based on Time Served in State Custody.*—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under § 5G1.3(b) and, accordingly, is not covered by a departure under § 5K2.23 (Discharged Terms of Imprisonment). See § 5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United

States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant’s other criminal history.

8. *Departure Based on Cultural Assimilation.*—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant’s illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant’s continued residence in the United States, (4) the duration of the defendant’s presence outside the United States, (5) the nature and extent of the defendant’s familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant’s criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.”.

The Commentary to § 2L1.2 is amended by inserting at the end the following new Commentary:

“*Additional Offense Specific Considerations:*

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense level determined under this guideline substantially understates the seriousness of the conduct underlying the prior offense may be relevant because of any of the following reasons:

(A) The length of the sentence imposed does not reflect the seriousness of the prior offense.

(B) The prior conviction is too remote to receive criminal history points (see § 4A1.2(e)).

See §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense level determined under this guideline overstates the seriousness of the conduct underlying the prior offense because the time actually served was substantially less than the length of the sentence imposed for the prior offense.

(B) The defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense and the time served is not covered by an adjustment under § 5G1.3(b). The court may also consider, among other things: (i) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (ii) the seriousness of any such additional criminal activity, including (I) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (II) whether the criminal activity resulted in death or serious bodily injury to any person, and (III) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (iii) the seriousness of the defendant’s other criminal history.

(C) The defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, and those cultural ties provided the primary motivation for the defendant’s illegal reentry or continued presence in the United States. The court may also consider, among other things: (i) the age in childhood at which the defendant began residing continuously in the United States; (ii) whether and for how long the defendant attended school in the United States; (iii) the duration of the defendant’s continued residence in the United States; (iv) the duration of the defendant’s presence outside the United States; (v) the nature and extent of the defendant’s familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States; (vi) the seriousness of the defendant’s criminal history; and (vii) whether the defendant engaged in

additional criminal activity after illegally reentering the United States. See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2L2.1 captioned “Application Notes” is amended—

by striking Note 3 as follows:

“3. Subsection (b)(3) provides an enhancement if the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws. If the defendant knew, believed, or had reason to believe that the felony offense to be committed was of an especially serious type, an upward departure may be warranted.”;

by redesignating Note 4 as Note 3; and by striking Note 5 as follows:

“5. If the offense involved substantially more than 100 documents, an upward departure may be warranted.”.

The Commentary to § 2L2.1 is amended by inserting at the end the following new Commentary:

“Additional Offense Specific Consideration:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved any of the following may be relevant:

(A) The defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws, that was of an especially serious type.

(B) The offense involved substantially more than 100 documents.

See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2L2.2 captioned “Application Notes” is amended by striking Note 6 as follows:

“6. *Upward Departure Provision.*—If the defendant fraudulently obtained or used a United States passport for the purpose of entering the United States to engage in terrorist activity, an upward departure may be warranted. See Application Note 4 of the Commentary to § 3A1.4 (Terrorism).”.

The Commentary to § 2L2.2 is amended by inserting at the end the following new Commentary:

“Additional Offense Specific Consideration:

1. *Entering the United States with Purpose to Engage in Terrorist Activity.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant fraudulently obtained or used a United States passport for the purpose of entering the United States to

engage in terrorist activity may be relevant. See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2M3.1 captioned “Application Notes” is amended—

in the caption by striking “Notes” and inserting “Note”;

and by striking Notes 2 and 3 as follows:

“2. The Commission has set the base offense level in this subpart on the assumption that the information at issue bears a significant relation to the nation’s security, and that the revelation will significantly and adversely affect security interests. When revelation is likely to cause little or no harm, a downward departure may be warranted. See Chapter Five, Part K (Departures).

3. The court may depart from the guidelines upon representation by the President or his duly authorized designee that the imposition of a sanction other than authorized by the guideline is necessary to protect national security or further the objectives of the nation’s foreign policy.”.

The Commentary to § 2M3.1 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“Additional Offense Specific Considerations:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), representation by the President or his duly authorized designee that the imposition of a sanction other than authorized by the guideline is necessary to protect national security or further the objectives of the nation’s foreign policy may be relevant. See §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—The Commission has set the base offense level in this subpart on the assumption that the information at issue bears a significant relation to the nation’s security, and that the revelation will significantly and adversely affect security interests. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the revelation is likely to cause little or no harm may be relevant. See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2M4.1 is amended—

by striking the Commentary captioned “Application Note” in its entirety as follows:

“Application Note:

1. Subsection (b)(1) does not distinguish between whether the offense was committed in peacetime or during time of war or armed conflict. If the

offense was committed when persons were being inducted for compulsory military service during time of war or armed conflict, an upward departure may be warranted.”;

and by inserting at the end the following new Commentary:

“Additional Offense Specific Consideration:

1. *War or Armed Conflict.*—This guideline does not distinguish between whether the offense was committed in peacetime or during time of war or armed conflict. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense was committed when persons were being inducted for compulsory military service during time of war or armed conflict may be relevant. See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2M5.1 captioned “Application Notes” is amended—

by striking Notes 1 and 2 as follows:

“1. In the case of a violation during time of war or armed conflict, an upward departure may be warranted.

2. In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. See Chapter Five, Part K (Departures).”;

and by redesignating Notes 3 and 4 as Notes 1 and 2.

The Commentary to § 2M5.1 is amended by inserting at the end the following new Commentary:

“Additional Offense Specific Considerations:

1. *War or Armed Conflict.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense was committed during time of war or armed conflict may be relevant. See §§ 6A1.1; 6A1.3.

2. *Additional Aggravating Factors Relating to the Offense.*—In determining the sentence within the applicable guideline range, the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences may be relevant. See §§ 6A1.1; 6A1.3.”.

The Commentary to § 2M5.2 captioned “Application Notes” is amended—

in the caption by striking “Notes” and inserting “Note”;

in Note 1 by striking the following:

“The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In the unusual case where the offense conduct posed no such risk, a downward departure may be warranted. In the case of a violation during time of war or armed conflict, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).”;

and by striking Note 2 as follows:

“2. In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security or foreign policy interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted.”.

The Commentary to § 2M5.2 is amended by inserting at the end the following new Commentary:

“Additional Offense Specific

Considerations:

1. *Aggravating Factors Relating to the Offense.*—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security or foreign policy interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Nonetheless, in determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that such factors are present in an extreme form may be relevant. *See* §§ 6A1.1; 6A1.3.

2. *War or Armed Conflict.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense was committed during time of war or armed conflict may be relevant. *See* §§ 6A1.1; 6A1.3.

3. *Mitigating Factors Relating to the Offense.*—This guideline assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense conduct posed no such risk may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2M5.3 captioned “Application Notes” is amended—

in the caption by striking “Notes” and inserting “Note”;

and by striking Note 2 as follows:

“2. *Departure Provisions.*—

(A) *In General.*—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of the funds or other material support or resources involved, the extent of planning or sophistication, and whether there were multiple occurrences. In a case in which such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures).

(B) *War or Armed Conflict.*—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.”.

The Commentary to § 2M5.3 is amended by inserting at the end the following new Commentary:

“Additional Offense Specific

Considerations:

1. *Aggravating Factors Relating to the Offense.*—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of the funds or other material support or resources involved, the extent of planning or sophistication, and whether there were multiple occurrences. Nonetheless, in determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that such factors are present in an extreme form may be relevant. *See* §§ 6A1.1; 6A1.3.

2. *War or Armed Conflict.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense was committed during time of war or armed conflict may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2N1.1 captioned “Application Notes” is amended—

in the caption by striking “Notes” and inserting “Note”;

by striking Note 1 as follows:

“1. The base offense level reflects that this offense typically poses a risk of death or serious bodily injury to one or more victims; or causes, or is intended to cause, bodily injury. Where the offense posed a substantial risk of death or serious bodily injury to numerous victims, or caused extreme psychological injury or substantial property damage or monetary loss, an upward departure may be warranted. In the unusual case in which the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.”;

and by redesignating Note 2 as Note 1.

The Commentary to § 2N1.1 is amended by inserting at the end the following new Commentary:

“Additional Offense Specific

Considerations:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense posed a substantial risk of death or serious bodily injury to numerous victims, or caused extreme psychological injury or substantial property damage or monetary loss may be relevant. *See* §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—This guideline reflects that this offense typically poses a risk of death or serious bodily injury to one or more victims; or causes, or is intended to cause, bodily injury. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2N1.2 is amended—

by striking the Commentary captioned “Application Note” in its entirety as follows:

“Application Note:

1. If death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).”;

and by inserting at the end the following new Commentary:

“Additional Offense Specific

Consideration:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2N1.3 is amended—

by striking the Commentary captioned “Application Note” in its entirety as follows:

“Application Note:

1. If death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).”;

and by inserting at the end the following new Commentary:

“Additional Offense Specific Consideration:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2N2.1 captioned “Application Notes” is amended—

by striking Note 1 as follows:
 “1. This guideline assumes a regulatory offense that involved knowing or reckless conduct. Where only negligence was involved, a downward departure may be warranted. *See* Chapter Five, Part K (Departures).”;

by redesignating Note 2 as Note 1;
 by striking Note 3 as follows:

“3. *Upward Departure Provisions.*—The following are circumstances in which an upward departure may be warranted:

(A) The offense created a substantial risk of bodily injury or death; or bodily injury, death, extreme psychological injury, property damage, or monetary loss resulted from the offense. *See* Chapter Five, Part K (Departures).

(B) The defendant was convicted under 7 U.S.C. 7734.”;

and by redesignating Note 4 as Note 2.

The Commentary to § 2N2.1 is amended by inserting at the end the following new Commentary:

“Additional Offense Specific Considerations:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense created a substantial risk of bodily injury or death; or bodily injury, death, extreme psychological injury, property damage, or monetary loss resulted from the offense.

(B) The defendant was convicted under 7 U.S.C. 7734.

See §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—This guideline assumes a regulatory offense that involved knowing or reckless conduct. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense only involved negligence may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2P1.1 captioned “Application Notes” is amended—

by striking Note 4 as follows:
 “4. If death or bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).”;

and by redesignating Notes 5 and 6 as Notes 4 and 5, respectively.

The Commentary to § 2P1.1 is amended by inserting at the end the following new Commentary:

“Additional Offense Specific Consideration:

1. *Death or Bodily Injury Resulted.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in death or bodily injury may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2P1.3 is amended—

by striking the Commentary captioned “Application Note” in its entirety as follows:

“Application Note:

1. If death or bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).”;

and by inserting at the end the following new Commentary:

“Additional Offense Specific Consideration:

1. *Death or Bodily Injury Resulted.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in death or bodily injury may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2Q1.1 is amended—

by striking the Commentary captioned “Application Note” in its entirety as follows:

“Application Note:

1. If death or serious bodily injury resulted, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).”;

and by inserting before the Commentary captioned “Background” the following new Commentary:

“Additional Offense Specific Consideration:

1. *Death or Serious Bodily Injury Resulted.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense resulted in death or serious bodily injury may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2Q1.2 captioned “Application Notes” is amended—

by striking Note 4 as follows:
 “4. Except when the adjustment in subsection (b)(6) for simple recordkeeping offenses applies, this section assumes knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.”;

redesignating Notes 5 through 8 as Notes 4 through 7, respectively;

in Note 4 (as so redesignated) by striking “Depending upon the harm resulting from the emission, release or

discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from the offense levels prescribed in these specific offense characteristics may be appropriate.”;

in Note 5 (as so redesignated) by striking “Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. *See* Chapter Five, Part K (Departures).”;

in Note 6 (as so redesignated) by striking “Depending upon the nature of the contamination involved, a departure of up to two levels either upward or downward could be warranted.”;

in Note 7 (as so redesignated) by striking “Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels either upward or downward may be warranted.”;

and by striking Note 9 as follows:

“9. Other Upward Departure Provisions.—

(A) *Civil Adjudications and Failure to Comply with Administrative Order.*—In a case in which the defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. *See* § 4A1.3 (Departures Based on Inadequacy of Criminal History Category).

(B) *Extreme Psychological Injury.*—If the offense caused extreme psychological injury, an upward departure may be warranted. *See* § 5K2.3 (Extreme Psychological Injury).

(C) *Terrorism.*—If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure would be warranted. *See* Application Note 4 of the Commentary to § 3A1.4 (Terrorism).”.

The Commentary to § 2Q1.2 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“Additional Offense Specific Considerations:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense resulted in death or serious bodily injury.

(B) The defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order.

(C) The offense caused extreme psychological injury.

(D) The offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.

See §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—Except when the adjustment in subsection (b)(6) for simple recordkeeping offenses applies, this guideline assumes knowing conduct. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense only involved negligent conduct may be relevant. See §§ 6A1.1; 6A1.3.

3. *Additional Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved any of the following may be relevant:

(A) The harm resulting from the emission, release or discharge into the environment, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation.

(B) The nature of the risk created, and the number of people placed at risk.

(C) The nature and quantity of the substance or contamination involved in, and the risk associated with, the offense. See §§ 6A1.1; 6A1.3.”

The Commentary to § 2Q1.3 captioned “Application Notes” is amended—by striking Note 3 as follows:

“3. The specific offense characteristics in this section assume knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.”;

by redesignating Notes 4 through 7 as Notes 3 through 6;

in Note 3 (as so redesignated) by striking “Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from that prescribed in these specific offense characteristics may be appropriate.”;

in Note 4 (as so redesignated) by striking “Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would

be called for. See Chapter Five, Part K (Departures).”;

in Note 5 (as so redesignated) by striking “Depending upon the nature of the contamination involved, a departure of up to two levels in either direction could be warranted.”;

in Note 6 (as so redesignated) by striking “Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels in either direction may be warranted.”;

and by striking Note 8 as follows:

“8. Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).”

The Commentary to § 2Q1.3 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“Additional Offense Specific Considerations:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The offense resulted in death or serious bodily injury.

(B) The defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order.

See §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—This guideline assumes knowing conduct. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense only involved negligent conduct may be relevant. See §§ 6A1.1; 6A1.3.

3. *Additional Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved any of the following may be relevant:

(A) The harm resulting from the emission, release or discharge into the environment, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation.

(B) The nature of the risk created, and the number of people placed at risk.

(C) The nature and quantity of the substance or contamination involved in, and the risk associated with, the offense. See §§ 6A1.1; 6A1.3.”

The Commentary to § 2Q1.4 captioned “Application Notes” is amended by striking Note 3 as follows:

“3. *Departure Provisions.*—

(A) *Downward Departure Provision.*—The base offense level in subsection (a)(1) reflects that offenses covered by that subsection typically pose a risk of death or serious bodily injury to one or more victims, or cause, or are intended to cause, bodily injury. In the unusual case in which such an offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.

(B) *Upward Departure Provisions.*—If the offense caused extreme psychological injury, or caused substantial property damage or monetary loss, an upward departure may be warranted.

If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure would be warranted. See Application Note 4 of § 3A1.4 (Terrorism).”

The Commentary to § 2Q1.4 is amended by inserting at the end the following new Commentary:

“Additional Offense Specific Considerations:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved any of the following may be relevant:

(A) The offense caused extreme psychological injury or caused substantial property damage or monetary loss.

(B) The offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.

See §§ 6A1.1; 6A1.3.

2. *Mitigating Factors Relating to the Offense.*—The base offense level in subsection (a)(1) reflects that offenses covered by that subsection typically pose a risk of death or serious bodily injury to one or more victims, or cause, or are intended to cause, bodily injury. In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, may be relevant. See §§ 6A1.1; 6A1.3.”

The Commentary to § 2Q2.1 captioned “Application Notes” is amended—by striking Note 5 as follows:

“5. If the offense involved the destruction of a substantial quantity of

fish, wildlife, or plants, and the seriousness of the offense is not adequately measured by the market value, an upward departure may be warranted.”;

and by redesignating Note 6 as Note 5.

The Commentary to § 2Q2.1 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“Additional Offense Specific Consideration:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense involved the destruction of a substantial quantity of fish, wildlife, or plants, and the seriousness of the offense is not adequately measured by the market value, may be relevant. *See* §§ 6A1.1; 6A1.3.”.

Section 2R1.1(d)(1) is amended by striking “§ 8C2.4” and inserting “§ 9C2.4”.

Section 2R1.1(d)(2) is amended by striking “§ 8C2.6” and inserting “§ 9C2.6”.

The Commentary to § 2R1.1 captioned “Application Notes” is amended—

in Note 3 by striking “Chapter Eight” and inserting “Chapter Nine”; and by striking “§ 8C2.4(a)(3)” and inserting “§ 9C2.4(a)(3)”;

and by striking Note 7 as follows:

“7. In the case of a defendant with previous antitrust convictions, a sentence at the maximum of the applicable guideline range, or an upward departure, may be warranted. *See* § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).”.

The Commentary to § 2R1.1 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“Additional Offense Specific Consideration:

1. *Defendant with Previous Antitrust Convictions.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant had prior antitrust convictions may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2R1.1 captioned “Background” is amended by striking “Chapter Eight” and inserting “Chapter Nine”.

The Commentary to § 2T1.1 captioned “Application Notes” is amended in Note 3 by striking “§ 6A1.3” both places such term appears and inserting “§ 7A1.3”.

The Commentary to § 2T1.8 is amended—

by striking the Commentary captioned “Application Note” in its entirety as follows:

“Application Note:

1. If the defendant was attempting to evade, rather than merely delay, payment of taxes, an upward departure may be warranted.”;

and by inserting before the Commentary captioned “Background” the following new Commentary:

“Additional Offense Specific Consideration:

1. *Attempt to Evade Payment of Taxes.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the defendant was attempting to evade, rather than merely delay, payment of taxes may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2T2.1 captioned “Application Notes” is amended—in the caption by striking “Notes” and inserting “Note”;

and by striking Note 2 as follows:

“2. Offense conduct directed at more than tax evasion (e.g., theft or fraud) may warrant an upward departure.”.

The Commentary to § 2T2.1 is amended by inserting at the end the following new Commentary:

“Additional Offense Specific Consideration:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the offense conduct was directed at more than tax evasion (e.g., theft or fraud) may be relevant. *See* §§ 6A1.1; 6A1.3.”.

Chapter Two, Part T, Subpart 3 is amended in the Introductory Commentary by striking “for departing upward if there is not another more specific applicable guideline” and inserting “for imposing a sentence that is greater than the otherwise applicable guideline range pursuant to Chapter Six, Part A (Consideration of Factors in 18 U.S.C. 3553(a))”.

The Commentary to § 2T3.1 captioned “Application Notes” is amended in Note 2 by striking “Especially when such items are harmful or protective quotas are in effect, the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, an upward departure may be warranted.”.

The Commentary to § 2T3.1 is amended by inserting at the end the following new Commentary:

“Additional Offense Specific Consideration:

1. *Aggravating Factors Relating to the Offense.*—In determining the

appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence that the duties evaded on the items involved in the offense do not adequately reflect the harm to society or protected industries resulting from their importation may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 2X5.1 captioned “Application Notes” is amended—

in Note 1 by inserting after “include:” the following: “§ 3F1.1 (Early Disposition Programs (Policy Statement));”; by striking “Chapter Five, Part H (Specific Offender Characteristics); Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Departures); Chapter Six, Part A (Sentencing Procedures); Chapter Six, Part B (Plea Agreements)” and inserting “Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Assistance to Authorities); Chapter Seven, Part A (Sentencing Procedures); Chapter Seven, Part B (Plea Agreements)”;

and in Note 2 by striking the following:

“2. *Convictions under 18 U.S.C. 1841(a)(1).*—

(A) *In General.*—If the defendant is convicted under 18 U.S.C. 1841(a)(1), the Chapter Two offense guideline that applies is the guideline that covers the conduct the defendant is convicted of having engaged in, *i.e.*, the conduct of which the defendant is convicted that violates a specific provision listed in 18 U.S.C. 1841(b) and that results in the death of, or bodily injury to, a child in utero at the time of the offense of conviction. For example, if the defendant committed aggravated sexual abuse against the unborn child’s mother and it caused the death of the child in utero, the applicable Chapter Two guideline would be § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(B) *Upward Departure Provision.*—For offenses under 18 U.S.C. 1841(a)(1), an upward departure may be warranted if the offense level under the applicable guideline does not adequately account for the death of, or serious bodily injury to, the child in utero.”;

and inserting the following:

“*Convictions under 18 U.S.C.*

1841(a)(1).—If the defendant is convicted under 18 U.S.C. 1841(a)(1), the Chapter Two offense guideline that applies is the guideline that covers the conduct the defendant is convicted of having engaged in, *i.e.*, the conduct of which the defendant is convicted that violates a specific provision listed in 18 U.S.C. 1841(b) and that results in the death of, or bodily injury to, a child in utero at the time of the offense of

conviction. For example, if the defendant committed aggravated sexual abuse against the unborn child's mother and it caused the death of the child in utero, the applicable Chapter Two guideline would be § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse)."

The Commentary to § 2X5.1 is amended by inserting before the Commentary captioned "Background" the following new Commentary:

"Additional Offense Specific Consideration:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a) for offenses under 18 U.S.C. 1841(a)(1), evidence that the offense level under the applicable guideline does not adequately account for the death of, or serious bodily injury to, the child in utero may be relevant. *See* §§ 6A1.1; 6A1.3."

The Commentary to § 2X7.2 is amended—

by striking the Commentary captioned "Application Note" in its entirety as follows:

"Application Note:

1. *Upward Departure Provisions.*—An upward departure may be warranted in any of the following cases:

(A) The defendant engaged in a pattern of activity involving use of a submersible vessel or semi-submersible vessel described in 18 U.S.C. 2285 to facilitate other felonies.

(B) The offense involved use of the vessel as part of an ongoing criminal organization or enterprise."

and by inserting before the Commentary captioned "Background" the following new Commentary:

"Additional Offense Specific Consideration:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), evidence of the following may be relevant:

(A) The defendant engaged in a pattern of activity involving use of a submersible vessel or semi-submersible vessel described in 18 U.S.C. 2285 to facilitate other felonies.

(B) The offense involved use of the vessel as part of an ongoing criminal organization or enterprise.

See §§ 6A1.1; 6A1.3."

The Commentary to § 3A1.1 captioned "Application Notes" is amended—

by striking Note 4 as follows:

"4. If an enhancement from subsection (b) applies and the defendant's criminal history includes a prior sentence for an offense that involved the selection of a vulnerable

victim, an upward departure may be warranted."; and by redesignating Note 5 as Note 4.

The Commentary to § 3A1.1 is amended by inserting before the Commentary captioned "Background" the following new Commentary:

"Additional Consideration:

1. *Criminal History Involving Vulnerable Victims.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), a prior offense that also involved the selection of a vulnerable victim may be relevant in a case in which an enhancement from subsection (b) applies. *See* §§ 6A1.1; 6A1.3."

The Commentary to § 3A1.2 captioned "Application Notes" is amended by striking Note 5 as follows:

"5. *Upward Departure Provision.*—If the official victim is an exceptionally high-level official, such as the President or the Vice President of the United States, an upward departure may be warranted due to the potential disruption of the governmental function."

The Commentary to § 3A1.2 is amended by inserting at the end the following new Commentary:

"Additional Offense Specific Consideration:

1. *Exceptionally High-Level Official.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), evidence that the official victim is an exceptionally high-level official, such as the President or the Vice President of the United States, may be relevant due to the potential disruption of the governmental function. *See* §§ 6A1.1; 6A1.3."

The Commentary to § 3A1.3 captioned "Application Notes" is amended by striking Note 3 as follows:

"3. If the restraint was sufficiently egregious, an upward departure may be warranted. *See* § 5K2.4 (Abduction or Unlawful Restraint)."

The Commentary to § 3A1.3 is amended by inserting at the end the following new Commentary:

"Additional Offense Specific Consideration:

1. *Sufficiently Egregious Restraint.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), evidence that the restraint was sufficiently egregious may be relevant. *See* §§ 6A1.1; 6A1.3."

The Commentary to § 3A1.4 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. *Upward Departure Provision.*—By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment

provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied."

The Commentary to § 3A1.4 is amended by inserting at the end the following new Commentary:

"Additional Offense Specific Consideration:

1. *Aggravating Factors Relating to the Offense.*—By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment provided by this guideline applies only to federal crimes of terrorism. However, in determining the appropriate sentence to impose under 18 U.S.C. 3553(a), evidence that the offense was calculated to influence or affect the conduct of government by intimidation or coercion, to retaliate against government conduct or to intimidate or coerce a civilian population may be relevant. *See* §§ 6A1.1; 6A1.3."

The Commentary to § 3B1.1 captioned "Application Notes" is amended in Note 2 by striking "An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization."

The Commentary to § 3B1.1 is amended by inserting before the Commentary captioned "Background" the following new Commentary:

"Additional Offense Specific Consideration:

1. *Management of Property, Assets, or Activities.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), evidence that the defendant exercised management

responsibility over the property, assets, or activities of a criminal organization may be relevant, regardless of whether this adjustment applied. *See* §§ 6A1.1; 6A1.2.”.

The Commentary to § 3B1.4 captioned “Application Notes” is amended by striking Note 3 as follows:

“3. If the defendant used or attempted to use more than one person less than eighteen years of age, an upward departure may be warranted.”.

The Commentary to § 3B1.4 is amended by inserting at the end the following new Commentary:

“Additional Offense Specific Consideration:

1. *Using Multiple Minors.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), evidence that the defendant used or attempted to use more than one person less than eighteen years of age may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 3C1.2 captioned “Application Notes” is amended—in Note 2 by striking “However, where a higher degree of culpability was involved, an upward departure above the 2-level increase provided in this section may be warranted.”;

and by striking Note 6 as follows:

“6. If death or bodily injury results or the conduct posed a substantial risk of death or bodily injury to more than one person, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).”.

The Commentary to § 3C1.2 is amended by inserting at the end the following new Commentary:

“Additional Offense Specific Consideration:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), evidence that the offense involved any of the following may be relevant:

(A) The offense involved a degree of culpability higher than recklessness.

(B) Death or bodily injury resulted from the offense, or the conduct posed a substantial risk of death or bodily injury to more than one person.

See §§ 6A1.1; 6A1.3.”.

The Commentary to § 3D1.1 captioned “Background” is amended by striking “Chapter Five (Determining the Sentence)” both places such phrase appears and inserting “Chapter Five (Determining the Sentencing Range and Options Under the Guidelines)”.

The Commentary to § 3D1.2 captioned “Background” is amended by striking “because it probably would require departure in many cases in order to capture adequately the criminal behavior” and inserting “because, in

many cases, it would not fully capture the scope and impact of the criminal behavior”.

The Commentary to § 3D1.3 captioned “Application Notes” is amended by striking Note 4 as follows:

“4. Sometimes the rule specified in this section may not result in incremental punishment for additional criminal acts because of the grouping rules. For example, if the defendant commits forcible criminal sexual abuse (rape), aggravated assault, and robbery, all against the same victim on a single occasion, all of the counts are grouped together under § 3D1.2. The aggravated assault will increase the guideline range for the rape. The robbery, however, will not. This is because the offense guideline for rape (§ 2A3.1) includes the most common aggravating factors, including injury, that data showed to be significant in actual practice. The additional factor of property loss ordinarily can be taken into account adequately within the guideline range for rape, which is fairly wide. However, an exceptionally large property loss in the course of the rape would provide grounds for an upward departure. *See* § 5K2.5 (Property Damage or Loss).”.

The Commentary to § 3D1.3 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“Additional Offense Specific Consideration:

1. *Aggravating Factors Relating to the Offense.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), evidence that the grouping rules under this section result in an offense level that substantially understates the seriousness of the defendant’s conduct may be relevant. *See* §§ 6A1.1; 6A1.3.”.

The Commentary to § 3D1.4 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“Additional Consideration:

1. *Factors Relating to Assignment of Units.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), the following may be relevant:

(A) The total number of Units is significantly more than 5 Units.

(B) There is no increase in the offense level under this guideline, because the most serious group has an offense level that is substantially higher than all of the other groups.

(C) The case involved several ungrouped minor offenses resulting in an excessive increase in the offense level under this guideline.

See §§ 6A1.1; 6A1.3.”.

The Commentary to § 3D1.4 captioned “Background” is amended by striking the following:

“When Groups are of roughly comparable seriousness, each Group will represent one Unit. When the most serious Group carries an offense level substantially higher than that applicable to the other Groups, however, counting the lesser Groups fully for purposes of the table could add excessive punishment, possibly even more than those offenses would carry if prosecuted separately. To avoid this anomalous result and produce declining marginal punishment, Groups 9 or more levels less serious than the most serious Group should not be counted for purposes of the table, and that Groups 5 to 8 levels less serious should be treated as equal to one-half of a Group. Thus, if the most serious Group is at offense level 15 and if two other Groups are at level 10, there would be a total of two Units for purposes of the table (one plus one-half plus one-half) and the combined offense level would be 17. Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 Units.

In unusual circumstances, the approach adopted in this section could produce adjustments for the additional counts that are inadequate or excessive. If there are several groups and the most serious offense is considerably more serious than all of the others, there will be no increase in the offense level resulting from the additional counts. Ordinarily, the court will have latitude to impose added punishment by sentencing toward the upper end of the range authorized for the most serious offense. Situations in which there will be inadequate scope for ensuring appropriate additional punishment for the additional crimes are likely to be unusual and can be handled by departure from the guidelines. Conversely, it is possible that if there are several minor offenses that are not grouped together, application of the rules in this part could result in an excessive increase in the sentence range. Again, such situations should be infrequent and can be handled through departure. An alternative method for ensuring more precise adjustments would have been to determine the appropriate offense level adjustment through a more complicated mathematical formula; that approach was not adopted because of its complexity.”;

and inserting the following:

“When Groups are of roughly comparable seriousness, each Group

will represent one Unit. When the most serious Group carries an offense level substantially higher than that applicable to the other Groups, however, counting the lesser Groups fully for purposes of the table could add excessive punishment, possibly even more than those offenses would carry if prosecuted separately. To avoid this anomalous result and produce declining marginal punishment, Groups 9 or more levels less serious than the most serious Group should not be counted for purposes of the table, and that Groups 5 to 8 levels less serious should be treated as equal to one-half of a Group. Thus, if the most serious Group is at offense level 15 and if two other Groups are at level 10, there would be a total of two Units for purposes of the table (one plus one-half plus one-half) and the combined offense level would be 17.”.

The Commentary to § 3D1.5 is amended by striking “Chapter Five (Determining the Sentence)” and inserting “Chapter Five (Determining the Sentencing Range and Options Under the Guidelines)”.

Chapter Three is amended by inserting at the end the following new Part F:

“Part F—Early Disposition Program

§ 3F1.1. Early Disposition Programs (Policy Statement)

Upon motion of the Government, the court may decrease the defendant’s offense level pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides. The level of the decrease shall be consistent with the authorized program within the filing district and the government motion filed, but shall be not more than 4 levels.

Commentary

Background: This policy statement implements the directive to the Commission in section 401(m)(2)(B) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the ‘PROTECT Act’, Public Law 108–21).”.

The Commentary to § 4A1.1 captioned “Background” is amended by striking “§ 4A1.3 authorizes the court to depart from the otherwise applicable criminal history category in certain circumstances” and inserting “§ 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category (Policy Statement)) provides a list of factors the court may consider in determining whether a defendant’s criminal history category under- or over-

represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes”.

Section 4A1.2(h) is amended by striking “§ 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))” and inserting “§ 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category (Policy Statement))”.

Section 4A1.2(i) is amended by striking “§ 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))” and inserting “§ 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category (Policy Statement))”.

Section 4A1.2(j) is amended by striking “§ 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))” and inserting “§ 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category (Policy Statement))”.

The Commentary to § 4A1.2 captioned “Applications Notes” is amended—in Note 3 by striking the following: “*Application of ‘Single Sentence’ Rule (Subsection (a)(2)).*—

(A) *Predicate Offenses.*—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under § 4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (*see* § 4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted ‘separately’ from each other (*see* § 4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant’s criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under § 4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under § 4A1.1(a). Because this particular robbery met the definition of a felony

crime of violence and independently would have received 2 criminal history points under § 4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under § 4A1.1(b), because it was not imposed within ten years of the defendant’s commencement of the instant offense. *See* § 4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.

(B) *Upward Departure Provision.*—Treating multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant’s criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant’s criminal history or the frequency with which the defendant has committed crimes.”;

and inserting the following:

“*Application of ‘Single Sentence’ Rule (Subsection (a)(2)).*—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under § 4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (*see* § 4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted ‘separately’ from each other (*see* § 4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant’s criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are

treated as a single sentence under § 4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under § 4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under § 4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under § 4A1.1(b), because it was not imposed within ten years of the defendant's commencement of the instant offense. See § 4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.”;

in Note 6 by striking “§ 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))” and inserting “§ 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category (Policy Statement))”; and in Note 8 by striking “in determining whether an upward departure is warranted under § 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))” and inserting “pursuant to § 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category (Policy Statement))”.

The Commentary to § 4A1.2 is amended by inserting before the Commentary captioned “Background” the following new Commentary: “Additional Consideration:

1. *Multiple Prior Sentences.*—In cases in which multiple prior sentences are treated as a single sentence, the court may, in determining the appropriate sentence to impose under 18 U.S.C. 3553(a), consider whether such treatment results in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that the defendant presents to the public. See § 4A1.3.”.

Section 4A1.3 is amended—in the heading by striking “Departures” and inserting “Additional Considerations”;

by striking the following:

“(a) *Upward Departures.*—

(1) *Standard for Upward Departure.*—If reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the

defendant will commit other crimes, an upward departure may be warranted.

(2) *Types of Information Forming the Basis for Upward Departure.*—The information described in subsection (a)(1) may include information concerning the following:

(A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal convictions).

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.

(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.

(3) *Prohibition.*—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.

(4) *Determination of Extent of Upward Departure.*—

(A) *In General.*—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's.

(B) *Upward Departures from Category VI.*—In a case in which the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

(b) *Downward Departures.*—

(1) *Standard for Downward Departure.*—If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

(2) *Prohibitions.*—

(A) *Criminal History Category I.*—Unless otherwise specified, a departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.

(B) *Armed Career Criminal and Repeat and Dangerous Sex Offender.*—

A downward departure under this subsection is prohibited for (i) an armed career criminal within the meaning of § 4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

(3) *Limitations.*—

(A) *Limitation on Extent of Downward Departure for Career Offender.*—The extent of a downward departure under this subsection for a career offender within the meaning of § 4B1.1 (Career Offender) may not exceed one criminal history category.

(B) *Limitation on Applicability of § 5C1.2 in Event of Downward Departure.*—A defendant who receives a downward departure under this subsection does not meet the criminal history requirement of subsection (a)(1) of § 5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if the defendant did not otherwise meet such requirement before receipt of the downward departure.

(c) *Written Specification of Basis for Departure.*—In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:

(1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

(2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.”;

and inserting the following:

“(a) *Aggravating and Mitigating Factors.*—In determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a), the court should consider whether the defendant's criminal history category under- or over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes. If established by reliable information, the following aggravating or mitigating factors may be relevant to this determination:

(1) *Aggravating Factors.*—

(A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal convictions).

(B) Prior sentences of substantially more than one year imposed as a result of independent crimes committed on different occasions.

(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.

(2) *Mitigating Factors.*—

(A) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

(B) The defendant received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person.

(b) *Prior Arrest Record.*—A prior arrest record itself is not a relevant consideration under this policy statement.”.

The Commentary to § 4A1.3 is amended—

by striking the Commentary captioned “Application Notes” and “Background” in its entirety as follows:

“*Application Notes:*

1. *Definitions.*—For purposes of this policy statement, the terms ‘depart’, ‘departure’, ‘downward departure’, and ‘upward departure’ have the meaning given those terms in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

2. *Upward Departures.*—

(A) *Examples.*—An upward departure from the defendant’s criminal history category may be warranted based on any of the following circumstances:

(i) A previous foreign sentence for a serious offense.

(ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.

(iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.

(iv) Commission of the instant offense while on bail or pretrial release for another serious offense.

(B) *Upward Departures from Criminal History Category VI.*—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant’s criminal history, a departure above the guideline range for a defendant with Criminal History

Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant’s criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.

(C) *Upward Departures Based on Tribal Court Convictions.*—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in § 4A1.3(a) above and, in addition, may consider relevant factors such as the following:

(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.

(ii) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.

(iii) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.

(iv) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.

(v) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this chapter.

(vi) The tribal court conviction is for an offense that otherwise would be counted under § 4A1.2 (Definitions and Instructions for Computing Criminal History).

3. *Downward Departures.*—

(A) *Examples.*—A downward departure from the defendant’s criminal history category may be warranted based on any of the following circumstances:

(i) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

(ii) The defendant received criminal history points from a sentence for

possession of marihuana for personal use, without an intent to sell or distribute it to another person.

(B) *Downward Departures from Criminal History Category I.*—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(A), unless otherwise specified.

Background: This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant’s criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant’s criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.”; and inserting the following new Commentary:

“*Application Note:*

1. *Tribal Convictions.*—In considering tribal court convictions not counted in the criminal history score, the presence of the following factors may be relevant to the court’s determination:

(A) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.

(B) The defendant received the due process protections required for criminal defendants under the Indian Civil Rights Act of 1968, Public Law 90–284, as amended.

(C) The tribe was exercising expanded jurisdiction under the Tribal Law and Order Act of 2010, Public Law 111–211.

(D) The tribe was exercising expanded jurisdiction under the Violence Against Women Reauthorization Act of 2013, Public Law 113–4.

(E) The tribal court conviction is not based on the same conduct that formed

the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this chapter.

(F) The tribal court conviction is for an offense that otherwise would be counted under § 4A1.2 (Definitions and Instructions for Computing Criminal History).

Background: This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. This policy statement recognizes that consideration of whether additional aggravating or mitigating factors established by reliable information indicates that the criminal history category assigned does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism is appropriate in determining the appropriate sentence to impose pursuant to 18 U.S.C. 3553(a)."

The Commentary to § 4B1.1 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. *Departure Provision for State Misdemeanors.*—In a case in which one or both of the defendant's 'two prior felony convictions' is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, application of the career offender guideline may result in a guideline range that substantially overrepresents the seriousness of the defendant's criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted without regard to the limitation in § 4A1.3(b)(3)(A)."

The Commentary to § 4B1.2 captioned "Application Notes" is amended by striking Note 4 as follows:

"4. *Upward Departure for Burglary Involving Violence.*—There may be cases in which a burglary involves violence, but does not qualify as a 'crime of violence' as defined in § 4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a 'crime of violence.' In such a case, an upward departure may be appropriate."

The Commentary to § 4B1.2 is amended by inserting at the end the following new Commentary:

Additional Considerations:

1. *State Misdemeanors.*—In a case in which one or both of the defendant's 'two prior felony convictions' is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, evidence

that application of the career offender guideline results in a guideline range that substantially overrepresents the seriousness of the defendant's criminal history or substantially overstates the seriousness of the instant offense may be relevant in determining the appropriate sentence to impose under 18 U.S.C. 3553(a).

2. *Offense Involving Violence.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), evidence that a prior offense, such as burglary, involved violence but does not qualify as a 'crime of violence' as defined in § 4B1.2(a) may be relevant."

The Commentary to § 4B1.4 captioned "Application Notes" is amended in Note 2, in the paragraph that begins "In a few cases", by striking "In such a case, an upward departure may be warranted so that the conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An upward departure under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a)" and inserting "In such a case, a sentence greater than the applicable guideline range may be warranted so that the conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a) does not result in a decrease in the total punishment. An increase in the total punishment under this paragraph shall not exceed the maximum of the guideline range that would have resulted had there not been a count of conviction under 18 U.S.C. 844(h), § 924(c), or § 929(a)".

The Commentary to § 4B1.4 captioned "Background" is amended by striking "§ 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))" and inserting "§ 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category (Policy Statement))".

The Commentary to § 4C1.1 captioned "Application Notes" is amended—

in the heading by striking "Notes" and inserting "Note";

and by striking Note 2 as follows:

"2. *Upward Departure.*—An upward departure may be warranted if an adjustment under this guideline substantially underrepresents the seriousness of the defendant's criminal history. For example, an upward departure may be warranted if the defendant has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence."

The Commentary to § 4C1.1 is amended by inserting at the end the following new Commentary:

Additional Consideration:

1. *Application of Adjustment.*—In determining the appropriate sentence to impose under 18 U.S.C. 3553(a), information establishing that an adjustment under this guideline substantially underrepresents the seriousness of the defendant's criminal history may be relevant. For example, a sentence greater than the applicable guideline range may be warranted if the defendant has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence."

Chapter Five is amended—

in the heading by striking "Determining the Sentence" and inserting "Determining the Sentencing Range and Options Under the Guidelines";

and in the Introductory Commentary by striking the following:

"For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. 3553(a).";

and inserting the following:

"Chapter Five sets forth the steps used to determine the applicable sentencing range based upon the guideline calculations made in Chapters Two through Four. For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. A sentence is within the guidelines if it complies with each applicable section of this chapter."

The Commentary to § 5C1.1 captioned "Applications Notes" is amended—

by striking Note 6 as follows:

"6. *Departures Based on Specific Treatment Purpose.*—There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may

be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

Examples: The following examples both assume the applicable guideline range is 12–18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (*see* § 5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.”;

by redesignating Notes 7 through 10 as Notes 6 through 9, respectively; and in Note 9 (as so redesignated) by striking the following:

“Zero-Point Offenders.—

(A) *Zero-Point Offenders in Zones A and B of the Sentencing Table.*—If the defendant received an adjustment under § 4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. *See* 28 U.S.C. 994(j).

(B) *Departure for Cases Where the Applicable Guideline Range Overstates the Gravity of the Offense.*—A departure, including a departure to a sentence other than a sentence of imprisonment, may be appropriate if the defendant received an adjustment under § 4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. *See* 28 U.S.C. 994(j).”; and inserting the following:

“Zero-Point Offenders in Zones A and B of the Sentencing Table.—If the defendant received an adjustment under § 4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. *See* 28 U.S.C. 994(j).”.

The Commentary to § 5C1.1 is amended by inserting at the end the following new Commentary:

“Additional Considerations:

1. *Cases Where the Applicable Guideline Range of Zero-Point Offender Overstates the Gravity of the Offense.*—A sentence other than a sentence of imprisonment may be appropriate if the defendant received an adjustment under § 4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. *See* 28 U.S.C. § 994(j).

2. *Specific Treatment Purpose.*—A sentencing option other than those authorized by the applicable zone of the Sentencing Table may be appropriate to accomplish a specific treatment purpose addressing a problem (e.g., substance abuse, alcohol abuse, or mental illness) that is related to the defendant's criminality.”.

The Commentary to § 5C1.2 captioned “Application Notes” is amended by inserting at the end the following new Note 7:

“7. *Interaction of § 5C1.2 and § 4A1.3.*—A defendant whose criminal history category was adjusted in accordance with § 4A1.3 (Additional Considerations Based on Inadequacy of Criminal History Category (Policy Statement)) does not meet the criminal history requirement of § 5C1.2(a)(1) if the defendant did not otherwise meet such requirement before application of § 4A1.3.”.

The Commentary to § 5D1.1 captioned “Application Notes” is amended—

in Note 1 by striking “The court may depart from this guideline and not impose a term of supervised release” and inserting “The court may not impose a term of supervised release”;

and in Note 3(C) by striking “§ 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction)” and inserting “Subsection (a)(7) of § 6A1.2 (Factors Relating to Individual Circumstances (Policy Statement))”.

The Commentary to § 5E1.2 captioned “Applications Notes” is amended—by striking Note 4 as follows:

“4. The Commission envisions that for most defendants, the maximum of the guideline fine range from subsection (c) will be at least twice the amount of gain or loss resulting from the offense. Where, however, two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline, an upward departure from the fine guideline may be warranted.

Moreover, where a sentence within the applicable fine guideline range would not be sufficient to ensure both the disgorgement of any gain from the offense that otherwise would not be disgorged (e.g., by restitution or forfeiture) and an adequate punitive fine, an upward departure from the fine guideline range may be warranted.”;

and by redesignating Notes 5, 6, and 7 as Notes 4, 5, and 6, respectively.

The Commentary to § 5E1.2 is amended by inserting at the end the following new Commentary:

“Additional Consideration:

1. *Additional Factors Relating to the Offense.*—In determining the appropriate amount of the fine to impose pursuant to 18 U.S.C. 3553(a), evidence that the fine range determined under this guideline understates the seriousness of the offense (e.g., the applicable fine guideline range would not provide adequate punishment for the offense and ensure disgorgement of any gain from the offense) may be relevant.”.

The Commentary to § 5E1.3 captioned “Application Notes” is amended in Note 1 by striking “§ 8E1.1” and inserting “§ 9E1.1”.

The Commentary to § 5G1.1 is amended by striking “; a sentence of less than 48 months would be a guideline departure”; and by striking “; a sentence of more than 60 months would be a guideline departure”.

The Commentary to § 5G1.3 captioned “Application Notes” is amended—

in Note 4(C) by striking “§ 7B1.3” and inserting “§ 8B1.3”;

by striking Note 4(E) as follows:

“(E) *Downward Departure*.—Unlike subsection (b), subsection (d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (d), it may be appropriate for the court to downwardly depart. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a downward departure may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a departure pursuant to this application note result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons’ exclusive authority provided under 18 U.S.C. 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any downward departure under this application note be clearly stated on the Judgment in a Criminal Case Order as a downward departure pursuant to § 5G1.3(d), rather than as a credit for time served.”;

and by striking Note 5 as follows:

“5. *Downward Departure Provision*.—In the case of a discharged term of imprisonment, a downward departure is not prohibited if the defendant (A) has completed serving a term of imprisonment; and (B) subsection (b) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. *See* § 5K2.23 (Discharged Terms of Imprisonment).”.

The Commentary to § 5G1.3 is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“*Additional Considerations*:

1. *Time Served on Undischarged Terms of Imprisonment*.—Unlike subsection (b), subsection (d) does not authorize an adjustment of the sentence for the instant offense for a period of imprisonment already served on the undischarged term of imprisonment. However, in an extraordinary case involving an undischarged term of imprisonment under subsection (d), it may be appropriate for the court to impose a sentence below the otherwise

applicable guideline range. This may occur, for example, in a case in which the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the relevant conduct for the instant offense. In such a case, a sentence below the applicable guideline range may be warranted to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings. Nevertheless, it is intended that a sentence below the applicable guideline range pursuant to this additional consideration result in a sentence that ensures a reasonable incremental punishment for the instant offense of conviction.

To avoid confusion with the Bureau of Prisons’ exclusive authority provided under 18 U.S.C. 3585(b) to grant credit for time served under certain circumstances, the Commission recommends that any sentence below the applicable guideline range under this additional consideration be clearly stated as such on the Judgment in a Criminal Case Order, rather than as a credit for time served.

2. *Discharged Terms of Imprisonment*.—In a case where (A) the defendant has completed serving a term of imprisonment, and (B) subsection (b) of § 5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment or Anticipated Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense, it may be appropriate for the court to impose a sentence below the otherwise applicable guideline range.”.

Chapter Five is amended by striking Part H in its entirety as follows:

“Part H—Specific Offender Characteristics

Introductory Commentary

This part addresses the relevance of certain specific offender characteristics in sentencing. The Sentencing Reform Act (the ‘Act’) contains several provisions regarding specific offender characteristics:

First, the Act directs the Commission to ensure that the guidelines and policy statements ‘are entirely neutral’ as to five characteristics—race, sex, national origin, creed, and socioeconomic status. *See* 28 U.S.C. 994(d).

Second, the Act directs the Commission to consider whether eleven specific offender characteristics, ‘among others’, have any relevance to the

nature, extent, place of service, or other aspects of an appropriate sentence, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance. *See* 28 U.S.C. 994(d).

Third, the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the ‘general inappropriateness’ of considering five of those characteristics—education; vocational skills; employment record; family ties and responsibilities; and community ties. *See* 28 U.S.C. 994(e).

Fourth, the Act also directs the sentencing court, in determining the particular sentence to be imposed, to consider, among other factors, ‘the history and characteristics of the defendant’. *See* 18 U.S.C. 3553(a)(1).

Specific offender characteristics are taken into account in the guidelines in several ways. One important specific offender characteristic is the defendant’s criminal history, *see* 28 U.S.C. 994(d)(10), which is taken into account in the guidelines in Chapter Four (Criminal History and Criminal Livelihood). *See* § 5H1.8 (Criminal History). Another specific offender characteristic in the guidelines is the degree of dependence upon criminal history for a livelihood, *see* 28 U.S.C. 994(d)(11), which is taken into account in Chapter Four, Part B (Career Offenders and Criminal Livelihood). *See* § 5H1.9 (Dependence upon Criminal Activity for a Livelihood). Other specific offender characteristics are accounted for elsewhere in this manual. *See, e.g.*, §§ 2C1.1(a)(1) and 2C1.2(a)(1) (providing alternative base offense levels if the defendant was a public official); 3B1.3 (Abuse of Position of Trust or Use of Special Skill); and 3E1.1 (Acceptance of Responsibility).

The Supreme Court has emphasized that the advisory guideline system should ‘continue to move sentencing in Congress’ preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.’ *See United States v. Booker*, 543 U.S. 220, 264–65 (2005). Although the court must consider ‘the history and characteristics of the defendant’ among other factors, *see* 18 U.S.C. 3553(a), in order to avoid unwarranted sentencing disparities the court should not give them excessive weight. Generally, the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guideline range but for other reasons, such as in determining the sentence within the

applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence. To avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, *see* 18 U.S.C. 3553(a)(6), 28 U.S.C. 991(b)(1)(B), the guideline range, which reflects the defendant's criminal conduct and the defendant's criminal history, should continue to be 'the starting point and the initial benchmark.' *Gall v. United States*, 552 U.S. 38, 49 (2007).

Accordingly, the purpose of this part is to provide sentencing courts with a framework for addressing specific offender characteristics in a reasonably consistent manner. Using such a framework in a uniform manner will help 'secure nationwide consistency,' *see Gall v. United States*, 552 U.S. 38, 49 (2007), 'avoid unwarranted sentencing disparities,' *see* 28 U.S.C. 991(b)(1)(B), 18 U.S.C. 3553(a)(6), 'provide certainty and fairness,' *see* 28 U.S.C. 991(b)(1)(B), and 'promote respect for the law,' *see* 18 U.S.C. 3553(a)(2)(A).

This part allocates specific offender characteristics into three general categories.

In the first category are specific offender characteristics the consideration of which Congress has prohibited (e.g., § 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status)) or that the Commission has determined should be prohibited.

In the second category are specific offender characteristics that Congress directed the Commission to take into account in the guidelines only to the extent that they have relevance to sentencing. *See* 28 U.S.C. 994(d). For some of these, the policy statements indicate that these characteristics may be relevant in determining whether a sentence outside the applicable guideline range is warranted (e.g., age; mental and emotional condition; physical condition). These characteristics may warrant a sentence outside the applicable guideline range if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. These specific offender characteristics also may be considered for other reasons, such as in determining the sentence within the applicable guideline range, the type of

sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence.

In the third category are specific offender characteristics that Congress directed the Commission to ensure are reflected in the guidelines and policy statements as generally inappropriate in recommending a term of imprisonment or length of a term of imprisonment. *See* 28 U.S.C. 994(e). The policy statements indicate that these characteristics are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, or various other aspects of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release). Furthermore, although these circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. They also may be relevant if a combination of such circumstances makes the case an exceptional one, but only if each such circumstance is identified as an affirmative ground for departure and is present in the case to a substantial degree. *See* § 5K2.0 (Grounds for Departure).

As with the other provisions in this manual, these policy statements 'are evolutionary in nature'. *See* Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines); 28 U.S.C. 994(o). The Commission expects, and the Sentencing Reform Act contemplates, that continuing research, experience, and analysis will result in modifications and revisions.

The nature, extent, and significance of specific offender characteristics can involve a range of considerations. The Commission will continue to provide information to the courts on the relevance of specific offender characteristics in sentencing, as the Sentencing Reform Act contemplates. *See, e.g.,* 28 U.S.C. 995(a)(12)(A) (the Commission serves as a 'clearinghouse and information center' on federal sentencing). Among other things, this may include information on the use of specific offender characteristics,

individually and in combination, in determining the sentence to be imposed (including, where available, information on rates of use, criteria for use, and reasons for use); the relationship, if any, between specific offender characteristics and (A) the 'forbidden factors' specified in 28 U.S.C. 994(d) and (B) the 'discouraged factors' specified in 28 U.S.C. 994(e); and the relationship, if any, between specific offender characteristics and the statutory purposes of sentencing.

§ 5H1.1. Age (Policy Statement)

Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and in-firm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

§ 5H1.2. Education and Vocational Skills (Policy Statement)

Education and vocational skills are not ordinarily relevant in determining whether a departure is warranted, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. *See* § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Education and vocational skills may be relevant in determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.

§ 5H1.3. Mental and Emotional Conditions (Policy Statement)

Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. *See also* Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* § 5C1.1, Application Note 7.

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; *e.g.*, participation in a mental health program (*see* §§ 5B1.3(d)(5) and 5D1.3(d)(5)).

§ 5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)

Physical condition or appearance, including physique, may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. An extraordinary physical impairment may be a reason to depart downward; *e.g.*, in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (*see* § 5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the probation office to judge the success of the program.

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. *See* § 5C1.1, Application Note 7.

In a case in which a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (*see* § 5B1.3(d)(4)).

Addiction to gambling is not a reason for a downward departure.

§ 5H1.5. Employment Record (Policy Statement)

Employment record is not ordinarily relevant in determining whether a departure is warranted.

Employment record may be relevant in determining the conditions of

probation or supervised release (*e.g.*, the appropriate hours of home detention).

§ 5H1.6. Family Ties and Responsibilities (Policy Statement)

In sentencing a defendant convicted of an offense other than an offense described in the following paragraph, family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

Commentary

Application Note:

1. Circumstances to Consider.—

(A) *In General.*—In determining whether a departure is warranted under this policy statement, the court shall consider the following non-exhaustive list of circumstances:

- (i) The seriousness of the offense.
- (ii) The involvement in the offense, if any, of members of the defendant's family.
- (iii) The danger, if any, to members of the defendant's family as a result of the offense.

(B) *Departures Based on Loss of Caretaking or Financial Support.*—A departure under this policy statement based on the loss of caretaking or financial support of the defendant's family requires, in addition to the court's consideration of the non-exhaustive list of circumstances in subdivision (A), the presence of the following circumstances:

- (i) The defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family.
- (ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant's family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of

a sort ordinarily incident to incarceration.

(iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable to the defendant's family.

(iv) The departure effectively will address the loss of caretaking or financial support.

Background: Section 401(b)(4) of Public Law 108–21 directly amended this policy statement to add the second paragraph, effective April 30, 2003.

§ 5H1.7. Role in the Offense (Policy Statement)

A defendant's role in the offense is relevant in determining the applicable guideline range (*see* Chapter Three, Part B (Role in the Offense)) but is not a basis for departing from that range (*see* subsection (d) of § 5K2.0 (Grounds for Departures)).

§ 5H1.8. Criminal History (Policy Statement)

A defendant's criminal history is relevant in determining the applicable criminal history category. *See* Chapter Four (Criminal History and Criminal Livelihood). For grounds of departure based on the defendant's criminal history, *see* § 4A1.3 (Departures Based on Inadequacy of Criminal History Category).

§ 5H1.9. Dependence upon Criminal Activity for a Livelihood (Policy Statement)

The degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence. *See* Chapter Four, Part B (Career Offenders and Criminal Livelihood).

§ 5H1.10. Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)

These factors are not relevant in the determination of a sentence.

§ 5H1.11. Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)

Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.

Civic, charitable, or public service; employment-related contributions; and

similar prior good works are not ordinarily relevant in determining whether a departure is warranted.

§ 5H1.12. Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)

Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted.”.

Chapter Five, Part K is amended in the heading by striking “DEPARTURES” and inserting “ASSISTANCE TO AUTHORITIES”.

Chapter Five, Part K, Subpart 1 is amended by striking the heading as follows:

“1. Substantial Assistance To Authorities”

Section 5K1.1 is amended by striking “the court may depart from the guidelines” and inserting “the court may impose a sentence that is below the otherwise applicable guideline range”.

Chapter Five, Part K is amended by striking Subparts 2 and 3 in their entirety as follows:

“2. Other Grounds For Departure

§ 5K2.0. Grounds for Departure (Policy Statement)

(a) *Upward Departures in General and Downward Departures in Criminal Cases Other than Child Crimes and Sexual Offenses.*—

(1) *In General.*—The sentencing court may depart from the applicable guideline range if—

(A) in the case of offenses other than child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. 3553(b)(1), that there exists an aggravating or mitigating circumstance; or

(B) in the case of child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. 3553(b)(2)(A)(i), that there exists an aggravating circumstance,

of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. 3553(a)(2), should result in a sentence different from that described.

(2) *Departures Based on Circumstances of a Kind Not Adequately Taken into Consideration.*—

(A) *Identified Circumstances.*—This subpart (Chapter Five, Part K, Subpart 2 (Other Grounds for Departure)) identifies some of the circumstances that the Commission may have not adequately taken into consideration in

determining the applicable guideline range (e.g., as a specific offense characteristic or other adjustment). If any such circumstance is present in the case and has not adequately been taken into consideration in determining the applicable guideline range, a departure consistent with 18 U.S.C. 3553(b) and the provisions of this subpart may be warranted.

(B) *Unidentified Circumstances.*—A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.

(3) *Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration.*—A departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.

(4) *Departures Based on Not Ordinarily Relevant Offender Characteristics and Other Circumstances.*—An offender characteristic or other circumstance identified in Chapter Five, Part H (Offender Characteristics) or elsewhere in the guidelines as not ordinarily relevant in determining whether a departure is warranted may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree.

(b) *Downward Departures in Child Crimes and Sexual Offenses.*—Under 18 U.S.C. 3553(b)(2)(A)(ii), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that—

(1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;

(2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(3) should result in a sentence different from that described.

The grounds enumerated in this Part K of Chapter Five are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.

(c) *Limitation on Departures Based on Multiple Circumstances.*—The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if—

(1) such offender characteristics or other circumstances, taken together, make the case an exceptional one; and

(2) each such offender characteristic or other circumstance is—

(A) present to a substantial degree;

and

(B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a determination of whether a departure is warranted.

(d) *Prohibited Departures.*—Notwithstanding subsections (a) and (b) of this policy statement, or any other provision in the guidelines, the court may not depart from the applicable guideline range based on any of the following circumstances:

(1) Any circumstance specifically prohibited as a ground for departure in §§ 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the last sentence of 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), and the last sentence of 5K2.12 (Coercion and Duress).

(2) The defendant’s acceptance of responsibility for the offense, which may be taken into account only under § 3E1.1 (Acceptance of Responsibility).

(3) The defendant’s aggravating or mitigating role in the offense, which may be taken into account only under § 3B1.1 (Aggravating Role) or § 3B1.2 (Mitigating Role), respectively.

(4) The defendant’s decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (i.e., a departure may not

be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. *See* § 6B1.2 (Standards for Acceptance of Plea Agreement).

(5) The defendant's fulfillment of restitution obligations only to the extent required by law including the guidelines (*i.e.*, a departure may not be based on unexceptional efforts to remedy the harm caused by the offense).

(6) Any other circumstance specifically prohibited as a ground for departure in the guidelines.

(e) *Requirement of Specific Reasons for Departure.*—If the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S.C. 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, shall state those reasons with specificity in the statement of reasons form.

Commentary

Application Notes:

1. *Definitions.*—For purposes of this policy statement:

'Circumstance' includes, as appropriate, an offender characteristic or any other offense factor.

'Depart', 'departure', 'downward departure', and 'upward departure' have the meaning given those terms in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

2. *Scope of this Policy Statement.*—

(A) *Departures Covered by this Policy Statement.*—This policy statement covers departures from the applicable guideline range based on offense characteristics or offender characteristics of a kind, or to a degree, not adequately taken into consideration in determining that range. *See* 18 U.S.C. 3553(b).

Subsection (a) of this policy statement applies to upward departures in all cases covered by the guidelines and to downward departures in all such cases except for downward departures in child crimes and sexual offenses.

Subsection (b) of this policy statement applies only to downward departures in child crimes and sexual offenses.

(B) *Departures Covered by Other Guidelines.*—This policy statement does not cover the following departures, which are addressed elsewhere in the guidelines: (i) departures based on the defendant's criminal history (*see* Chapter Four (Criminal History and Criminal Livelihood), particularly

§ 4A1.3 (Departures Based on Inadequacy of Criminal History Category)); (ii) departures based on the defendant's substantial assistance to the authorities (*see* § 5K1.1 (Substantial Assistance to Authorities)); and (iii) departures based on early disposition programs (*see* § 5K3.1 (Early Disposition Programs)).

3. *Kinds and Expected Frequency of Departures under Subsection (a).*—As set forth in subsection (a), there generally are two kinds of departures from the guidelines based on offense characteristics and/or offender characteristics: (A) departures based on circumstances of a kind not adequately taken into consideration in the guidelines; and (B) departures based on circumstances that are present to a degree not adequately taken into consideration in the guidelines.

(A) *Departures Based on Circumstances of a Kind Not Adequately Taken into Account in Guidelines.*—Subsection (a)(2) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. 3553(b)(2)(A)(i), of a kind not adequately taken into consideration in the guidelines.

(i) *Identified Circumstances.*—This subpart (Chapter Five, Part K, Subpart 2) identifies several circumstances that the Commission may have not adequately taken into consideration in setting the offense level for certain cases. Offense guidelines in Chapter Two (Offense Conduct) and adjustments in Chapter Three (Adjustments) sometimes identify circumstances the Commission may have not adequately taken into consideration in setting the offense level for offenses covered by those guidelines. If the offense guideline in Chapter Two or an adjustment in Chapter Three does not adequately take that circumstance into consideration in setting the offense level for the offense, and only to the extent not adequately taken into consideration, a departure based on that circumstance may be warranted.

(ii) *Unidentified Circumstances.*—A case may involve circumstances, in addition to those identified by the guidelines, that have not adequately been taken into consideration by the Commission, and the presence of any such circumstance may warrant departure from the guidelines in that case. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to take into consideration relevant circumstances in sentencing, it is expected that departures based on

such unidentified circumstances will occur rarely and only in exceptional cases.

(B) *Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration in Guidelines.*—

(i) *In General.*—Subsection (a)(3) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. 3553(b)(2)(A)(i), to a degree not adequately taken into consideration in the guidelines. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to determine the most appropriate weight to be accorded the mitigating and aggravating circumstances specified in the guidelines, it is expected that departures based on the weight accorded to any such circumstance will occur rarely and only in exceptional cases.

(ii) *Examples.*—As set forth in subsection (a)(3), if the applicable offense guideline and adjustments take into consideration a circumstance identified in this subpart, departure is warranted only if the circumstance is present to a degree substantially in excess of that which ordinarily is involved in the offense. Accordingly, a departure pursuant to § 5K2.7 for the disruption of a governmental function would have to be substantial to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the guideline covering the mailing of injurious articles is applicable, however, and the offense caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure may be warranted if several persons were injured.

(C) *Departures Based on Circumstances Identified as Not Ordinarily Relevant.*—Because certain circumstances are specified in the guidelines as not ordinarily relevant to sentencing (*see, e.g.*, Chapter Five, Part H (Specific Offender Characteristics)), a departure based on any one of such circumstances should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree. If two or more of

such circumstances each is present in the case to a substantial degree, however, and taken together make the case an exceptional one, the court may consider whether a departure would be warranted pursuant to subsection (c). Departures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases.

In addition, as required by subsection (e), each circumstance forming the basis for a departure described in this subdivision shall be stated with specificity in the statement of reasons form.

4. Downward Departures in Child Crimes and Sexual Offenses.—

(A) *Definition.*—For purposes of this policy statement, the term ‘child crimes and sexual offenses’ means offenses under any of the following: 18 U.S.C. 1201 (involving a minor victim), 18 U.S.C. 1591, or chapter 71, 109A, 110, or 117 of title 18, United States Code.

(B) *Standard for Departure.*—

(i) *Requirement of Affirmative and Specific Identification of Departure Ground.*—The standard for a downward departure in child crimes and sexual offenses differs from the standard for other departures under this policy statement in that it includes a requirement, set forth in 18 U.S.C. 3553(b)(2)(A)(ii)(I) and subsection (b)(1) of this guideline, that any mitigating circumstance that forms the basis for such a downward departure be affirmatively and specifically identified as a ground for downward departure in this part (*i.e.*, Chapter Five, Part K).

(ii) *Application of Subsection (b)(2).*—The commentary in Application Note 3 of this policy statement, except for the commentary in Application Note 3(A)(ii) relating to unidentified circumstances, shall apply to the court’s determination of whether a case meets the requirement, set forth in subsection 18 U.S.C. 3553(b)(2)(A)(ii)(II) and subsection (b)(2) of this policy statement, that the mitigating circumstance forming the basis for a downward departure in child crimes and sexual offenses be of kind, or to a degree, not adequately taken into consideration by the Commission.

5. *Departures Based on Plea Agreements.*—Subsection (d)(4) prohibits a downward departure based only on the defendant’s decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense. Even though a departure may not be based merely on the fact that the defendant agreed to plead guilty or enter a plea agreement, a departure may be based on justifiable, non-prohibited

reasons for departure as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. *See* § 6B1.2 (Standards for Acceptance of Plea Agreements). In cases in which the court departs based on such reasons as set forth in the plea agreement, the court must state the reasons for departure with specificity in the statement of reasons form, as required by subsection (e).

Background: This policy statement sets forth the standards for departing from the applicable guideline range based on offense and offender characteristics of a kind, or to a degree, not adequately considered by the Commission. Circumstances the Commission has determined are not ordinarily relevant to determining whether a departure is warranted or are prohibited as bases for departure are addressed in Chapter Five, Part H (Offender Characteristics) and in this policy statement. Other departures, such as those based on the defendant’s criminal history, the defendant’s substantial assistance to authorities, and early disposition programs, are addressed elsewhere in the guidelines.

As acknowledged by Congress in the Sentencing Reform Act and by the Commission when the first set of guidelines was promulgated, ‘it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision.’ (*See* Chapter One, Part A). Departures, therefore, perform an integral function in the sentencing guideline system. Departures permit courts to impose an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing. Departures also help maintain ‘sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.’ 28 U.S.C. 991(b)(1)(B). By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, along with appellate cases reviewing these departures, the Commission can further refine the guidelines to specify more precisely when departures should and should not be permitted.

As reaffirmed in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the ‘PROTECT Act’, Public Law 108–21), circumstances warranting departure should be rare. Departures were never intended to permit

sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid.

In order for appellate courts to fulfill their statutory duties under 18 U.S.C. 3742 and for the Commission to fulfill its ongoing responsibility to refine the guidelines in light of information it receives on departures, it is essential that sentencing courts state with specificity the reasons for departure, as required by the PROTECT Act.

This policy statement, including its commentary, was substantially revised, effective October 27, 2003, in response to directives contained in the PROTECT Act, particularly the directive in section 401(m) of that Act to—

‘(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and

(2) promulgate, pursuant to section 994 of title 28, United States Code—

(A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reduced;

(B) a policy statement authorizing a departure pursuant to an early disposition program; and

(C) any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by the Act, including a revision of . . . section 5K2.0’.

The substantial revision of this policy statement in response to the PROTECT Act was intended to refine the standards applicable to departures while giving due regard for concepts, such as the ‘heartland’, that have evolved in departure jurisprudence over time.

Section 401(b)(1) of the PROTECT Act directly amended this policy statement to add subsection (b), effective April 30, 2003.

§ 5K2.1. Death (Policy Statement)

If death resulted, the court may increase the sentence above the authorized guideline range.

Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant’s state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by

which life was taken. The extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury. For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.

§ 5K2.2. Physical Injury (Policy Statement)

If significant physical injury resulted, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked. When the victim suffers a major, permanent disability and when such injury was intentionally inflicted, a substantial departure may be appropriate. If the injury is less serious or if the defendant (though criminally negligent) did not knowingly create the risk of harm, a less substantial departure would be indicated. In general, the same considerations apply as in § 5K2.1.

§ 5K2.3. Extreme Psychological Injury (Policy Statement)

If a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked.

Normally, psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns. The court should consider the extent to which such harm was likely, given the nature of the defendant's conduct.

§ 5K2.4. Abduction or Unlawful Restraint (Policy Statement)

If a person was abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense or to facilitate the escape from the scene of the crime, the court may increase the sentence above the authorized guideline range.

§ 5K2.5. Property Damage or Loss (Policy Statement)

If the offense caused property damage or loss not taken into account within the guidelines, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction.

§ 5K2.6. Weapons and Dangerous Instrumentalities (Policy Statement)

If a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a firearm might warrant a substantial sentence increase.

§ 5K2.7. Disruption of Governmental Function (Policy Statement)

If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

§ 5K2.8. Extreme Conduct (Policy Statement)

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme

conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

§ 5K2.9. Criminal Purpose (Policy Statement)

If the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct.

§ 5K2.10. Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding whether a sentence reduction is warranted, and the extent of such reduction, the court should consider the following:

- (1) The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant.
- (2) The persistence of the victim's conduct and any efforts by the defendant to prevent confrontation.
- (3) The danger reasonably perceived by the defendant, including the victim's reputation for violence.
- (4) The danger actually presented to the defendant by the victim.
- (5) Any other relevant conduct by the victim that substantially contributed to the danger presented.
- (6) The proportionality and reasonableness of the defendant's response to the victim's provocation.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

§ 5K2.11. Lesser Harms (Policy Statement)

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the

interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted. For example, providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected.

In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted.

§ 5K2.12. Coercion and Duress (Policy Statement)

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may depart downward. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions, on the proportionality of the defendant's actions to the seriousness of coercion, blackmail, or duress involved, and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. Notwithstanding this policy statement, personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure.

§ 5K2.13. Diminished Capacity (Policy Statement)

A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the

defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.

Commentary

Application Note:

1. For purposes of this policy statement—

‘Significantly reduced mental capacity’ means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.

Background: Section 401(b)(5) of Public Law 108–21 directly amended this policy statement to add subdivision (4), effective April 30, 2003.

§ 5K2.14. Public Welfare (Policy Statement)

If national security, public health, or safety was significantly endangered, the court may depart upward to reflect the nature and circumstances of the offense.

§ 5K2.16. Voluntary Disclosure of Offense (Policy Statement)

If the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a downward departure may be warranted. For example, a downward departure under this section might be considered where a defendant, motivated by remorse, discloses an offense that otherwise would have remained undiscovered. This provision does not apply where the motivating factor is the defendant's knowledge that discovery of the offense is likely or imminent, or where the defendant's disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct.

§ 5K2.17. Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)

If the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense, an upward departure may be warranted. A ‘semiautomatic firearm capable of accepting a large capacity magazine’

means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (1) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (2) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. The extent of any increase should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case.

Commentary

Application Note:

1. ‘Crime of violence’ and ‘controlled substance offense’ are defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

§ 5K2.18. Violent Street Gangs (Policy Statement)

If the defendant is subject to an enhanced sentence under 18 U.S.C. 521 (pertaining to criminal street gangs), an upward departure may be warranted. The purpose of this departure provision is to enhance the sentences of defendants who participate in groups, clubs, organizations, or associations that use violence to further their ends. It is to be noted that there may be cases in which 18 U.S.C. 521 applies, but no violence is established. In such cases, it is expected that the guidelines will account adequately for the conduct and, consequently, this departure provision would not apply.

§ 5K2.20. Aberrant Behavior (Policy Statement)

(a) *In General.*—Except where a defendant is convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, a downward departure may be warranted in an exceptional case if (1) the defendant's criminal conduct meets the requirements of subsection (b); and (2) the departure is not prohibited under subsection (c).

(b) *Requirements.*—The court may depart downward under this policy statement only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.

(c) *Prohibitions Based on the Presence of Certain Circumstances.*—The court may not depart downward pursuant to

this policy statement if any of the following circumstances are present:

(1) The offense involved serious bodily injury or death.

(2) The defendant discharged a firearm or otherwise used a firearm or a dangerous weapon.

(3) The instant offense of conviction is a serious drug trafficking offense.

(4) The defendant has either of the following: (A) more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood) before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category); or (B) a prior federal or state felony conviction, or any other significant prior criminal behavior, regardless of whether the conviction or significant prior criminal behavior is countable under Chapter Four.

Commentary

Application Notes:

1. *Definitions*.—For purposes of this policy statement:

‘Dangerous weapon,’ ‘firearm,’ ‘otherwise used,’ and ‘serious bodily injury’ have the meaning given those terms in the Commentary to § 1B1.1 (Application Instructions).

‘Serious drug trafficking offense’ means any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. 844, that provides for a mandatory minimum term of imprisonment of five years or greater, regardless of whether the defendant meets the criteria of § 5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases).

2. *Repetitious or Significant, Planned Behavior*.—Repetitious or significant, planned behavior does not meet the requirements of subsection (b). For example, a fraud scheme generally would not meet such requirements because such a scheme usually involves repetitive acts, rather than a single occurrence or single criminal transaction, and significant planning.

3. *Other Circumstances to Consider*.—In determining whether the court should depart under this policy statement, the court may consider the defendant’s (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense.

Background: Section 401(b)(3) of Public Law 108–21 directly amended subsection (a) of this policy statement, effective April 30, 2003.

§ 5K2.21. *Dismissed and Uncharged Conduct (Policy Statement)*

The court may depart upward to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.

§ 5K2.22. *Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)*

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code:

(1) Age may be a reason to depart downward only if and to the extent permitted by § 5H1.1.

(2) An extraordinary physical impairment may be a reason to depart downward only if and to the extent permitted by § 5H1.4.

(3) Drug, alcohol, or gambling dependence or abuse is not a reason to depart downward.

Commentary

Background: Section 401(b)(2) of Public Law 108–21 directly amended Chapter Five, Part K, to add this policy statement, effective April 30, 2003.

§ 5K2.23. *Discharged Terms of Imprisonment (Policy Statement)*

A downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of § 5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment or Anticipated Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

§ 5K2.24. *Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (Policy Statement)*

If, during the commission of the offense, the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. 716, an upward departure may be warranted.

Commentary

Application Note:

1. *Definition*.—For purposes of this policy statement, ‘official insignia or uniform’ has the meaning given that term in 18 U.S.C. § 716(c)(3).

3. Early Disposition Programs

§ 5K3.1. *Early Disposition Programs (Policy Statement)*

Upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides.

Commentary

Background: This policy statement implements the directive to the Commission in section 401(m)(2)(B) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the ‘PROTECT Act’, Public Law 108–21).’.

Chapter Eight is amended—

by redesignating Chapter Eight as Chapter Nine;

in the heading by striking “Chapter Eight” and inserting “Chapter Nine”;

in Part A by redesignating §§ 8A1.1 and 8A1.2 as §§ 9A1.1 and 9A1.2, respectively;

in Part B, Subpart 1 by redesignating §§ 8B1.1, 8B1.2, 8B1.3, and 8B1.4 as §§ 9B1.1, 9B1.2, 9B1.3, and 9B1.4, respectively;

in Part B, Subpart 2 by redesignating § 8B2.1 as § 9B2.1;

in Part C, Subpart 1 by redesignating § 8C1.1 as § 9C1.1;

in Part C, Subpart 2 by redesignating §§ 8C2.1, 8C2.2, 8C2.3, 8C2.4, 8C2.5, 8C2.6, 8C2.7, 8C2.8, 8C2.9, and 8C2.10 as §§ 9C2.1, 9C2.2, 9C2.3, 9C2.4, 9C2.5, 9C2.6, 9C2.7, 9C2.8, 9C2.9, and 9C2.10, respectively;

in Part C, Subpart 3 by redesignating §§ 8C3.1, 8C3.2, 8C3.3, and 8C3.4 as §§ 9C3.1, 9C3.2, 9C3.3, and 9C3.4, respectively;

in Part C, Subpart 4—

by redesignating § 8C4.1 as § 9C4.1; and striking §§ 8C4.2 through 8C4.11 as follows:

“§ 8C4.2. *Risk of Death or Bodily Injury (Policy Statement)*

If the offense resulted in death or bodily injury, or involved a foreseeable risk of death or bodily injury, an upward departure may be warranted. The extent of any such departure should depend, among other factors, on the nature of the harm and the extent to which the harm was intended or knowingly risked, and the extent to

which such harm or risk is taken into account within the applicable guideline fine range.

§ 8C4.3. Threat to National Security (Policy Statement)

If the offense constituted a threat to national security, an upward departure may be warranted.

§ 8C4.4. Threat to the Environment (Policy Statement)

If the offense presented a threat to the environment, an upward departure may be warranted.

§ 8C4.5. Threat to a Market (Policy Statement)

If the offense presented a risk to the integrity or continued existence of a market, an upward departure may be warranted. This section is applicable to both private markets (e.g., a financial market, a commodities market, or a market for consumer goods) and public markets (e.g., government contracting).

§ 8C4.6. Official Corruption (Policy Statement)

If the organization, in connection with the offense, bribed or unlawfully gave a gratuity to a public official, or attempted or conspired to bribe or unlawfully give a gratuity to a public official, an upward departure may be warranted.

§ 8C4.7. Public Entity (Policy Statement)

If the organization is a public entity, a downward departure may be warranted.

§ 8C4.8. Members or Beneficiaries of the Organization as Victims (Policy Statement)

If the members or beneficiaries, other than shareholders, of the organization are direct victims of the offense, a downward departure may be warranted. If the members or beneficiaries of an organization are direct victims of the offense, imposing a fine upon the organization may increase the burden upon the victims of the offense without achieving a deterrent effect. In such cases, a fine may not be appropriate. For example, departure may be appropriate if a labor union is convicted of embezzlement of pension funds.

§ 8C4.9. Remedial Costs that Greatly Exceed Gain (Policy Statement)

If the organization has paid or has agreed to pay remedial costs arising from the offense that greatly exceed the gain that the organization received from the offense, a downward departure may be warranted. In such a case, a substantial fine may not be necessary in

order to achieve adequate punishment and deterrence. In deciding whether departure is appropriate, the court should consider the level and extent of substantial authority personnel involvement in the offense and the degree to which the loss exceeds the gain. If an individual within high-level personnel was involved in the offense, a departure would not be appropriate under this section. The lower the level and the more limited the extent of substantial authority personnel involvement in the offense, and the greater the degree to which remedial costs exceeded or will exceed gain, the less will be the need for a substantial fine to achieve adequate punishment and deterrence.

§ 8C4.10. Mandatory Programs to Prevent and Detect Violations of Law (Policy Statement)

If the organization's culpability score is reduced under § 8C2.5(f) (Effective Compliance and Ethics Program) and the organization had implemented its program in response to a court order or administrative order specifically directed at the organization, an upward departure may be warranted to offset, in part or in whole, such reduction.

Similarly, if, at the time of the instant offense, the organization was required by law to have an effective compliance and ethics program, but the organization did not have such a program, an upward departure may be warranted.

§ 8C4.11. Exceptional Organizational Culpability (Policy Statement)

If the organization's culpability score is greater than 10, an upward departure may be appropriate.

If no individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense; the organization at the time of the offense had an effective program to prevent and detect violations of law; and the base fine is determined under § 8C2.4(a)(1), § 8C2.4(a)(3), or a special instruction for fines in Chapter Two (Offense Conduct), a downward departure may be warranted. In a case meeting these criteria, the court may find that the organization had exceptionally low culpability and therefore a fine based on loss, offense level, or a special Chapter Two instruction results in a guideline fine range higher than necessary to achieve the purposes of sentencing. Nevertheless, such fine should not be lower than if determined under § 8C2.4(a)(2).";

in Part D by redesignating §§ 8D1.1, 8D1.2, 8D1.3, and 8D1.4 as §§ 9D1.1, 9D1.2, 9D1.3, and 9D1.4, respectively;

in Part E by redesignating §§ 8E1.1, 8E1.2, and 8E1.3 as §§ 9E1.1, 9E1.2, and 9E1.3, respectively; and in Part F by redesignating § 8F1.1 as § 9F1.1.

Chapter Seven is amended—
by redesignating Chapter Seven as Chapter Eight;

in the heading by striking "Chapter Seven" and inserting "Chapter Eight"; and in Part B by redesignating §§ 7B1.1, 7B1.2, 7B1.3, 7B1.4, and 7B1.5 as §§ 8B1.1, 8B1.2, 8B1.3, 8B1.4, and 8B1.5.

Chapter Six is amended—
by redesignating Chapter Six as Chapter Seven;
in the heading by striking "Chapter Six" and inserting "Chapter Seven";
in Part A—
by redesignating §§ 6A1.1, 6A1.2, 6A1.3, and 6A1.5 as §§ 7A1.1, 7A1.2, 7A1.3, and 7A1.4, respectively;
and by striking § 6A1.4 as follows:

"§ 6A1.4. Notice of Possible Departure (Policy Statement)

Before the court may depart from the applicable sentencing guideline range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. Rule 32(h), Fed. R. Crim. P.

Commentary

Background: The Federal Rules of Criminal Procedure were amended, effective December 1, 2002, to incorporate into Rule 32(h) the holding in *Burns v. United States*, 501 U.S. 129, 138–39 (1991). This policy statement parallels Rule 32(h), Fed. R. Crim. P.";

and in Part B by redesignating §§ 6B1.1, 6B1.2, 6B1.3, and 6B1.4 as §§ 7B1.1, 7B1.2, 7B1.3, and 7B1.4, respectively.

The *Guidelines Manual* is amended by inserting before Chapter Seven (Sentencing Procedures, Plea Agreements, and Crime Victims' Rights) (as so redesignated) the following new Chapter Six:

"Chapter Six

Determining the Sentence

Introductory Commentary

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) (the 'Act') provides that courts must consider a variety of factors when imposing a sentence 'sufficient but not greater than necessary' to comply with the purposes

of sentencing as set forth in the Act. 18 U.S.C. 3553(a). The Act provides for the development of guidelines that will further the basic purposes of criminal punishment. 28 U.S.C. 994(f). Originally, those guidelines were mandatory under the Act, with limited exceptions. *See* 18 U.S.C. 3553(b). Later, in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the provision in 18 U.S.C. 3553(b) making the guidelines mandatory was unconstitutional. Following *Booker*, the guideline ranges established by application of the Guidelines Manual remain ‘the starting point and the initial benchmark’ of sentencing, though the guidelines are advisory in nature. *See Gall v. United States*, 552 U.S. 38, 49 (2007); *Peugh v. United States*, 569 U.S. 530 (2013) (noting that ‘the post-*Booker* federal sentencing system adopted procedural measures that make the guidelines the ‘lodestone’ of sentencing’). Consistent with 18 U.S.C. 3553(a), which remains binding on courts following *Booker*, courts must also consider a variety of additional factors when determining the sentence to be imposed.

As background, Congress provided specific directives to the Commission when setting a guideline range for ‘each category of offense involving each category of defendant.’ 28 U.S.C. 994(b)(1).

First, to effectuate Congress’s intent that sentences not ‘afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training,’ Rep. 225, 98th Cong., 1st Sess. 171 (1983), the Act directs the Commission to ensure that the guidelines and policy statements ‘are entirely neutral’ as to five characteristics—race, sex, national origin, creed, and socioeconomic status. *See* 28 U.S.C. 994(d).

Second, the Act directs the Commission to consider (a) whether seven matters, ‘among others,’ have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence for purposes of establishing categories of offenses, and (b) whether eleven matters, ‘among others,’ have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence for purposes of establishing categories of defendants, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance. *See* 28 U.S.C. 994(d).

Third, to effectuate Congress’s intent to ‘guard against the inappropriate use of incarceration for those defendants

who lack education, employment, and stabilizing ties.’ S. Rep. 225, 98th Cong., 1st Sess. 174 (1983), the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the ‘general inappropriateness’ of considering five of those characteristics—education; vocational skills; employment record; family ties and responsibilities; and community ties. *See* 28 U.S.C. 994(e).

The statutory requirements placed by Congress upon courts in 18 U.S.C. 3553(a), however, do not include the same limitations placed upon the Commission. Accordingly, the purpose of this chapter is to assist courts in complying with their obligation under 18 U.S.C. 3553(a) to consider a variety of factors, including the ‘nature and circumstances of the offense and the history and characteristics of the defendant,’ in addition to the guideline range when determining the sentence to be imposed. This chapter provides examples of factors that are generally not considered in the calculation of the guideline range in Chapters Two through Five, but which courts regularly consider pursuant to section 3553(a). The Commission recognizes that the nature, extent, and significance of various considerations may be difficult or impossible to quantify for purposes of establishing the guideline ranges. As such, the factors identified in this chapter are neither weighted in any manner nor intended to be comprehensive so as to otherwise infringe upon the court’s unique position to determine the most appropriate sentence.

Part A—Consideration of Factors in 18 U.S.C. 3553(a)

§ 6A1.1. Factors To Be Considered in Imposing a Sentence (Policy Statement)

(a) After determining the kinds of sentence and guidelines range pursuant to subsection (a) of § 1B1.1 (Application Instructions) and 18 U.S.C. 3553(a)(4) and (5), the court shall consider the other applicable factors in 18 U.S.C. 3553(a) to determine a sentence that is sufficient but not greater than necessary. Specifically, as set forth in 18 U.S.C. 3553(a), in determining the particular sentence to be imposed, the court shall also consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. 3553(a)(2);
- (3) the kinds of sentences available;

(4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(5) the need to provide restitution to any victims of the offense.

Commentary

Section 3553(a) of title 18, United States Code, requires courts to impose a sentence ‘sufficient, but not greater than necessary,’ to comply with the purposes of sentencing set forth in 18 U.S.C. 3553(a)(2). *See* 18 U.S.C. 3553(a). After determining the kinds of sentence and guidelines range, the court must also fully consider the factors in 18 U.S.C. 3553(a), including, among other factors, ‘the nature and circumstances of the offense and the history and characteristics of the defendant,’ to determine an appropriate sentence. To the extent that any of the above-noted statutory provisions conflict with the provisions of this policy statement, the applicable statutory provision shall control.

§ 6A1.2. Factors Relating to Individual Circumstances (Policy Statement)

(a) In considering the history and characteristics of the defendant pursuant to 18 U.S.C. 3553(a)(1), the following factors may be relevant:

- (1) Age.
- (2) Education.
- (3) Vocational Skills.
- (4) Mental and Emotional Conditions.
- (5) Diminished Mental Capacity.
- (6) Physical Condition.
- (7) Drug or Alcohol Dependence.
- (8) Gambling Addiction.
- (9) Previous Employment Record.
- (10) Family Ties and Responsibilities.
- (11) Lack of Guidance as a Youth and Similar Circumstances.
- (12) Community Ties.
- (13) Role in the Offense.
- (14) Personal Financial Difficulties and Economic Pressures.
- (15) Degree of Dependence Upon Criminal Activity for a Livelihood.
- (16) Military Service.
- (17) Civic, Charitable, or Public Service.
- (18) Employment-Related Contributions.
- (19) Record of Prior Good Works.
- (20) Aberrant Behavior.
- (21) Other Individual Circumstances Relating to the Culpability of or the Need to Incapacitate the Defendant.

Commentary

This policy statement recognizes that the nature, extent, and significance of individual circumstances can involve a range of considerations that are difficult or impossible to quantify for purposes of

establishing the guideline range. This policy statement provides examples of factors relating to the history and characteristics of the defendant that are generally not considered in the calculation of the guideline range in Chapters Two through Five, but which courts regularly consider pursuant to 18 U.S.C. 3553(a). The factors identified in this policy statement are not weighted in any manner or intended to be comprehensive or to otherwise infringe upon the court's unique position to determine the most appropriate sentence.

§ 6A1.3. Factors Relating to the Nature and Circumstances of the Offense (Policy Statement)

(a) In considering the nature and circumstances of the offense pursuant to 18 U.S.C. 3553(a)(1), the following factors, if not accounted for in the applicable Chapter Two guideline, may be relevant:

(1) *Other Offense Specific Conduct Over- or Under-Representing Serious of Offense.*—Additional factors the court determines support a finding that the offense level determined under the applicable guideline over- or under-represents the seriousness of the offense. Such factors may be identified in specific Chapter Two guidelines as ‘Additional Considerations.’

(2) *Death.*—In cases in which death resulted, the court may consider, for example, whether multiple deaths resulted, the means by which life was taken, the defendant's state of mind, and the degree of planning or preparation.

(3) *Extreme Physical Injury.*—In cases in which extreme physical injury resulted, the court may consider, for example, whether multiple victims suffered such injury, the nature of the injury, and the extent to which the defendant intended the injury or knowingly created risk.

(4) *Extreme Psychological Injury.*—The defendant caused extended or continuous substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of the victim that is more serious than that normally resulting from the commission of the offense.

(5) *Abduction or Unlawful Restraint.*—The defendant abducted, took hostage, or unlawfully restrained a person to facilitate the commission of the offense or escape.

(6) *Extreme Conduct.*—The defendant engaged in unusually heinous, cruel, brutal, or degrading conduct such as the torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

(7) *Weapons and Dangerous Instrumentalities.*—In cases in which the defendant possessed a weapon or dangerous instrumentality, the court may consider, for example, the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others.

(8) *Semiautomatic Firearms Capable of Accepting Large Capacity Magazine.*—The defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense.

(9) *Property Damage or Loss.*—In cases in which the offense caused property damage or loss not taken into account within the guidelines, the court may consider, for example, the extent to which the defendant knowingly intended or risked harm, and the extent to which the harm to property is more serious than other harm caused or risked by the defendant's conduct.

(10) *Disruption of a Governmental Function.*—The defendant's conduct resulted in a significant disruption of a governmental function.

(11) *Public Welfare.*—The defendant's conduct significantly endangered national security, public health, or safety.

(12) *Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform.*—The defendant wore or displayed an official, or counterfeit official, insignia or uniform during the commission of the offense.

(13) *Criminal Purpose.*—The defendant committed the offense in order to facilitate or conceal the commission of another offense.

(14) *Victim's Conduct.*—The victim's wrongful conduct contributed significantly to provoking the offense behavior.

(15) *Lesser Harms.*—The defendant committed the offense in order to avoid a perceived greater harm.

(16) *Coercion or Duress.*—The defendant committed the offense under coercion, blackmail, duress, or circumstances not amounting to a complete defense.

(17) *Dismissed and Uncharged Conduct.*—The offense level determined under the applicable guideline under-represents the seriousness of the offense because conduct underlying a charge dismissed as part of a plea agreement in the case or conduct underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason did not enter into the determination of the applicable guideline range.

(18) *Voluntary Disclosure of Offense.*—The defendant voluntarily disclosed to authorities the existence of, and accepted responsibility for, an offense that was unlikely to have been discovered otherwise.

(19) *Discharged Terms of Imprisonment.*—In the case of a discharged term of imprisonment, (A) the defendant has completed serving a term of imprisonment; and (B) subsection (b) of § 5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment or Anticipated Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense.

(20) *Violent Street Gangs.*—The defendant is subject to an enhanced sentence under 18 U.S.C. 521 (pertaining to criminal street gangs) and the offense involved violence.

Commentary

This policy statement recognizes that the nature, extent, and significance of individual circumstances can involve a range of considerations that are difficult or impossible to quantify for purposes of establishing the guideline range. This policy statement provides examples of factors relating to the nature and circumstances of the offense that are generally not considered in the calculation of the guideline range in Chapters Two through Five, but which courts regularly consider pursuant to 18 U.S.C. 3553(a). The factors identified in this policy statement are not weighted in any manner or intended to be comprehensive or to otherwise infringe upon the court's unique position to determine the most appropriate sentence.”

Chapter Seven, Part B (as so redesignated) is amended in the Introductory Commentary by striking “The policy statements also ensure that the basis for any judicial decision to depart from the guidelines will be explained on the record.”

The Commentary to § 7B1.1 (as so redesignated) is amended in the second paragraph by striking “Section 6B1.1(c)” and inserting “Section 7B1.1(c)”.

The Commentary to § 7B1.2 (as so redesignated) is amended—
in the paragraph that begins “Similarly, the court” by striking “As set forth in subsection (d) of § 5K2.0 (Grounds for Departure), however, the court may not depart below the applicable guideline range merely because of the defendant's decision to plead guilty to the offense or to enter a plea agreement with respect to the offense.”;

and in the paragraph that begins “The second paragraph of subsection (a)” by striking “Section 5K2.21 (Dismissed and Uncharged Conduct) addresses the use, as a basis for upward departure, of conduct underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement.”.

The Commentary to § 7B1.4 (as so redesignated) is amended—

in the paragraph that begins “Because of the importance” by striking “§ 6A1.2” and inserting “§ 7A1.2”;

and in the final paragraph by striking “Section 6B1.4(d)” and inserting “Section 7B1.4(d)”.

Chapter Eight, Part A (as so redesignated) is amended in the heading by striking “CHAPTER SEVEN” and inserting “CHAPTER EIGHT”.

Section 8B1.3(b) (as so redesignated) is amended by striking “§ 7B1.4” and inserting “§ 8B1.4”.

Section 8B1.3(c)(1) (as so redesignated) is amended by striking “§ 7B1.4” and inserting “§ 8B1.4”.

Section 8B1.3(c)(2) (as so redesignated) is amended by striking “§ 7B1.4” and inserting “§ 8B1.4”.

Section 8B1.3(d) (as so redesignated) is amended by striking “§ 7B1.4” and inserting “§ 8B1.4”.

The Commentary to § 8B1.4 (as so redesignated) captioned “Application Notes” is amended—

by striking Notes 2, 3, and 4 as follows:

“2. Departure from the applicable range of imprisonment in the Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in § 4A1.3 (Departures Based on Inadequacy of Criminal History Category) in originally imposing the sentence that resulted in supervision. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in supervision, has been sentenced for an offense that is not the basis of the violation proceeding.

3. In the case of a Grade C violation that is associated with a high risk of new felonious conduct (e.g., a defendant, under supervision for conviction of criminal sexual abuse, violates the condition that the defendant not associate with children by loitering near a schoolyard), an upward departure may be warranted.

4. Where the original sentence was the result of a downward departure (e.g., as a reward for substantial assistance), or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant’s underlying

conduct, an upward departure may be warranted.”;

and by redesignating Notes 5 and 6 as Notes 2 and 3, respectively.

The Commentary to § 8B1.4 (as so redesignated) is amended by inserting at the end the following new Commentary:

“Additional Consideration:

1. *Aggravating Factors.*—In determining the appropriate term of imprisonment upon revocation pursuant to 18 U.S.C. 3553(a), the following factors may be relevant:

(A) The court previously departed or varied on the basis that the defendant’s criminal history category at the original sentencing substantially over- or under-represented the seriousness of the defendant’s criminal history.

(B) The defendant, subsequent to the federal sentence resulting in supervision, has been sentenced for an offense that is not the basis of the violation proceeding.

(C) The revocation is the result of a Grade C violation that is associated with a high risk of new felonious conduct (e.g., a defendant, under supervision for conviction of criminal sexual abuse, violates the condition that the defendant not associate with children by loitering near a schoolyard).

(D) The defendant was originally sentenced below the applicable guideline range as the result of a departure or variance (e.g., as a reward for substantial assistance) or charge reduction.”.

Section 9A1.1 (as so redesignated) is amended in the heading by striking “Chapter Eight” and inserting “Chapter Nine”.

The Commentary to § 9A1.1 (as so redesignated) captioned “Application Notes” is amended in Note 2 by striking “§§ 8C2.2 through 8C2.9” both places such phrase appears and inserting “§§ 9C2.2 through 9C2.9”.

Section 9A1.2(b) (as so redesignated) is amended—

in paragraph (1) by striking “§ 8C1.1” and inserting “§ 9C1.1”.

in paragraph (2) by striking “§ 8C2.1” and inserting “§ 9C2.1”; and by striking “§§ 8C2.2 through 8C2.9” and inserting “§§ 9C2.2 through 9C2.9”;

in paragraph (2)(A) by striking “§ 8C2.2” and inserting “§ 9C2.2”;

in paragraph (2)(B) by striking “§ 8C2.3” and inserting “§ 9C2.3”;

in paragraph (2)(C) by striking “§ 8C2.4” and inserting “§ 9C2.4”;

in paragraph (2)(D) by striking “§ 8C2.5 (Culpability Score)” and inserting “§ 9C2.5 (Culpability Score)”;

by striking “§ 8C2.5(f)” and inserting “§ 9C2.5(f)”;

and inserting “§ 9B2.1”;

in paragraph (2)(E) by striking “§ 8C2.6” and inserting “§ 9C2.6”;

in paragraph (2)(F) by striking “§ 8C2.7” and inserting “§ 9C2.7”;

in paragraph (2)(G) by striking “§ 8C2.8” and inserting “§ 9C2.8”;

in paragraph (2)(H) by striking “§ 8C2.9” and inserting “§ 9C2.9”;

in the paragraph that begins “For any count” by striking “§ 8C2.1” and inserting “§ 9C2.1”; and by striking “§ 8C2.10” and inserting “§ 9C2.10”;

in paragraph (4) by striking “For grounds for departure from the applicable guideline fine range, refer to Part C, Subpart 4 (Departures from the Guideline Fine Range)” and inserting “Determine whether a sentence below the otherwise applicable guideline range is appropriate upon motion of the government pursuant to § 9C4.1 (Substantial Assistance to Authorities—Organizations (Policy Statement))”;

and by inserting at the end the following new paragraph (5):

“(5) Consider as a whole the additional factors identified in 18 U.S.C. 3553(a) and the guidance provided in Part C, Subpart 5 (Consideration of Factors in Determining the Guideline Fine Range) of this chapter to determine the sentence that is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. 3553(a)(2). See 18 U.S.C. 3553(a).”.

The Commentary to § 9A1.2 (as so redesignated) captioned “Application Notes” is amended—

in Note 2 by striking “and E (Acceptance of Responsibility)” and inserting “E (Acceptance of Responsibility), and F (Early Disposition Program)”;

by striking “Chapter Six (Sentencing Procedures, Plea Agreements, and Crime Victims’ Rights)” and inserting “Chapter Seven (Sentencing Procedures, Plea Agreements, and Crime Victims’ Rights)”;

and by striking “Chapter Seven (Violations of Probation and Supervised Release)” and inserting “Chapter Eight (Violations of Probation and Supervised Release)”;

and in Note 3(B) by striking “§ 8C2.5” and inserting “§ 9C2.5”.

Section 9B1.2(a) (as so redesignated) is amended by striking “§ 8B1.1” and inserting “§ 9B1.1”.

Section 9B2.1(a) (as so redesignated) is amended by striking “§ 8C2.5” and inserting “§ 9C2.5”;

and by striking “§ 8D1.4” and inserting “§ 9D1.4”.

The Commentary to § 9B2.1 (as so redesignated) captioned “Application Notes” is amended—

in Note 1 by striking “§ 8A1.2” and inserting “§ 9A1.2”;

and in Note 2(D) by striking “§ 8A1.2” and inserting “§ 9A1.2”.

Section 9C1.1 (as so redesignated) is amended by striking “§ 8C3.4” and inserting “§ 9C3.4”.

Section 9C2.1 (as so redesignated) is amended by striking “§§ 8C2.2 through 8C2.9” and inserting “§§ 9C2.2 through 9C2.9”.

The Commentary to § 9C2.1 (as so redesignated) captioned “Applications Notes” is amended—

in Note 1 by striking “§§ 8C2.2 through 8C2.9” in both places such phrase appears and inserting “§§ 9C2.2 through 9C2.9”;

and in Note 2 by striking “§§ 8C2.2 through 8C2.9” in both places such phrase appears and inserting “§§ 9C2.2 through 9C2.9”.

The Commentary to § 9C2.1 (as so redesignated) captioned “Background” is amended by striking “§§ 8C2.2 through 8C2.9” and inserting “§§ 9C2.2 through 9C2.9”; and by striking “§ 8C2.10” and inserting “§ 9C2.10”.

Section 9C2.2(a) (as so redesignated) is amended by striking “§ 8B1.1” and inserting “§ 9B1.1”; and by striking “§ 8C3.3(a)” and inserting “§ 9C3.3(a)”.

Section 9C2.2(b) (as so redesignated) is amended by striking “§§ 8C2.3 through 8C2.7” and inserting “§§ 9C2.3 through 9C2.7”; and by striking “§ 8C3.3” and inserting “§ 9C3.3”.

The Commentary to § 9C2.2 (as so redesignated) captioned “Background” is amended by striking “§ 8C2.7(a)” and inserting “§ 9C2.7(a)”; by striking “§ 8C2.7 (Guideline Fine Range—Organizations)” and inserting “§ 9C2.7 (Guideline Fine Range—Organizations)”; and by striking “§ 8C3.3” and inserting “§ 9C3.3”.

Section 9C2.3(a) (as so redesignated) is amended by striking “§ 8C2.1” and inserting “§ 9C2.1”.

The Commentary to § 9C2.3 (as so redesignated) captioned “Application Notes” is amended in Note 2 by striking “and E (Acceptance of Responsibility)” and inserting “E (Acceptance of Responsibility), and F (Early Disposition Program)”.

Section 9C2.4(a)(1) (as so redesignated) is amended by striking “§ 8C2.3” and inserting “§ 9C2.3”.

The Commentary to § 9C2.4 (as so redesignated) captioned “Application Notes” is amended—

in Note 1 by striking “§ 8A1.2” and inserting “§ 9A1.2”;

and in Note 4 by striking “§ 8C2.4(a)(3)” and inserting “§ 9C2.4(a)(3)”.

The Commentary to § 9C2.4 (as so redesignated) captioned “Background” is amended by striking “§ 8C2.5” and inserting “§ 9C2.5”.

Section 9C2.5(f) (as so redesignated) is amended—

in paragraph (1) by striking “§ 8B2.1” and inserting “§ 9B2.1”;

in paragraph (3)(A) by striking “§ 8B2.1(b)(2)(B) or (C)” and inserting “§ 9B2.1(b)(2)(B) or (C)”; and in paragraph (3)(C)(i) by striking “§ 8B2.1(b)(2)(C)” and inserting “§ 9B2.1(b)(2)(C)”.

The Commentary to § 9C2.5 (as so redesignated) captioned “Application Notes” is amended—

in Note 1 by striking “§ 8A1.2” and inserting “§ 9A1.2”;

and in Note 3 by striking “§ 8A1.2” and inserting “§ 9A1.2”.

Section 9C2.6 (as so redesignated) is amended by striking “§ 8C2.5” and inserting “§ 9C2.5”.

Section 9C2.7(a) (as so redesignated) is amended by striking “§ 8C2.4” and inserting “§ 9C2.4”; and by striking “§ 8C2.6” and inserting “§ 9C2.6”.

Section 9C2.7(b) (as so redesignated) is amended by striking “§ 8C2.4” and inserting “§ 9C2.4”; and by striking “§ 8C2.6” and inserting “§ 9C2.6”.

Section 9C2.8(a)(7) (as so redesignated) is amended by striking “§ 8C2.5(c)” and inserting “§ 9C2.5(c)”.

Section 9C2.8(a)(8) (as so redesignated) is amended by striking “§ 8C2.5” and inserting “§ 9C2.5”.

Section 9C2.8(a)(9) (as so redesignated) is amended by striking “§ 8C2.5” and inserting “§ 9C2.5”.

Section 9C2.8(a)(11) (as so redesignated) is amended by striking “§ 8B2.1” and inserting “§ 9B2.1”.

The Commentary to § 9C2.8 (as so redesignated) captioned “Application Notes” is amended—

in Note 5 by striking “§ 8C2.5(c)” each place such term appears and inserting “§ 9C2.5(c)”; and by striking “In a case involving a pattern of illegality, an upward departure may be warranted.”;

and in Note 7 by striking “§ 8C2.5(c)(2)” and inserting “§ 9C2.5(c)(2)”.

The Commentary to § 9C2.8 (as so redesignated) is amended by inserting before the Commentary captioned “Background” the following new Commentary:

“Additional Consideration:

1. *Pattern of Illegality.*—In determining the appropriate fine pursuant to 18 U.S.C. 3553(a) and 3572(a), evidence of a pattern of illegality may be relevant.”.

The Commentary to § 9C2.8 (as so redesignated) captioned “Background” is amended by striking “a basis for departure” and inserting “a basis for setting the fine either above or below the otherwise applicable guideline fine range”.

Section 9C2.9 (as so redesignated) is amended by striking “§ 8C2.8” and inserting “§ 9C2.8”.

Section 9C2.10 (as so redesignated) is amended by striking “§ 8C2.1” and inserting “§ 9C2.1”; by striking “§ 8C2.8” and inserting “§ 9C2.8”; and by striking “§ 8C2.9” and inserting “§ 9C2.9”.

The Commentary to § 9C2.10 (as so redesignated) captioned “Background” is amended by striking “§ 8C2.1” and inserting “§ 9C2.1”.

Section 9C3.1(a) (as so redesignated) is amended by striking “§ 8C1.1” and inserting “§ 9C1.1”; by striking “§ 8C2.7” and inserting “§ 9C2.7”; by striking “§ 8C2.9” and inserting “§ 9C2.9”; and by striking “§ 8C2.10” and inserting “§ 9C2.10”.

Section 9C3.3(a) (as so redesignated) is amended by striking “§ 8C1.1” and inserting “§ 9C1.1”; by striking “§ 8C2.7” and inserting “§ 9C2.7”; and by striking “§ 8C2.9” and inserting “§ 9C2.9”.

Section 9C3.3(b) (as so redesignated) is amended by striking “§ 8C2.7” both places such term appears and inserting “§ 9C2.7”; and by striking “§ 8C2.9” both places such term appears and inserting “§ 9C2.9”.

The Commentary to § 9C3.3 (as so redesignated) captioned “Application Notes” is amended in Note 1 by striking “§ 8C3.2” and inserting “§ 9C3.2”.

Chapter Nine, Part C, Subpart 4 (as so redesignated) is amended—

in the heading by striking “DEPARTURES FROM THE GUIDELINE FINE RANGE” and inserting “SUBSTANTIAL ASSISTANCE TO AUTHORITIES”;

and by striking the Introductory Commentary as follows:

“Introductory Commentary

The statutory provisions governing departures are set forth in 18 U.S.C. 3553(b). Departure may be warranted if the court finds ‘that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.’ This subpart sets forth certain factors that, in connection with certain offenses, may not have been adequately taken into consideration by the guidelines. In deciding whether departure is warranted, the court should consider the extent to which that factor is adequately taken into consideration by the guidelines and the relative importance or substantiality of that factor in the particular case.

To the extent that any policy statement from Chapter Five, Part K (Departures) is relevant to the organization, a departure from the

applicable guideline fine range may be warranted. Some factors listed in Chapter Five, Part K that are particularly applicable to organizations are listed in this subpart. Other factors listed in Chapter Five, Part K may be applicable in particular cases. While this subpart lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive.”.

Section 9C4.1(a) (as so redesignated) is amended by striking “the court may depart from the guidelines” and inserting “the court may set a fine that is below the otherwise applicable guideline fine range”.

The Commentary to § 9C4.1 (as so redesignated) captioned “Application Note” is amended in Note 1 by striking “Departure” and inserting “Fine reduction”.

Chapter Nine, Part C (as so redesignated) is amended by inserting at the end the following new Subpart 5:

“5. Consideration of Factors in Determining the Guideline Fine Range

Introductory Commentary

Following *United States v. Booker*, 543 U.S. 220 (2005), the fine range established in this chapter remains ‘the starting point and the initial benchmark,’ but the ranges established by application of the Guidelines Manual are advisory. *See Gall v. United States*, 552 U.S. 38, 49 (2007); *Peugh v. United States*, 569 U.S. 530 (2013). Consistent with 18 U.S.C. 3553(a), which remains binding on courts, courts must also consider a variety of additional factors when determining the sentence to be imposed. This subpart sets forth certain factors that, in connection with certain offenses, may not have been adequately taken into consideration by the guidelines. These factors are provided to assist courts in complying with their obligation under 18 U.S.C. 3553(a).

To the extent that any policy statement from Chapter Six, Part A (Consideration of Factors in 18 U.S.C. 3553(a)) is relevant to the organization, the court may consider such policy statement when determining the applicable guideline fine range. Some factors listed in Chapter Six, Part A that are particularly applicable to organizations are listed in this subpart. Other factors listed in Chapter Six, Part A may be applicable in particular cases. While this subpart lists factors that the Commission believes may be relevant, the list is not exhaustive.

§ 9C5.1. Factors Relating to the Nature and Circumstances of the Organization’s Offense (Policy Statement)

(a) In considering the nature and circumstances of the offense pursuant to 18 U.S.C. 3553(a)(1), the following factors, if not accounted for in the applicable Chapter Two guideline, may be relevant:

(1) *Risk of Death or Bodily Injury*.—The court may consider whether the offense resulted in death or bodily injury or involved a foreseeable risk of death or bodily injury, the nature of the harm and the extent to which the harm was intended or knowingly risked, and the extent to which such harm or risk is taken into account within the applicable guideline fine range.

(2) *Threat to National Security*.—The offense constituted a threat to national security.

(3) *Threat to the Environment*.—The offense presented a threat to the environment.

(4) *Threat to a Market*.—The offense presented a risk to the integrity or continued existence of a market, including either private markets (e.g., a financial market, a commodities market, or a market for consumer goods) or public markets (e.g., government contracting).

(5) *Official Corruption*.—The organization, in connection with the offense, bribed or unlawfully gave a gratuity to a public official, or attempted or conspired to bribe or unlawfully give a gratuity to a public official.

(6) *Public Entity*.—The organization is a public entity.

(7) *Members or Beneficiaries of the Organization as Victims*.—In cases in which the members or beneficiaries, other than shareholders, of the organization are direct victims of the offense, the court may consider whether imposing a fine upon the organization may increase the burden upon the victims of the offense without achieving a deterrent effect.

(8) *Remedial Costs that Greatly Exceed Gain*.—In cases in which the organization has paid or has agreed to pay remedial costs arising from the offense that greatly exceed the gain that the organization received from the offense, the court may consider whether a substantial fine is necessary in order to achieve adequate punishment and deterrence, the level and extent of substantial authority personnel involvement in the offense, and the degree to which the loss exceeds the gain.

(9) *Mandatory Programs to Prevent and Detect Violations of Law*.—The

organization’s culpability score is reduced under § 9C2.5(f) (Effective Compliance and Ethics Program) and the organization had implemented its program in response to a court order or administrative order specifically directed at the organization, or the organization was required by law to have an effective compliance and ethics program but did not have such a program.

(10) *Exceptionally High Organizational Culpability*.—The organization’s culpability score is greater than 10.

(11) *Exceptionally Low Organizational Culpability*.—No individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense; the organization at the time of the offense had an effective program to prevent and detect violations of law; and the base fine is determined under § 9C2.4(a)(1), § 9C2.4(a)(3), or a special instruction for fines in Chapter Two (Offense Conduct).

Commentary

This policy statement recognizes that the nature, extent, and significance of offense specific characteristics can involve a range of considerations that are difficult or impossible to quantify for purposes of establishing the guideline fine range. This policy statement provides examples of factors relating to the nature and circumstances of the offense that are generally not considered in the calculation of the guideline fine range, but which courts regularly consider pursuant to 18 U.S.C. 3553(a). The factors identified in this policy statement are not weighted in any manner or intended to be comprehensive or to otherwise infringe upon the court’s unique position to determine the most appropriate sentence.”.

Chapter Nine, Part D is amended in the Introductory Commentary by striking “Section 8D1.1” and inserting “Section 9D1.1”; and by striking “Sections 8D1.2 through 8D1.4, and 8F1.1” and inserting “Sections 9D1.2 through 9D1.4, and 9F1.1”.

Section 9D1.1(a)(1) (as so redesignated) is amended by striking “§ 8B1.1” and inserting “§ 9B1.1”; by striking “§ 8B1.2” and inserting “§ 9B1.2”; and by striking “§ 8B1.3” and inserting “§ 9B1.3”.

Section 9D1.4(b) (as so redesignated) is amended by striking “§ 8D1.1” and inserting “§ 9D1.1”.

Section 9D1.4(b)(1) (as so redesignated) is amended by striking “§ 8B2.1” and inserting “§ 9B2.1”.

The Commentary to § 9D1.4 captioned “Application Notes” is amended in

Note 1 by striking “§ 8D1.1” and inserting “§ 9D1.1”; and by striking “§ 8B2.1” and inserting “§ 9B2.1”.

The Commentary to § 9F1.1 captioned “Application Notes” is amended in

Note 2 by striking “§§ 8D1.3 (Conditions of Probation—Organizations) and 8D1.4 (Recommended Conditions of Probation—Organizations)” and inserting “§§ 9D1.3 (Conditions of

Probation—Organizations) and 9D1.4 (Recommended Conditions of Probation—Organizations)”.

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Part IV

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Section 45V Credit for Production of Clean Hydrogen; Section 48(a)(15)
Election To Treat Clean Hydrogen Production Facilities as Energy Property;
Proposed Rule

DEPARTMENT OF THE TREASURY**Internal Revenue Service****26 CFR Part 1****[REG–117631–23]****RIN 1545–BQ97****Section 45V Credit for Production of Clean Hydrogen; Section 48(a)(15) Election To Treat Clean Hydrogen Production Facilities as Energy Property****AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to the credit for production of clean hydrogen (clean hydrogen production credit) and the energy credit, as established and amended by the Inflation Reduction Act of 2022, respectively. The proposed regulations would provide rules for: determining lifecycle greenhouse gas emissions rates resulting from hydrogen production processes; petitioning for provisional emissions rates; verifying production and sale or use of clean hydrogen; modifying or retrofitting existing qualified clean hydrogen production facilities; using electricity from certain renewable or zero-emissions sources to produce qualified clean hydrogen; and electing to treat part of a specified clean hydrogen production facility instead as property eligible for the energy credit. The proposed regulations would affect all taxpayers who produce qualified clean hydrogen and claim the clean hydrogen production credit, elect to treat part of a specified clean hydrogen production facility as property eligible for the energy credit, or produce electricity from certain renewable or zero-emissions sources used by taxpayers or related persons to produce qualified clean hydrogen. This document also provides notice of a public hearing on the proposed regulations.

DATES: Written or electronic comments must be received by February 26, 2024. The public hearing on these proposed regulations is scheduled to be held on March 25, 2024, at 10 a.m. (ET). Requests to speak and outlines of topics to be discussed at the public hearing must be received by March 4, 2024. If no outlines are received by March 4, 2024, the public hearing will be cancelled. Requests to attend the public hearing must be received by March 18, 2024. The public hearing will be made accessible to people with disabilities.

Requests for special assistance during the hearing must be received by March 18, 2024.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically via the Federal eRulemaking Portal at <https://www.regulations.gov> (indicate IRS and REG–117631–23) by following the online instructions for submitting comments. Requests for a public hearing must be submitted as prescribed in the “Comments and Requests for a Public Hearing” section. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comments submitted to the IRS’s public docket. Send paper submissions to: CC:PA:LPD:PR (REG–117631–23), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning these proposed regulations, the Office of Chief Counsel (Passthroughs and Special Industries) at (202) 317–6853 (not a toll-free number); concerning submissions of comments or the public hearing, Vivian Hayes at (202) 317–6901 (not a toll-free number) or by email to publichearings@irs.gov (preferred).

SUPPLEMENTARY INFORMATION:**Background**

This document contains proposed regulations to amend the Income Tax Regulations (26 CFR part 1) under sections 45V and 48(a)(15) of the Internal Revenue Code (Code), as added to the Code by section 13204 of Public Law 117–169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA).

The IRA added several provisions to the Code related to the production of, and investment in, clean hydrogen, which, along with the provisions of sections 45V and 48(a)(15), are described in part I of this Background section. Part II of this Background section describes a previous request for public comment on these provisions.

I. IRA Provisions for Clean Hydrogen Production and Investment

This part I describes the credit for production of clean hydrogen as determined under section 45V (section 45V credit) and the irrevocable election to claim an energy credit under section 48 (section 48 credit) in lieu of the section 45V credit. Also described are statutory exceptions to the requirement that electricity be sold to an unrelated

person to be eligible for the renewable electricity production credit determined under section 45 (section 45 credit) or the zero-emission nuclear power production credit determined under section 45U (section 45U credit). Under these exceptions, electricity produced by a taxpayer from a qualified facility under section 45(d) or a qualified nuclear power facility under section 45U(b)(1) may be treated as sold by the taxpayer to an unrelated person during the taxable year if the electricity is used by the taxpayer or a related person at a qualified clean hydrogen production facility to produce qualified clean hydrogen.

A. Section 45V**1. Amount of Credit**

Section 45V provides a tax credit for the production of qualified clean hydrogen. For purposes of section 38 of the Code, section 45V(a) provides that the clean hydrogen production credit for any taxable year is an amount equal to the product of (i) the kilograms of qualified clean hydrogen produced by the taxpayer during such taxable year at a qualified clean hydrogen production facility during the 10-year period beginning on the date such facility was originally placed in service, and (ii) the applicable amount as determined under section 45V(b) with respect to such hydrogen.

Section 45V(b)(1) provides that, for purposes of section 45V(a)(2), the applicable amount is an amount equal to the applicable percentage of \$0.60. If the amount so determined is not a multiple of 0.1 cent, then such amount is rounded to the nearest multiple of 0.1 cent.

Section 45V(b)(2) provides that, for purposes of section 45V(b)(1), the applicable percentage is determined based on the lifecycle greenhouse gas emissions (lifecycle GHG emissions) rate of the process to produce any qualified clean hydrogen as follows: (i) if the lifecycle GHG emissions rate is not greater than 4 kilograms of carbon dioxide equivalent (CO₂e) per kilogram of hydrogen, and not less than 2.5 kilograms of CO₂e per kilogram of hydrogen, then the applicable percentage is 20 percent; (ii) if the lifecycle GHG emissions rate is less than 2.5 kilograms of CO₂e per kilogram of hydrogen, and not less than 1.5 kilograms of CO₂e per kilogram of hydrogen, then the applicable percentage is 25 percent; (iii) if the lifecycle GHG emissions rate is less than 1.5 kilograms of CO₂e per kilogram of hydrogen, and not less than 0.45 kilograms of CO₂e per kilogram of

hydrogen, then the applicable percentage is 33.4 percent; and (iv) if the lifecycle GHG emissions rate is less than 0.45 kilograms of CO₂e per kilogram of hydrogen, then the applicable percentage is 100 percent.

Section 45V(b)(3) provides that the \$0.60 amount in section 45V(a)(1) is adjusted by multiplying such amount by the inflation adjustment factor (as determined under section 45(e)(2), determined by substituting “2022” for “1992” in section 45(e)(2)(B)) for the calendar year in which the qualified clean hydrogen is produced. If any amount as increased under section 45V(b)(3) is not a multiple of 0.1 cent, such amount is rounded to the nearest multiple of 0.1 cent.¹

Section 45V(e)(1) provides that, in the case of any qualified clean hydrogen production facility that satisfies the requirements of section 45V(e)(2), the amount of the section 45V credit with respect to qualified clean hydrogen described in section 45V(b)(2) is equal to the amount determined under section 45V(a) (determined without regard to section 45V(e)(1)) multiplied by five.

A qualified clean hydrogen production facility meets the requirements of section 45V(e)(2) if: (i) the facility began construction before January 29, 2023, and with respect to any taxable year, for any period of such taxable year that is within the 10-year period beginning on the date the facility is originally placed in service, the prevailing wage requirements of section 45V(e)(3)(A) are met for any alteration or repair of the facility that occurs after January 29, 2023 (to the extent applicable);² or (ii) the facility satisfies the prevailing wage and apprenticeship (PWA) requirements of sections 45V(e)(3)(A) and (4).³

Generally, the prevailing wage requirements under section 45V(e)(3)(A) with respect to any qualified clean hydrogen production facility require the taxpayer to ensure that any laborers and

mechanics employed by the taxpayer or by any contractor or subcontractor in (i) the construction of such facility, and (ii) with respect to any taxable year, for any portion of such taxable year that is within the 10-year period beginning on the date such facility was originally placed in service, the alteration or repair of such facility, are paid wages at rates not less than the prevailing rates for construction, alteration, or repair of a similar character in the locality in which such facility is located as most recently determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31 of title 40 of the United States Code, commonly known as the Davis-Bacon Act. Correction and penalty rules similar to the rules of section 45(b)(7)(B) also apply.

Section 45V(e)(4) provides that rules similar to the apprenticeship requirements of section 45(b)(8) apply for purposes of section 45V(e)(2).⁴

For purposes of section 45V(a), in the case of a qualified clean hydrogen production facility that does not satisfy the requirements of section 45(e)(2), the amount of the clean hydrogen production credit for any taxable year is \$0.12, \$0.15, \$0.20, or \$0.60 per kilogram of qualified clean hydrogen produced (before taking into account any inflation adjustment under section 45V(b)(3)), depending on the lifecycle GHG emissions rate associated with the facility’s hydrogen production process. For facilities meeting the requirements of section 45V(e)(2), the credit amount determined under section 45V(a) (as adjusted for inflation subject to section 45V(b)(3)) is multiplied by five.

2. Definitions

a. Lifecycle Greenhouse Gas Emissions

Section 45V(c)(1)(A) provides that, subject to section 45V(c)(1)(B), the term “lifecycle greenhouse gas emissions” has the same meaning given such term under section 211(o)(1)(H) of the Clean Air Act (42 U.S.C. 7545(o)(1)(H)), as in effect on August 16, 2022. Under section 45V(c)(1)(B), the term “lifecycle greenhouse gas emissions” includes emissions only through the point of production (well-to-gate), as determined

under the most recent Greenhouse gases, Regulated Emissions, and Energy use in Transportation model, referred to as the “GREET model” commonly and in this document, developed by Argonne National Laboratory, or a successor model as determined by the Secretary of the Treasury or her delegate (Secretary).

b. Qualified Clean Hydrogen

Section 45V(c)(2)(A) provides that the term “qualified clean hydrogen” means hydrogen that is produced through a process that results in a lifecycle GHG emissions rate of not greater than 4 kilograms of CO₂e per kilogram of hydrogen. Section 45V(c)(2)(B) further provides that the term “qualified clean hydrogen” does not include any hydrogen unless (i) such hydrogen is produced (A) in the United States (as defined in section 638(1) of the Code) or a United States territory (having the meaning of the term “possession” as defined in section 638(2)), (B) in the ordinary course of a trade or business of the taxpayer, and (C) for sale or use; and (ii) the production and sale or use of such hydrogen is verified by an unrelated party.

c. Provisional Emissions Rate

Section 45V(c)(2)(C) provides that, in the case of any hydrogen for which a lifecycle GHG emissions rate has not been determined for purposes of section 45V, a taxpayer producing such hydrogen may file a petition with the Secretary for a determination of the lifecycle GHG emissions rate with respect to such hydrogen, which is referred to as a “provisional emissions rate” or PER in the proposed regulations.

d. Qualified Clean Hydrogen Production Facility

Section 45V(c)(3) provides that the term “qualified clean hydrogen production facility” means a facility (i) owned by the taxpayer, (ii) that produces qualified clean hydrogen, and (iii) the construction of which begins before January 1, 2033.⁵

¹ The IRS will publish the inflation-adjusted section 45V applicable amount annually. For the calendar year 2023, the section 45V(b)(3) inflation adjustment factor is equal to one, so the inflation-adjusted applicable amount remains \$0.60 for the calendar year 2023.

² Section 45V(e)(3)(A)(ii) requires the payment of wages at prevailing rates “with respect to any taxable year, for any portion of such taxable year which is within the period described in subsection (a)(2)”, with respect to the alteration or repair of the facility. There is no “period described in subsection (a)(2).” The Treasury Department and the IRS interpret the reference to “subsection (a)(2)” as a reference to section 45V(a)(1) where the 10-year credit period is identified.

³ See proposed §§ 1.45–7, 1.45–8, 1.45–12, and 1.45V–3 as proposed in the notice of proposed rulemaking (REG–100908–23) published in the *Federal Register* (88 FR 60018) on August 30, 2023, and corrected at 88 FR 73807 on October 27, 2023.

⁴ Under proposed § 1.45V–3, the PWA requirements for purposes of section 45V(e)(2) would be satisfied if a facility meets the prevailing wage requirements of section 45(b)(7) and proposed § 1.45–7, the apprenticeship requirements of section 45(b)(8) and proposed § 1.45–8, and the recordkeeping and reporting requirements of proposed § 1.45–12. Those proposed regulations are outside the scope of this notice of proposed rulemaking and proposed § 1.45V–3 is addressed only to the extent necessary for purposes of formatting the proposed regulations that are the subject of this notice of proposed rulemaking in accordance with CFR standards.

⁵ Section 45V does not specify an earliest date on which a qualified clean hydrogen production facility must begin construction or be placed in service to be eligible to claim the section 45V credit. However, the section 45V credit is available for qualified clean hydrogen produced after December 31, 2022. Section 13204(a)(5)(A) of the IRA. Thus, the owner of a qualified clean hydrogen production facility originally placed in service after December 31, 2012, could claim the section 45V credit for qualified clean hydrogen produced during at least some portion of the 10-year period described in section 45V(a)(1), provided all other requirements are met.

3. Special Rules

a. Treatment of Facilities Owned by More Than One Taxpayer

Section 45V(d)(1) provides that rules similar to the rules of section 45(e)(3) apply for purposes of section 45V. Section 45(e)(3) provides that, in the case of a facility in which more than one person has an ownership interest, except to the extent provided in regulations prescribed by the Secretary, production from the facility is allocated among such persons in proportion to their respective ownership interests in the gross sales from such facility.

b. Coordination With Section 45Q

Section 45V(d)(2) provides that no section 45V credit is allowed with respect to any qualified clean hydrogen produced at a facility that includes carbon capture equipment for which a credit is allowed to any taxpayer as determined under section 45Q (section 45Q credit) for the taxable year or any prior taxable year.

c. Credit Reduced for Tax-Exempt Bonds

Section 45V(d)(3) provides that rules similar to the rules under section 45(b)(3) (credit reduced for tax-exempt bonds) apply for purposes of section 45V. Section 45V(d)(3) is effective for facilities that begin construction after August 16, 2022. Section 13204(a)(5)(B) of the IRA. Section 45(b)(3) provides that the amount of the credit determined under section 45(a) with respect to any facility for any taxable year (determined after the application of section 45(b)(1) and (2) regarding phaseout and inflation adjustment rules) is reduced by the amount that is the product of the amount so determined for such year and the lesser of 15 percent or a fraction (A) the numerator of which is the sum, for the taxable year and all prior taxable years, of proceeds of an issue of any obligations the interest on which is exempt from tax under section 103 and that is used to provide financing for the qualified facility, and (B) the denominator of which is the aggregate amount of additions to the capital account for the qualified facility for the taxable year and all prior taxable years. Section 45(b)(3) further provides that the amounts determined under section 45(b)(3) for any taxable year are determined as of the close of the taxable year.

d. Modification of Existing Facilities

Section 45V(d)(4) provides that for purposes of section 45V(a)(1), in the case of any facility that (A) was originally placed in service before

January 1, 2023, and, prior to the modification described in section 45V(d)(4)(B), did not produce qualified clean hydrogen, and (B) after the date such facility was originally placed in service (i) is modified to produce qualified clean hydrogen, and (ii) amounts paid or incurred with respect to such modification are properly chargeable to the capital account of the taxpayer, such facility is deemed to have been originally placed in service as of the date the property required to complete the modification described in section 45V(d)(4)(B) is placed in service. Section 45V(d)(4) is effective for modifications made after December 31, 2022. See section 13204(a)(5)(C) of the IRA.

B. Electricity Used at a Qualified Clean Hydrogen Production Facility

Section 45(e)(13) provides that electricity produced by the taxpayer is treated as sold by such taxpayer to an unrelated person during the taxable year if (i) such electricity is used during such taxable year by the taxpayer or a person related to the taxpayer at a qualified clean hydrogen production facility (as defined in section 45V(c)(3)) to produce qualified clean hydrogen (as defined in section 45V(c)(2)); and (ii) such use and production is verified (in such form or manner as the Secretary may prescribe) by an unrelated party. Section 45(e)(13) is effective for electricity produced after December 31, 2022. See section 13204(b)(3) of the IRA.

Section 45U(c)(2) provides that rules similar to the rules of section 45(e)(13) apply for purposes of section 45U. Generally, section 45U is effective for electricity produced at a qualified nuclear power facility and sold after December 31, 2023, in taxable years beginning after that date.

C. Election To Treat Clean Hydrogen Production Facilities as Energy Property

Section 48(a)(15)(A)(i) provides that, in the case of any qualified property (as defined in section 48(a)(5)(D)) that is part of a specified clean hydrogen production facility, such property is treated as energy property. Section 48(a)(15)(A)(ii) provides that the energy percentage of the basis of any qualified property that is treated as energy property is, for a facility that is designed and reasonably expected to produce qualified clean hydrogen with a lifecycle GHG emissions rate that is: (i) not greater than 4 kilograms of CO₂e per kilogram of hydrogen, and not less than 2.5 kilograms of CO₂e per kilogram of hydrogen, 1.2 percent; (ii) less than 2.5 kilograms of CO₂e per kilogram of hydrogen, and not less than 1.5

kilograms of CO₂e per kilogram of hydrogen, 1.5 percent; (iii) less than 1.5 kilograms of CO₂e per kilogram of hydrogen, and not less than 0.45 kilograms of CO₂e per kilogram of hydrogen, 2 percent; and (iv) less than 0.45 kilograms of CO₂e per kilogram of hydrogen, 6 percent. Under section 48(a)(9), the amount of the section 48 credit determined for a specified clean hydrogen production facility under section 48(a)(15) is multiplied by five if the facility meets the requirements of section 48(a)(9)(B) (regarding application of certain maximum net output levels of electrical or thermal energy or prevailing wage and apprenticeship requirements). However, the domestic content and energy communities bonuses under section 48(a)(12) and (a)(14) do not apply to a specified clean hydrogen production facility.

Section 48(a)(15) is effective for property placed in service after December 31, 2022, and for any property the construction of which began before January 1, 2023, only to the extent of the basis thereof attributable to construction, reconstruction, or erection after December 31, 2022. See section 13204(c)(3) of the IRA.

1. Denial of Production Credit

Section 48(a)(15)(B) provides that no section 45V credit or section 45Q credit is allowed for any taxable year with respect to any specified clean hydrogen production facility or any carbon capture equipment included at such facility.

2. Specified Clean Hydrogen Production Facility

Section 48(a)(15)(C) provides that the term “specified clean hydrogen production facility” means any qualified clean hydrogen production facility (as defined in section 45V(c)(3)) (i) that is placed in service after December 31, 2022, (ii) with respect to which (I) no section 45V credit or section 45Q credit has been allowed, and (II) the taxpayer makes an irrevocable election to have section 48(a)(15) apply, and (iii) for which an unrelated third party has verified (in such form or manner as the Secretary may prescribe) that such facility produces hydrogen through a process that results in lifecycle GHG emissions that are consistent with the hydrogen that such facility was designed and expected to produce under section 48(a)(15)(A)(ii).

3. Qualified Clean Hydrogen

Section 48(a)(15)(D) provides that, for purposes of section 48(a)(15), the term

“qualified clean hydrogen” has the meaning given such term by section 45V(c)(2).

4. Regulations

Section 48(a)(15)(E) provides the Secretary authority to issue regulations or other guidance as she determines necessary to carry out the purposes of section 48, including regulations or other guidance that recaptures so much of any section 48 credit allowed as exceeds the amount of the credit that would have been allowed if the expected production were consistent with the actual verified production (or all of the credit so allowed in the absence of verification).

II. Previous Request for Comments

On November 3, 2022, the Treasury Department and the IRS published Notice 2022–58, 2022–47 I.R.B. 483. The notice requested general comments on issues arising under section 45V and the associated clean hydrogen production and investment incentives in sections 45 and 48. The notice also requested specific comments concerning (i) definitions; (ii) boundaries of the well-to-gate analysis for determining the lifecycle GHG emissions rate; (iii) the PER process; (iv) recordkeeping and reporting; (v) verification by unrelated parties; and (vi) coordination with sections 45, 48, and 45Q. The Treasury Department and the IRS received over 200 comments from industry participants, environmental groups, individuals, and other stakeholders. The Treasury Department and the IRS appreciate the commenters’ interest and engagement on these issues. These comments have been carefully considered in the development of these proposed regulations.

Explanation of Provisions

I. Overview

Proposed § 1.45V–1 would provide guidance, including definitions of key terms used in proposed §§ 1.45V–1 through 1.45V–6 and 1.48–15, to determine the eligibility for, and the amount of, the section 45V credit for the production of qualified clean hydrogen. The term “section 45V credit” would be provided at § 1.45V–1(a)(12) and mean the credit for production of clean hydrogen determined under section 45V, so much of sections 6417 and 6418 that relate to section 45V, and the section 45V regulations. The term “section 45V regulations” would be provided at proposed § 1.45V–1(a)(13) to mean the provisions of §§ 1.45V–1 through 1.45V–6 and so much of the regulations under sections 6417 and

6418 that relate to the section 45V credit.

Proposed § 1.45V–2 would provide special rules for purposes of the section 45V credit. Proposed § 1.45V–4 would provide procedures for determining lifecycle GHG emissions rates for qualified clean hydrogen. Proposed § 1.45V–5 would provide procedures for verification of qualified clean hydrogen production and sale or use. Proposed § 1.45V–6 would provide rules for determining the placed in service date for an existing facility that is modified or retrofitted to produce qualified clean hydrogen. Additionally, proposed § 1.48–15 would provide procedures for a taxpayer to elect to treat any qualified property that is part of a specified clean hydrogen production facility as energy property for purposes of the section 48 credit.

II. Definitions

Proposed § 1.45V–1(a)(2) through (13) would provide generally applicable definitions of terms for purposes of section 45V, so much of sections 6417 and 6418 of the Code that relate to the section 45V credit, and the section 45V regulations. The definitions for applicable amount, applicable percentage, and qualified clean hydrogen production facility would generally reflect the statutory definitions without additional elaboration on the terms. See proposed § 1.45V–1(a)(2), (3), and (10). This part II discusses those definitions in the proposed regulations that provide additional clarity beyond the statutory language.

A. Facility

Proposed § 1.45V–1(a)(7)(i) would provide that, for purposes of the definition of a qualified clean hydrogen production facility provided at section 45V(c)(3), the term “facility” means a single production line that is used to produce qualified clean hydrogen. A “single production line” would include all components of property that function interdependently to produce qualified clean hydrogen. Components of property are functionally interdependent if the placing in service of each component is dependent upon the placing in service of each of the other components to produce qualified clean hydrogen. Proposed § 1.45V–1(a)(7)(ii) would provide that a facility does not include equipment used to condition or transport hydrogen beyond the point of production. A facility would also not include electricity production equipment used to power the hydrogen production process, including any carbon capture

equipment associated with the electricity production process. Proposed § 1.45V–1(a)(7)(iii) would provide that components that have a purpose in addition to the production of qualified hydrogen may be part of a facility if such components function interdependently with other components to produce qualified clean hydrogen. Proposed § 1.45V–1(a)(7)(iv) would provide an example to illustrate the definition of facility for purposes of section 45V.

B. Lifecycle Greenhouse Gas Emissions

Proposed § 1.45V–1(a)(8)(i) would incorporate the statutory definition of the term “lifecycle greenhouse gas emissions” under section 45V(c)(1)(A) and (B), specifically providing that the term has the same meaning as that in 42 U.S.C. 7545(o)(1)(H) as in effect on August 16, 2022, and includes emissions only through the point of production (well-to-gate) as determined under the most recent GREET model.

C. Most Recent GREET Model

Proposed § 1.45V–1(a)(8)(ii) would provide that the term “most recent GREET model” means the latest version of 45VH2–GREET developed by Argonne National Laboratory (ANL) that is publicly available on the first day of the taxpayer’s taxable year in which the qualified clean hydrogen for which the taxpayer is claiming the section 45V credit was produced.⁶ After consultation with the Department of Energy (DOE), the Treasury Department and the IRS believe that the use of the latest version of 45VH2–GREET would be appropriate because it is tailored to the administration of the section 45V tax credit and includes features that make it easy to use for taxpayers. Use of the latest version of 45VH2–GREET would also ensure that the pathways and approaches provided for determining well-to-gate emissions for various hydrogen production processes are of sufficient methodological certainty to be appropriate for determining eligibility of tax credits. The latest version of 45VH2–GREET is the only variant of GREET that is suitable for use and may be used to determine emissions rates for purposes of the section 45V credit.

Further, proposed § 1.45V–1(a)(8)(ii) would provide that, if a version of

⁶ 45VH2–GREET is a user interface designed to accept input related to a hydrogen production facility, execute GREET calculations in the background, and display the well-to-gate carbon intensity of produced hydrogen in kg of CO₂e/kg of H₂. 45VH2–GREET is currently available at www.energy.gov/45vresources. Successor locations for 45V–H2GREET will be provided in IRS forms and instructions.

45VH2-GREET becomes publicly available after the first day of the taxable year of production (but still within such taxable year), then the taxpayer may, in its discretion, treat such version of 45VH2-GREET as the most recent GREET model.

Instead of defining “most recent GREET model” to be the latest version of 45VH2-GREET that is publicly available on the first day of the taxpayer’s taxable year, an alternative approach would be for the Secretary to determine that the latest version of 45VH2-GREET is an appropriate “successor model,” as provided by section 45V(c)(1)(B), for the purpose of administering the section 45V tax credit. The Treasury Department and the IRS request comment on these approaches.

D. Emissions Through the Point of Production (Well-to-Gate)

Proposed § 1.45V–1(a)(8)(iii) would provide that, for purposes of section 45V(c)(1)(B) and proposed § 1.45V–1(a)(8)(i), the term “emissions through the point of production (well-to-gate)” means the aggregate lifecycle GHG emissions related to hydrogen produced at a hydrogen production facility during the taxable year through the point of production. It includes emissions associated with feedstock growth, gathering, extraction, processing, and delivery to a hydrogen production facility. It also includes the emissions associated with the hydrogen production process, inclusive of the electricity used by the hydrogen production facility and any capture and sequestration of carbon dioxide generated by the hydrogen production facility.

E. Qualified Clean Hydrogen

Proposed § 1.45V–1(a)(9)(i) would incorporate the statutory definition of the term “qualified clean hydrogen” provided at section 45V(c)(2)(A) and (B), including the requirement that the hydrogen be produced (i) in the United States or a U.S. territory (meaning possession as provided in section 638(2)); (ii) in the ordinary course of a trade or business of the taxpayer; and (iii) for sale or use. Proposed § 1.45V–1(a)(9)(i)(B) would provide that, to qualify as qualified clean hydrogen, the production and sale or use of such hydrogen must be verified by an unrelated party (as required by section 45V(c)(2)(B)(ii)). See also proposed § 1.45V–5.

Proposed § 1.45V–1(a)(9)(ii) would provide that for purposes of section 45V(c)(2)(B)(i)(III) and proposed § 1.45V–1(a)(9)(i)(C) the term “for sale or use” means for the primary purpose

of making such hydrogen ready and available for sale or use. Storage of hydrogen before its sale or use would not disqualify such hydrogen from being considered produced for sale or use.

III. Rules of General Applicability

Proposed § 1.45V–1(b)(1) would provide the general rules for calculating the amount of the section 45V credit.

Proposed § 1.45V–1(b)(2) would provide that, for purposes of section 45V(a)(1) and proposed § 1.45V–1(b)(1), the term “taxpayer” means the taxpayer that owns the qualified clean hydrogen production facility at the time of the facility’s production of qualified clean hydrogen with respect to which the section 45V credit is claimed, regardless of whether such taxpayer is treated as a producer under section 263A of the Code or under any other provision of law with respect to such qualified clean hydrogen. This rule is intended to avoid unintended consequences that could arise with respect to contract manufacturing and tolling arrangements under § 1.263A–2(a)(1)(ii)(A) and (a)(1)(ii)(B)(1) in the context of the section 45V credit, as well as to simplify the administration of the section 45V credit and provide clarity for taxpayers.

Proposed § 1.45V–1(c) would provide that, subject to any applicable Code sections that may limit the section 45V credit amount, the section 45V credit for any taxable year is determined with respect to the qualified clean hydrogen produced by the taxpayer during that taxable year although the verification of the production and sale or use of such hydrogen may occur in a later taxable year. However, the taxpayer would not be eligible to claim the section 45V credit until all relevant verification requirements, and the verification itself, have been completed. Therefore, despite such verification occurring in a later taxable year, the section 45V credit would be properly claimed with respect to the taxable year of hydrogen production and subject to the general period of limitations for filing a claim for credit or refund. Thus, if verification occurred after the extended return filing deadline for the taxable year in which the hydrogen was produced, the taxpayer would need to file an amended return or administrative adjustment request (AAR) to claim the section 45V credit for such hydrogen. The Treasury Department and the IRS request comments on this proposed rule, specifically whether taxpayers anticipate they will be able to complete all the requirements for claiming the section 45V credit, including the proposed requirements for verification specified below, by the extended return

filing deadline for the taxable year of hydrogen production. If taxpayers anticipate that they will not be able to complete all the requirements by such filing deadline, comments are also requested on what specific alternatives to the proposed rule, if any, should be considered and their rationale.

IV. Special Rules

Proposed § 1.45V–2(a) would address the coordination between the section 45V credit and the section 45Q credit.

Proposed § 1.45V–2(b)(1) would provide an anti-abuse rule that would make the section 45V credit unavailable in extraordinary circumstances in which, based on a consideration of all the relevant facts and circumstances, the primary purpose of the production and sale or use of qualified clean hydrogen is to obtain the benefit of the section 45V credit in a manner that is wasteful, such as the production of qualified clean hydrogen that the taxpayer knows or has reason to know will be vented, flared, or used to produce hydrogen.

If the cost of producing qualified clean hydrogen were to be less than the amount of the section 45V credit that would be available with respect to such hydrogen, the Treasury Department and the IRS are concerned that taxpayers may have an incentive to produce qualified clean hydrogen solely for the purpose of exploiting the section 45V credit in a manner that is inconsistent with a purpose of section 45V, which is to provide an incentive to produce qualified clean hydrogen for a productive use. Producing and selling or using qualified clean hydrogen with the primary purpose of obtaining the benefit of the section 45V credit in a wasteful manner would not, in certain circumstances, satisfy the requirement in section 45V(c)(2)(B)(i)(II) for hydrogen to be produced in the ordinary course of a trade or business of the taxpayer. Proposed § 1.45V–2(b)(2) would provide an example illustrating this anti-abuse rule.

V. Procedures for Determining Lifecycle Greenhouse Gas Emissions Rates for Qualified Clean Hydrogen

Proposed § 1.45V–4(a) would provide that the amount of the section 45V credit is determined under section 45V(a) and proposed § 1.45V–1(b) based upon the lifecycle GHG emissions rate (as defined in proposed § 1.45V–1(a)(8)(i)) of all hydrogen produced at a qualified clean hydrogen production facility (as defined in proposed § 1.45V–1(a)(10)) during the taxable year. This determination is made following the close of each such taxable year and must include all hydrogen production from

the year. Further, proposed § 1.45V-4(a) would provide that the lifecycle GHG emissions rate for purposes of section 45V is determined under the most recent GREET model (as defined in proposed § 1.45V-1(a)(8)(ii)). Additionally, proposed § 1.45V-4(a) would provide that in the case of any hydrogen for which a lifecycle GHG emissions rate has not been determined under the most recent GREET model for purposes of section 45V, a taxpayer producing such hydrogen may file a petition with the Secretary for a determination of the lifecycle GHG emissions rate with respect to such hydrogen (a provisional emissions rate (PER)).

A. GREET Model

Proposed § 1.45V-4(b) would provide procedures to calculate the lifecycle GHG emissions rate of hydrogen produced at a hydrogen production facility using the most recent GREET model as defined in proposed § 1.45V-1(a)(8)(ii) (referring to 45VH2-GREET). Proposed § 1.45V-4(b) would provide that for each taxable year during the period described in section 45V(a)(1), a taxpayer claiming the section 45V credit determines the lifecycle GHG emissions rate of hydrogen produced at a hydrogen production facility using the most recent GREET model. Such a determination is made separately for each hydrogen production facility the taxpayer owns and as of the close of each respective taxable year in which such production occurs (that is, such a determination is made for that taxable year's total hydrogen production at a hydrogen production facility). Proposed § 1.45V-4(b) would provide that in calculating the lifecycle GHG emissions rate for purposes of determining the amount of the section 45V credit, the taxpayer must accurately enter all information about its qualified clean hydrogen production facility requested within the interface of 45VH2-GREET in compliance with the most recent version of the *Guidelines to Determine Well-to-Gate Greenhouse Gas (GHG) Emissions of Hydrogen Production Pathways using 45VH2-GREET* (GREET User Manual), which currently can be found at: www.energy.gov/45vresources. Current 45VH2-GREET, previous versions of 45VH2-GREET, and subsequent updates to 45VH2-GREET can be found at www.energy.gov/45vresources. Proposed § 1.45V-4(b) would provide that information for the location of 45VH2-GREET and accompanying documentation will be included in the instructions to the Form 7210, *Clean Hydrogen Production Credit*.

45VH2-GREET includes various hydrogen production pathways. As of the publication date of these proposed regulations, 45VH2-GREET includes the following hydrogen production pathways—

- (1) Steam methane reforming (SMR) of natural gas, with potential carbon capture and sequestration (CCS);
- (2) Autothermal reforming (ATR) of natural gas, with potential CCS;
- (3) SMR of landfill gas with potential CCS;
- (4) ATR of landfill gas with potential CCS;
- (5) Coal gasification with potential CCS;
- (6) Biomass gasification with corn stover and logging residue with no significant market value with potential CCS;
- (7) Low-temperature water electrolysis using electricity; and
- (8) High-temperature water electrolysis using electricity and potential heat from nuclear power plants.

As described in *Guidelines to Determine Well-to-Gate Greenhouse Gas (GHG) Emissions of Hydrogen Production Pathways using 45VH2-GREET* (GREET User Manual), certain parameters in 45VH2-GREET are fixed assumptions, referred to as “background data” in this document. Users of 45VH2-GREET may not change background data. Examples of background data include upstream methane loss rates, emissions associated with power generation from specific generator types, and emissions associated with regional electricity grids. Background data are parameters for which bespoke inputs from hydrogen producers are unlikely to be independently verifiable with high fidelity, given the current status of verification mechanisms. The Treasury Department and the IRS seek comment on the readiness of verification mechanisms that could be utilized for certain background data in 45VH2-GREET if it were reverted to foreground data in future releases. For example, the upstream methane loss rate is background data in 45VH2-GREET, and the Treasury Department and the IRS seek comment on conditions, if any, under which the methane loss rate may in future releases become foreground data (such as certificates that verifiably demonstrate different methane loss rates for natural gas feedstocks, sometimes described as responsibly sourced natural gas).

45VH2-GREET allows users to input the quantity of valorized co-products (that is, co-products from the hydrogen production process that are

productively utilized or sold) and allocates emissions to those co-products (rather than to the hydrogen production) as described in *Guidelines to Determine Well-to-Gate Greenhouse Gas (GHG) Emissions of Hydrogen Production Pathways using 45VH2-GREET 2023*. As described in that document, 45VH2-GREET utilizes the “system expansion” approach for all co-products if possible, but restricts the amount of steam co-product that reformers can claim based on the quantity of steam that an optimally designed reformer is expected to be capable of producing based on modeling from the National Energy Technology Laboratory.⁷ This restriction is included within the model to avoid incentivizing generation or over-production of hydrogen co-products like steam to enable access to a higher tax credit value by artificially reducing the calculated carbon intensity of the hydrogen (for example, by combustion of fuel onsite that is unnecessary for hydrogen production). The Treasury Department and the IRS seek comments on this approach, including whether alternative co-product accounting methods, such as physical allocation (for example, energy allocation or mass allocation) or allocation based on other characteristics, would better ensure well-to-gate carbon intensity of hydrogen production is accurately represented.

B. Provisional Emissions Rate

Proposed § 1.45V-4(c)(1) would provide that, for purposes of section 45V(c)(2)(C) and proposed § 1.45V-4(a), the term “provisional emissions rate” or “PER” means the lifecycle GHG emissions rate of the process by which qualified clean hydrogen is produced by the taxpayer at a qualified clean hydrogen production facility as determined by the Secretary under proposed § 1.45V-4(c).

Proposed § 1.45V-4(c)(2)(i) would provide that a taxpayer may not file a petition with the Secretary for a PER unless a lifecycle GHG emissions rate has not been determined under the most recent GREET model (as defined in proposed § 1.45V-1(a)(8)(ii) as 45VH2-GREET) for hydrogen produced by the taxpayer at a hydrogen production facility. Proposed § 1.45V-4(c)(2)(i) would further provide that a lifecycle GHG emissions rate has not been determined under the most recent GREET model with respect to hydrogen

⁷ National Energy Technology Laboratory, DOE, “Comparison of Commercial, State-of-the-Art, Fossil-Based Hydrogen Production Technologies,” April 12, 2022, available at <https://www.netl.doe.gov/energy-analysis/details?id=ed4825aa-8f04-4df7-abef-60e564f636c9>.

produced by the taxpayer at a hydrogen production facility if it uses a hydrogen production pathway that is not included in the most recent GREET model—that is, if either the feedstock used by such facility or the facility’s hydrogen production technology is not included in the most recent GREET model.

For example, the initial version of 45VH2–GREET does not model every possible biomass fuel as a feedstock nor does it represent all hydrogen production technologies that are currently of commercial interest or that may be commercially viable in the future, including geologic hydrogen, trigeneration, or other technologies if sufficient technical analysis had not been completed at the time the model was published. A taxpayer with one of these types of hydrogen production pathways may use the PER process to obtain carbon intensities because such hydrogen production technologies or feedstocks are not currently in 45VH2–GREET. To use the PER process, the hydrogen production pathway that the taxpayer is utilizing must either be consuming a feedstock that is not represented in 45VH2–GREET (for example, a type of biomass that is not represented in the model) or using a hydrogen production technology that is not represented in 45VH2–GREET (for example, technologies used to drill for geologic hydrogen or trigeneration that can use a fuel cell to co-produce hydrogen, heat, and power). A taxpayer may not use the PER process if its feedstock and hydrogen production technology are represented in 45VH2–GREET, even if the taxpayer disagrees with the underlying assumptions (that is, background data) or calculation approach used by the most recent 45VH2–GREET. Future versions of 45VH2–GREET may include additional hydrogen production pathways, such as geologic hydrogen, as sufficient technical information becomes available to provide consistent treatment in 45VH2–GREET.

Proposed § 1.45V–4(c)(2)(i) would also provide that, if a taxpayer’s request for an emissions value from the DOE under proposed § 1.45V–4(c)(5) with respect to the hydrogen produced by the taxpayer at a hydrogen production facility is pending at the time such hydrogen production facility’s pathway is included in an updated version of 45VH2–GREET, the taxpayer’s request for an emissions value will be automatically denied.

Proposed § 1.45V–4(c)(2)(ii) would specify that, notwithstanding proposed § 1.45V–1(a)(8)(ii), for the taxable year in which the hydrogen production pathway the taxpayer uses to produce

hydrogen at a qualified clean hydrogen production facility is first included in an updated version of 45VH2–GREET, the updated version of 45VH2–GREET will be considered the most recent GREET model with respect to the hydrogen produced by the taxpayer at the hydrogen production facility.

1. Process for Filing a Provisional Emissions Rate Petition

Proposed § 1.45V–4(c)(3) would provide that a taxpayer petitions the Secretary for a PER by attaching a PER petition to its Federal income tax return or information return for the first taxable year of hydrogen production ending within the 10-year period described in section 45V(a)(1) for which the taxpayer claims the section 45V credit for hydrogen to which the PER petition relates and for which a lifecycle GHG emissions rate has not been determined, as defined under proposed § 1.45V–4(c)(2)(i). Proposed § 1.45V–4(c)(3) would provide that a PER petition must contain (i) an emissions value obtained from the DOE setting forth the DOE’s analytical assessment of the lifecycle GHG emissions rate associated with the facility’s hydrogen production pathway, and (ii) a copy of the taxpayer’s request to the DOE for an emissions value, including any information that the taxpayer provided to the DOE pursuant to the emissions value request process specified in proposed § 1.45V–4(c)(5). Proposed § 1.45V–4(c)(3) would further provide that, if the taxpayer obtained more than one emissions value from the DOE, then the PER petition must contain the emissions value setting forth the lifecycle GHG emissions rate of the hydrogen for which the section 45V credit is claimed on the Form 7210, *Clean Hydrogen Production Credit*, to which the PER petition is attached.

2. Provisional Emissions Rate Determination

Proposed § 1.45V–4(c)(4) would provide that upon the IRS’s acceptance of the taxpayer’s Federal income tax return or information return containing a PER petition, the emissions value specified on such PER petition will be deemed accepted. Proposed § 1.45V–4(c)(4) would provide that a taxpayer would be able to rely upon an emissions value provided by the DOE for purposes of calculating and claiming a section 45V credit, provided that any information, representations, or other data provided to the DOE in support of the request for an emissions value are accurate. Proposed § 1.45V–4(c)(4) would also state that the IRS’s deemed acceptance of such emissions value is

the Secretary’s determination of the PER. Proposed § 1.45V–4(c)(4) would state, however, that the production and sale or use of such hydrogen must be verified by an unrelated party under section 45V(c)(2)(B)(ii) and in compliance with the procedures provided in proposed § 1.45V–5. Proposed § 1.45V–4(c)(4) would state that such verification and any information, representations, or other data provided to the DOE in support of the request for an emissions value are subject to later examination by the IRS.

3. Department of Energy Emissions Value Request Process

Proposed § 1.45V–4(c)(5) would provide that, in order to obtain an emissions value, an applicant must submit a request for an emissions value following procedures that will be specified by the DOE. The emissions value request process will open on April 1, 2024.

Proposed § 1.45V–5 would also provide that emissions values will be evaluated using the same well-to-gate system boundary that is employed in 45VH2–GREET, as proposed in § 1.45V–1(a)(8)(iii). Additionally, proposed § 1.45V–5 would also provide that if applicable, background data parameters in 45VH2–GREET would also be treated as background data (with fixed values that an applicant cannot change) in the emissions value request process. The emissions value request process would be subject to any guidance issued under section 45V, including any guidance related to the use of EACs.

Proposed § 1.45V–4(c)(5) would also provide that an applicant may request an emissions value from the DOE only after a front-end engineering and design (FEED) study or similar indication of project maturity, such as project specification and cost estimation sufficient to inform a final investment decision, has been completed for the hydrogen production facility. Forthcoming guidance from the DOE, which will be published prior to the April 1, 2024, opening of the emissions value request process, will specify criteria the DOE intends to consider in evaluating whether a FEED study has been completed or that a similar indicator of project readiness has been achieved. The Treasury Department and the IRS seek comments on appropriate indicators of project readiness that should be in place before an applicant requests an emissions value to ensure that requests correspond to hydrogen production facilities with significant commercial interest, and standards against which these indicators could be measured.

Additionally, proposed § 1.45V–4(c)(5) would provide that the DOE may decline to review applications that are not responsive, including those applications that use a hydrogen production technology and feedstock already in GREET or applications that are incomplete. Guidance and procedures for applicants to request and obtain an emissions value from the DOE will be published by the DOE,⁸ including a process for, under limited circumstances, a revision to the DOE's initial analytical assessment of an emissions value, such as to address revised technical information or facility design and operation.

4. Effect of Provisional Emissions Rate

Proposed § 1.45V–4(c)(6) would provide that a taxpayer may use a PER determined by the Secretary to calculate the amount of the clean hydrogen production credit under section 45V(a) and proposed § 1.45V–1(b) with respect to qualified clean hydrogen produced by the taxpayer at a qualified clean hydrogen production facility beginning with the first taxable year in which a PER determined by the Secretary has been obtained and for any subsequent taxable year during the 10-year period beginning on the date such facility was originally placed in service, provided all other requirements of section 45V are met, and until the lifecycle GHG emissions rate of such hydrogen has been determined (for purposes of section 45V(c)(2)(C)) under the most recent GREET model (as defined in proposed § 1.45V–1(a)(8)(ii)).

Proposed § 1.45V–4(c)(6) would provide that the Secretary's PER determination is not an examination or an inspection of books of account for purposes of section 7605(b) of the Code, and would not preclude or impede the IRS (under section 7605(b) or any administrative provisions adopted by the IRS) from later examining a return or inspecting books or records with respect to any taxable year for which the section 45V credit is claimed. Proposed § 1.45V–4(c)(6) would provide that a verification report submitted under section 45V(c)(2)(B)(ii) and § 1.45V–5 and any information, representations, or other data provided to the DOE in support of an emissions value request would still be subject to IRS examination. Further, proposed § 1.45V–4(c)(6) would state that a PER determination would not mean that the IRS has determined that all the requirements of section 45V have been satisfied for any taxable year, nor would

it create an inference that such a presumption exists.

C. Use of Energy Attribute Certificates

The Treasury Department and the IRS, in consultation with the United States Environmental Protection Agency (EPA) and the DOE, have preliminarily determined that energy attribute certificates (EACs) may be considered under certain conditions in documenting purchased electricity inputs and assessing emissions impacts of electricity used in the production of hydrogen for purposes of the section 45V credit.⁹ For purposes of these proposed regulations, the term “EACs” refers solely to EACs that represent attributes of electricity generated by a specific facility or source. The EPA has advised that EACs are an established mechanism for substantiating the purchase of electricity from zero GHG-emitting sources and that the use of EACs with attributes that meet certain criteria is an appropriate way for the Treasury Department and the IRS to document electricity inputs to electrolytic hydrogen production. Such EACs can also serve as a reasonable methodological proxy for quantifying certain indirect emissions associated with electricity for purposes of the section 45V credit. Similarly, the EPA and the DOE have advised that it would be appropriate for EACs with attributes that meet certain criteria to be included as part of the basis for assessing emissions for purposes of the section 45V credit. The Treasury Department and the IRS have preliminarily determined that the use of certain EACs, which satisfy the qualifying EAC requirements (as specified in proposed § 1.45V–4(d)(3)), is consistent with the references to subparagraph (H) of section 211(o)(1) of the Clean Air Act (42 U.S.C. 7545(o)(1)(H)) and the most recent GREET Model, as specified in section 45V(c)(1).

Proposed § 1.45V–4(d)(1) would provide that for purposes of section 45V, if a taxpayer determines a lifecycle GHG emissions rate for hydrogen produced at a hydrogen production facility using the most recent GREET model (as defined in proposed § 1.45V–1(a)(8)(ii)) or a PER (as defined in proposed § 1.45V–4(c)(1)), then the taxpayer may reflect in GREET or include in a PER such hydrogen

production facility's use of electricity as being from a specific electricity generating facility rather than the being from the regional electricity grid (as represented in 45VH2–GREET) only if the taxpayer acquires and retires a qualifying EAC (as defined in proposed § 1.45V–4(d)(2)(iv)) for each unit of electricity that the taxpayer claims from such source. For example, one megawatt-hour of electricity used to produce hydrogen would need to be matched with one megawatt-hour of qualifying EACs. The Treasury Department and the IRS seek comments on whether a different treatment would be more appropriate to account for transmission and distribution line losses.

Further, proposed § 1.45V–4(d)(1) would provide that to satisfy this requirement, a taxpayer's acquisition and retirement of qualifying EACs must also be recorded in a qualified EAC registry or accounting system (as defined in proposed § 1.45V–4(d)(2)(v)) so that the acquisition and retirement of such EACs may be verified by a qualified verifier (as defined in proposed § 1.45V–5(h)).

The double counting of EACs and their underlying attributes would undermine the integrity of lifecycle GHG emissions rate determinations that incorporate EACs. A double counting occurs if two different parties claim the same environmental benefits from the same generated energy.¹⁰ Uniformly requiring claims of using electricity generated from specific sources to be evidenced by EACs that meet the requirements of proposed § 1.45V–4(d)(1) would mitigate the risk of double counting. Thus, proposed § 1.45V–4(d)(1) would provide that certain requirements must be met regardless of whether the electricity generating facility giving rise to the qualifying EAC is grid connected, directly connected, or co-located with the hydrogen production facility (that is, regardless of whether the underlying source of the qualifying EAC physically supplies electricity through a direct connection to the hydrogen production facility).

1. Definitions Related To Use of Energy Attribute Certificates

Proposed § 1.45V–4(d)(2)(i) would define the term “commercial operations date” or “COD” as the date on which a facility that generates electricity begins commercial operations. The COD, as defined here, is the first date of the operation of the relevant electricity

⁸ DOE will provide guidance and procedures at www.energy.gov/45vresources.

⁹ EPA Letter, available at <https://home.treasury.gov/system/files/136/45V-NPRM-EPA-letter.pdf>; DOE. 2023. “Assessing Lifecycle Greenhouse Gas Emissions Associated with Electricity Use for the Section 45V Clean Hydrogen Production Tax Credit.” Washington, DC: U.S. Department of Energy available at www.energy.gov/45vresources.

¹⁰ EPA, “Double Counting,” last updated Feb. 5, 2023, available at <https://www.epa.gov/green-power-markets/double-counting>.

generating facility. The general rules for determining an electricity generating facility's placed in service date for Federal income tax purposes would not apply in determining its COD.

Proposed § 1.45V-4(d)(2)(ii) would define the term "energy attribute certificate" or "EAC" to mean a tradeable contractual instrument, issued through a qualified EAC registry or accounting system (as defined in proposed § 1.45V-4(d)(2)(v)), that represents the energy attributes of a specific unit of energy produced. An EAC may be acquired with or separately from the underlying energy it represents. An EAC can be retired by or on behalf of its owner, which is the party that has the right to claim the underlying attributes represented by an EAC. Renewable energy certificates (RECs) and other similar energy certificates issued through a registry or accounting system are forms of EACs.

Proposed § 1.45V-4(d)(2)(iii) would define the term "eligible EAC" to mean an EAC that, with respect to the electricity to which the EAC relates, provides, at minimum, the following information: (i) a description of the electricity generating facility, including the technology and feedstock used to generate the electricity; (ii) the amount and units of electricity; (iii) the date on which the facility that generated the electricity first began commercial operations (referred to as the commercial operations date (COD)) (as defined in proposed § 1.45V-4(d)(2)(i)); (iv) for electricity that is generated before January 1, 2028, the calendar year in which such electricity was generated; (v) for electricity that is generated after December 31, 2027, the date and hour in which such electricity was generated; and (vi) a unique project identification number or assigned identifier for each EAC that can be used to cross reference any additional electricity generating facility information that may be needed, such as location.

Proposed § 1.45V-4(d)(2)(iv) would define the term "qualifying EAC" to mean an eligible EAC (as defined in proposed § 1.45V-4(d)(2)(iii)) that meets the requirements of proposed § 1.45V-4(d)(3) and for which the satisfaction of those requirements has been verified by a qualified verifier (as defined in proposed § 1.45V-5(h)).

Proposed § 1.45V-4(d)(2)(v) would define the term "qualified EAC registry or accounting system" to mean a tracking system that (i) assigns a unique identification number to each EAC tracked by such system, (ii) enables verification that only one EAC is associated with each unit of electricity, (iii) verifies that the underlying

attributes of each EAC is claimed and retired only once, (iv) identifies the owner of each EAC, and (v) provides a publicly accessible view (for example, through an application programming interface) of all currently registered electricity generators in the tracking system to prevent the duplicative registration of such generators. Qualified EAC registries currently include, but are not limited to, the following: Electric Reliability Council of Texas (ERCOT); Michigan Renewable Energy Certification System (MIRECS); Midwest Renewable Energy Tracking System, Inc. (M-RETS); North American Registry (NAR); New England Power Pool Generation Information System (NEPOOL-GIS); New York Generation Attribute Tracking System (NYGATS); North Carolina Renewable Energy Tracking System (NC-RETS); PJM Generation Attribute Tracking System (PJM-GATS); and Western Electric Coordinating Council (WREGIS).

Proposed § 1.45V-4(d)(2)(vi) would define the term "region" to mean a United States region derived from the National Transmission Needs Study (DOE Needs Study) that was released by the DOE on October 30, 2023.¹¹ The DOE has mapped the DOE Needs Study regions to actual balancing authorities. The data file and map of the resulting United States regions can be found in *Guidelines to Determine Well-to-Gate Greenhouse Gas (GHG) Emissions of Hydrogen Production Pathways using 45VH2-GREET* (GREET User Manual) as of December 26, 2023. The location of an electricity generation source and the location of a hydrogen production facility will be based on the balancing authority to which it is electrically interconnected (not its geographic location), with each balancing authority linked to a single region. The MISO balancing authority is an exception because it is split into two U.S. regions as shown in the map located at GREET User Manual as of December 26, 2023. Alaska, Hawaii, and each U.S. territory will be treated as separate regions.

2. Eligible Energy Attribute Certificate Requirements

Proposed § 1.45V-4(d)(3) would provide that an EAC meets the requirements to be a qualifying EAC if it meets the requirements for incrementality, temporal matching, and deliverability. The incrementality requirement in proposed § 1.45V-4(d)(3)(i) would require qualifying EACs

to represent incremental source electricity, such as electricity from an electricity generating facility that has a recent COD. As discussed in more detail later in this section, the Treasury Department and the IRS are requesting comments on whether and under what circumstances electricity generated by an existing electricity generating facility (that is, with a less recent COD) that is dedicated to hydrogen production may be treated as satisfying the incrementality requirement. The temporal matching requirement in proposed § 1.45V-4(d)(3)(ii) would require that qualifying EACs are retired that represent electricity produced in the same time period in which the hydrogen production facility consumes electricity in the production of hydrogen. The deliverability requirement in proposed § 1.45V-4(d)(3)(iii) would require qualifying EACs to represent electricity that was produced by an electricity generating facility that is in the same region as the relevant hydrogen production facility.

The Treasury Department and the IRS, in consultation with the EPA and the DOE, have preliminarily determined that these qualifying EAC requirements are consistent with the requirements of section 45V(c)(1)(A) and (B) of the Code.¹² The EPA has advised that, based on its prior implementation of section 211(o)(1)(H) of the Clean Air Act in other contexts, it would be reasonable and consistent with the EPA's precedent for the Treasury Department and the IRS to determine that induced grid emissions are an anticipated real-world result of electrolytic hydrogen production that must be considered in lifecycle GHG analyses for purposes of the section 45V credit. Such interpretation would be consistent with the EPA's long-standing interpretation and application of section 211(o)(1)(H) of the Clean Air Act in the context of the Renewable Fuel Standard (RFS) program. The EPA has also noted that EACs are an established means for documentation and verification of the electricity generation and purchase of zero-GHG electricity. Moreover, the EPA has advised that it believes it would be reasonable for the Treasury Department and the IRS to use EACs that possess specific attributes that meet certain criteria as a means of reducing the risk of induced grid emissions resulting from

¹¹ DOE, National Transmission Needs Study, Oct. 2023, available at https://www.energy.gov/sites/default/files/2023-10/National_Transmission_Needs_Study_2023.pdf.

¹² EPA Letter, available at <https://home.treasury.gov/system/files/136/45V-NPRM-EPA-letter.pdf>; DOE. 2023. "Assessing Lifecycle Greenhouse Gas Emissions Associated with Electricity Use for the Section 45V Clean Hydrogen Production Tax Credit." Washington, DC: U.S. Department of Energy, available at www.energy.gov/45vresources.

new load from electrolytic hydrogen production being added to an existing grid. Such requirements would mitigate the risk of inappropriately crediting hydrogen production that does not meet the lifecycle GHG levels required by section 45V.

DOE has published a technical paper, *Assessing Lifecycle Greenhouse Gas Emissions Associated with Electricity Use for the Section 45V Clean Hydrogen Production Tax Credit*, which the Treasury Department and the IRS have reviewed, and which has informed the development of the proposed regulations. As discussed therein, incrementality, temporal matching, and deliverability requirements are important guardrails to ensure that hydrogen producers' electricity use can be reasonably deemed to reflect the emissions associated with the specific generators from which the EACs were purchased and retired. If hydrogen producers rely on EACs without attributes that meet these three criteria there is a significant risk that hydrogen production would significantly increase induced grid GHG emissions beyond the allowable levels required to qualify for the section 45V credit.

Electricity from a specific generator will have a GHG emissions profile that results from both its direct and indirect emissions. EACs with attributes that meet the three criteria are intended to address indirect GHG emissions resulting from the dynamics of the electricity market and the electric grid. If a hydrogen producer purchases zero GHG-emitting electricity that is represented by such EACs it is relatively straightforward to verify both the direct and indirect emissions resulting from such purchase and use. However, for minimal-emitting sources of electricity, additional considerations may be necessary to verify the full range of direct and indirect emissions. The Treasury Department and the IRS request comment on what information is needed to document and verify GHG emissions related to minimal-emitting electricity generation that is purchased and used for hydrogen production for purposes of claiming the section 45V credit.

While the Treasury Department and the IRS are soliciting comment on the type of information that hydrogen producers must provide in order to document and verify the direct and indirect GHG emissions associated with purchased electricity generally, we are also seeking input on two specific types of electricity generation for which GHG emissions can be highly variable or uncertain: fossil fuel-powered electricity generation with CCS and biomass-

powered electricity generation. With regard to non-minimally emitting electricity generation, and fossil fuel-powered generation and biomass powered generation with or without CCS in particular, the Treasury Department and the IRS request comment on mechanisms to verify accurately real-world emissions related to hydrogen production. This includes mechanisms for, among other things, verification of the origin of the feedstock, rate of carbon capture, and other parameters that are relevant to accurate lifecycle analysis, as well as the ability of EAC instruments to represent accurately such attributes. The Treasury Department and the IRS also request comment on specific lifecycle GHG emissions considerations, including the use of counterfactual scenarios, that should be considered in evaluating direct and indirect emissions associated with specific types of biomass and its consumption. The Treasury Department and the IRS also request comment on the extent and manner in which incrementality, temporal matching, and deliverability should be applied in accounting for existing or new electricity generation from biomass or fossil feedstock. These comments may inform future versions of 45VH2-GREET.

a. Incrementality

Proposed § 1.45V-4(d)(3)(i)(A) would provide that an EAC meets the incrementality requirement if the electricity generating facility that produced the unit of electricity to which the EAC relates has a COD (as defined in proposed § 1.45V-4(d)(2)(i)) that is no more than 36 months before the hydrogen production facility for which the EAC is retired was placed in service.

The Treasury Department and the IRS understand that EAC tracking systems capture the COD of each electricity generating facility during the registration process (often using data also reported to the Energy Information Administration), inclusive of month and year, which can be cross-referenced based on project identification codes included on those EACs. That COD should represent the initial date of operation for the relevant electricity generating facility. Third-party verifiers should use this data to confirm the eligibility of purchased and retired EACs.

The Treasury Department and the IRS note that there are circumstances in which an existing higher-emitting electricity generating facility may make upgrades to subsequently deliver minimal-emitting electricity. For example, an existing fossil-fuel

electricity generating facility may add CCS capability, thereby reducing its lifecycle emissions rate as determined in 45VH2-GREET. The Treasury Department and the IRS request comments on whether the electricity generated by such a facility should be considered incremental under circumstances such as if an existing fossil fuel electricity-generating facility after the addition of CCS (after upgrade), had a COD that is no more than 36 months before the relevant hydrogen production facility was placed in service. Comment is also requested on the related question of whether, depending on its carbon dioxide capture rate, it would be appropriate to treat such a facility as a new source of minimal-emitting generation on the grid that would not be associated with induced grid emissions. Relevant to these questions, the Treasury Department and the IRS additionally request comment on what information would be needed to allow for qualifying EACs representing existing fossil fuel-powered electricity from facilities that have added CCS. In particular, comment is requested on whether there are safeguards that can ensure that a hydrogen producer's purchase and use of electricity from an existing fossil fuel-fired electricity generating facility that installs CCS does not result in indirect GHG emissions due to the dynamics of the electricity market and electric grid. The Treasury Department and the IRS request comment on the direct and induced emissions impacts of making such a facility eligible, and whether and under what circumstances it would be appropriate to do so.

Proposed § 1.45V-4(d)(3)(i)(B) would provide an alternative test for establishing incrementality for electricity generating facilities that undergo an uprate. Proposed § 1.45V-4(d)(3)(i)(B) would provide that an EAC satisfies this alternative test if the electricity represented by the EAC is produced by an electricity generating facility that had an uprate no more than 36 months before the hydrogen production facility with respect to which the EAC is retired was placed in service and such electricity is part of such electricity generating facility's uprated production.

Proposed § 1.45V-4(d)(3)(i)(B) would provide rules for determining uprated production. Specifically, proposed § 1.45V-4(d)(3)(i)(B) would provide that an uprated electricity generating facility's production must be prorated to each hour or year, consistent with the requirements in proposed § 1.45V-4(d)(3)(ii), of such facility's generation by multiplying each hour's production

by the uprated production rate to determine the electricity to which the uprate relates. Proposed § 1.45V–4(d)(3)(i)(B) would define key terms, including: (i) “uprate,” which means an increase in an electricity generating facility’s rated nameplate capacity (in nameplate megawatts); (ii) “pre-uprate capacity,” which means the nameplate capacity of an electricity generating facility immediately before an uprate; (iii) “post-uprate capacity,” which means the nameplate capacity of an electricity generating facility immediately after an uprate; (iv) “incremental generation capacity,” which means the increase in an electricity generating facility’s rated nameplate capacity from the pre-uprate capacity to the post-uprate capacity; (v) “uprated production rate,” which means the incremental generation capacity (in nameplate megawatts) divided by the post-uprate capacity (in nameplate megawatts); and (vi) “uprated production,” which means the uprated production rate of an electricity generating facility multiplied by its total generation output in a given hour (in megawatt hours). Proposed § 1.45V–4(d)(3)(i)(C) would provide an example to illustrate the application of the alternative test for establishing incrementality due to uprates.

The DOE has advised that there are circumstances during which diversion of existing minimal (that is, zero or near-zero) emissions power generation to hydrogen production is unlikely to result in significant induced GHG emissions.¹³ Such circumstances may include generation from minimal-emitting power plants (i) that would retire absent the ability to sell electricity for qualified clean hydrogen production, (ii) during periods in which minimal-emitting generation would have otherwise been curtailed, if marginal emissions rates are minimal, or (iii) in locations where grid-electricity is 100 percent generated by minimal-emitting generators or where increases in load do not increase grid emissions, for example, due to State policy capping total GHG emissions such that new load must be met with minimal-emitting generators. The Treasury Department and the IRS seek comments on whether and how to provide alternative approaches to identifying circumstances in which there is minimal risk of significant induced grid emissions for

certain existing electricity generating facilities.

The Treasury Department and the IRS are considering providing, in the final regulations, alternative circumstances under which an EAC may be deemed to satisfy the incrementality requirement. The Treasury Department and the IRS request comments on these specific circumstances as described in part V.C.2.a.i through iii of this Explanation of Provisions.

i. Avoided Retirements Approach

The Treasury Department and the IRS seek comments on whether to recognize an avoided retirements approach that would treat EACs from an existing electricity generating facility as satisfying the incrementality requirement if the facility is likely to avoid retirement because of its relationship with a hydrogen production facility. With respect to this potential approach, the Treasury Department and the IRS request comments on the following: (i) the appropriate criteria that should be considered to assess retirement risk; (ii) the extent to which demonstration of financial loss, projected or actual local electricity market conditions, presence of out-of-market financial support (which could potentially include financial support driven by Federal or State policy, bilateral contracts for EACs or above-market electricity sales, or revenue provided by cost-of-service regulation), or upcoming relicensing decisions, in combination, are appropriate criteria to assess risk; (iii) industry best practices for estimating financial loss and the documentation necessary to support those estimates; (iv) the appropriate criteria that should be taken into account to assess the likelihood that an electricity generator’s relationship with a hydrogen production facility avoids retirement of the generator (for example, size of electrolyzer, co-location, contract length, or otherwise); (v) the appropriate criteria that should be taken into account to ensure that only electricity generation supplying the minimum hydrogen production necessary to avoid retirement is counted as incremental, and, in particular, whether there should be a cap on the amount of generation from a given facility that qualifies as incremental and how such a cap should be determined; (vi) the period during which any determination of incrementality of existing electricity generators would be maintained before a new showing would be required; (vii) the process by which eligibility for this approach should be determined and any related administrability considerations;

and (viii) what role, if any, EAC tracking systems should play in the verification or tracking of eligible EACs from such electricity generators.

With respect to processes that may be used to implement this approach, the Treasury Department and the IRS request comments on whether such approach should allow existing minimal-emitting generators that wish to provide EACs to hydrogen producers to demonstrate incrementality through submission to the IRS or another Federal agency, such as the DOE, specific information that supports a conclusion that the electricity generator is at risk of retirement that may be mitigated by sales to hydrogen producers, and, if so, what information and information submission process should be required.

The available data on retirement risk indicates this approach may be warranted. Some clean power plants, primarily nuclear plants, have retired in recent years. Based on data from the Energy Information Administration (EIA), from 2013 through 2022, 10,800 megawatts (MW) of nuclear, 1,700 MW of wind, 950 MW of hydropower, and 360 MW of solar have retired.¹⁴ Studies have shown that there is risk of continued retirement in the years ahead.¹⁵ The EIA, for example, estimates that an additional 4,600 MW of existing nuclear plants may retire through 2032, equivalent to five percent of the existing nuclear fleet (1,900 gigawatts (GW) of renewable power plants may retire as well).¹⁶ Some of these plant owners (primarily owners of nuclear plants) may decide whether to retire the plants based on the finances of continuing to operate the plants. It is likely that for some plants, additional revenue from selling EACs and electricity to hydrogen producers may improve the financial outlook of the plant and help avert retirement, thereby keeping the minimal-emitting power plant in operation and not resulting in induced grid emissions compared to a scenario in which the plant retires.

¹⁴ Monthly Generator Report Based on Form 860 available at <https://www.eia.gov/electricity/data/eia860m/>.

¹⁵ See John Bistline et al., “Emissions and energy impacts of the Inflation Reduction Act”, 380Science, 1324–27, June 29, 2023, available at <https://www.science.org/doi/10.1126/science.adg3781>; U.S. Energy Information Administration, Annual Energy Outlook 2023, March 16, 2023, available at https://www.eia.gov/outlooks/aeo/tables_ref.php.

¹⁶ U.S. Energy Information Administration, Annual Energy Outlook 2023, March 16, 2023, available at https://www.eia.gov/outlooks/aeo/tables_ref.php.

¹³ DOE. 2023. “Assessing Lifecycle Greenhouse Gas Emissions Associated with Electricity Use for the Section 45V Clean Hydrogen Production Tax Credit.” Washington, DC: U.S. Department of Energy, available at www.energy.gov/45vresources.

ii. Zero or Minimal Induced Grid Emissions Through Modeling or Other Evidence

The Treasury Department and the IRS seek comments on whether to provide an opportunity to demonstrate zero or minimal induced grid emissions through modeling or other evidence under specific circumstances. A demonstrated or modeled minimal-emission approach could treat electricity produced by certain existing electricity generating facilities under certain circumstances as satisfying the incrementality requirement if it is demonstrated that such sources and circumstances would not give rise to significant induced grid emissions. Such a showing could be based on modeling or potentially be deemed to be made in certain circumstances based on regional grid characteristics, state policy, or facility history.

The Treasury Department and the IRS request comments on this demonstrated or modeled minimal-emission approach, including: (i) the circumstances in which it should be available and the criteria that are appropriate to evaluate and determine whether those circumstances occur; (ii) who should apply under this approach, the electricity generation facility, the hydrogen producer, or both; (iii) what data or modeling should be submitted; (iv) best practices for making such demonstrations, including for ensuring the impartiality and replicability of calculation approaches; (v) how an administrator of such a program would validate the accuracy of applicant submissions; (vi) under what circumstances, if any, it would be appropriate to deem generation to satisfy the incrementality requirement without modeling, and what documentation should be provided in these cases; (vii) the process by which eligibility for this approach should be determined and any related administrability considerations; (viii) the period during which any determination of incrementality would be maintained before a new showing would be required; and (ix) the circumstances and capability of EACs and tracking systems to track and verify energy attributes from such sources.

There are several circumstances that may be covered under this pathway. Periods of curtailment or zero or negative pricing is one such circumstance. Hydropower plants sometimes “spill” water, a form of curtailment. Curtailment of minimal-emitting electricity generation tends to occur during times when wholesale electricity prices are zero or negative on

a system-wide basis. Purchasing EACs from existing minimal-emitting electricity generators under these conditions would have limited or no induced grid emissions as these are times during which increased load would tend to be met by the otherwise curtailed minimal-emitting electricity generators rather than inducing increased generation from emitting electricity generators, and so is unlikely to significantly increase induced grid emissions.

Similarly, if in a particular region, all generation—including imported generation—comes from minimal-emitting electricity generators, then increased load is unlikely to significantly increase induced grid emissions. The same may be true if a region is subject to a state or local policy that ensures that new load is met with minimal-emitting electricity generation.

There may be limited risk of significant induced GHG emissions for islanded generation systems. Diversion of generation from a minimal-emitting electricity generator that has never been connected to the grid generally may not have the same induced GHG emissions effects as diversion from an electricity generator that is connected to the grid. Induced GHG emissions could occur, however, if the energy demand that the existing minimal-emitting electricity generator previously met is instead met by a different, emitting, energy source. For example, an onsite minimal-emitting electricity generator that powers an industrial facility could be diverted for hydrogen production, in which case the induced GHG emissions would depend on what happens at the site to meet the power needs of the industrial facility (unless the industrial facility ceases operation).

iii. Formulaic Approaches To Addressing Incrementality From Existing Clean Generators

The Treasury Department and the IRS recognize the difficulty in reliably identifying the specific electricity generators and specific times and places in which the circumstances described in part V.C.2.a.i and ii of this Explanation of Provisions might occur. Therefore, the Treasury Department and the IRS are also considering alternative approaches that would serve as proxy for all the pathways described in part V.C.2.a.i and part V.C.2.a.ii of this Explanation of Provisions. EACs that satisfy the incrementality requirement through this pathway would still be required to meet temporal matching and deliverability requirements.

One such approach would deem five percent of the hourly generation from

minimal-emitting electricity generators (for example, wind, solar, nuclear, and hydropower facilities) placed in service before January 1, 2023, as satisfying the incrementality requirement. This pathway may be appropriate because some circumstances (including periods of curtailment or times when generation from minimal-emitting electricity generation is on the margin) may make the resulting incremental generation difficult to anticipate or identify, or because the process for identifying the circumstances (such as avoided retirement risk or modeling of minimal-emissions) may be overly burdensome to evaluate for specific electricity generators or require data that is not available. In some instances, for example, in determining whether EACs come from electricity generation that would otherwise have been curtailed, these circumstances require understanding of counterfactual “what if” scenarios that depend on numerous assumptions. In other circumstances, for example, in determining whether EACs come from minimal-emitting electricity generators that otherwise would have retired or if policy regimes restrict increases in grid emissions in the face of growing electricity demand, they may require detailed assessment and pre-qualification based on applicant-submitted information and forecasts with related concerns about information accuracy. In still other cases, they may require complex geographically and temporally granular modeling and data (such as for marginal emission rates that consider operational and structural effects¹⁷) in concert with hourly EAC tracking infrastructure that is not yet widely available.

The Treasury Department and the IRS are mindful of the risk that an allowance without further temporal, spatial, and circumstantial precision results in hydrogen production facilities receiving credits for which they should not be eligible given their induced emissions rates. Given the risks of induced GHG emissions, the Treasury Department and the IRS believe that a broadly available allowance that is not tailored to specific geographic or other conditions should not be greater than the national average rate of the occurrence of the above circumstances and instead should be a conservative lower bound of the national average. The DOE reports that wind curtailment in 2022 averaged 5.3 percent of total wind generation

¹⁷ DOE 2023. “Assessing Lifecycle Greenhouse Gas Emissions Associated with Electricity Use for the Section 45V Clean Hydrogen Production Tax Credit.” Washington, DC: U.S. Department of Energy, available at www.energy.gov/45vresources.

nationwide (data are only available for Independent System Operator (ISO) regions),¹⁸ and Lawrence Berkeley National Laboratory reports curtailment rates for solar photovoltaics at over 10 percent of solar generation in ERCOT and over 3 percent in California Independent System Operator (CAISO).

Purchasing EACs from existing minimal-emission electricity generators, whether or not from the electricity generators that would otherwise curtail their output, under these conditions would have limited risk of induced grid emissions. As noted earlier, curtailment is most likely to occur in the face of negative wholesale electricity prices if the marginal grid emissions rate is minimal or zero. Based on a data tool developed by Lawrence Berkeley National Laboratory that considers over 50,000 wholesale pricing nodes across the nation, negative wholesale prices occurred during roughly five percent of hours over the last several years (6.3 percent of hours in 2022, 5.8 percent in 2021, 4.8 percent in 2020, 3.3 percent in 2019, and 2.3% in 2018).¹⁹ These are times during which increased load is unlikely to increase significantly induced grid emissions.²⁰ Modeled data from the National Renewable Energy Laboratory (NREL) is broadly consistent with these trends. Specifically, NREL's Cambium data set for 2024 shows that long-run marginal emissions rates on a national basis are projected to be at or near zero for about five percent of hours, times during which minimal-emitting electricity generators are on the margin and often curtailed.²¹

In addition, some minimal-emitting electricity generators are at risk of retirement, including about five percent of the nuclear fleet according to EIA estimates. A percentage allowance can also serve as proxy for avoided retirements.

The Treasury Department and the IRS seek comments on this five percent-

allowance approach, including the merits of this approach compared to the targeted pathways described, particularly with respect to balancing administrative feasibility and burden with accuracy of identifying circumstances with a low risk of induced grid emissions. The Treasury Department and the IRS also seek comments on whether 5 percent is the appropriate magnitude for an allowance. In particular, as noted earlier, data show that curtailment rates have increased in recent years, and NREL's Cambium model predicts additional increases going forward. In light of these data and projections, the Treasury Department and the IRS seek comments on whether a higher amount, such as up to 10 percent, would be appropriate, either in general or in certain cases or circumstances. The Treasury Department and the IRS also seek comments on: (i) how a five-percent allowance should be tracked, allocated, and administered and how feasible it is for EAC tracking systems to incorporate data on such an allowance; (ii) whether the five percent should apply to all existing minimal-emitting electricity generators in all locations or a subset and for what reasons; (iii) whether such an allowance should be assessed at the individual plant level or across an operator's fleet within the same deliverability region; and (iv) any other administrability considerations. The Treasury Department and the IRS seek comments specifically on whether and how the "averaging" approach of a proxy appropriately captures the circumstances in which generation is incremental or does not generate induced grid emissions. The Treasury Department and the IRS also seek comments on how and whether the targeted alternative approaches or the other proxy approaches described subsequently in this part V.C.2.a.iii of this Explanation of Provisions might replace the five-percent allowance or might be coordinated with the allowance.

The Treasury Department and the IRS invite comments on alternative formulaic, proxy approaches that might better capture conditions under which using existing minimal-emitting electricity generation to produce hydrogen does not significantly impact induced grid emissions. The Treasury Department and the IRS request comments on whether there would be an appropriate, more formulaic approach to capturing retirement risk, instead of the application-based process or the five-percent allowance. Comments are specifically requested on

whether such an alternative approach should be limited to facilities with specific technical, market, or geographic characteristics corresponding with a greater risk of retirement (for example, participation in a wholesale market, lack of state support for a facility, nuclear plants with a single reactor) and higher likelihood that using a subset of electricity generation and related EACs for hydrogen production would minimize the risk.

In particular, the Treasury Department and the IRS seek comments on whether existing nuclear and hydroelectric facilities that need to undertake a relicensing process are generally at higher risk of retirement without additional financial assistance and, if so, what considerations should be integrated into a potential formulaic approach. Comments are further requested on whether there are particular characteristics of hydrogen production facilities associated with existing generators at risk of retirement that should be considered (i) to demonstrate that the hydrogen production reduces retirement risk, such as co-location of hydrogen production with an existing generator and (ii) to assess the minimum hydrogen production necessary to reduce retirement risk, such as limitations on project size, electrolyzer capacity, or percent of generation used by the hydrogen production. Comments are further requested on how to determine the portion of such electricity generation and related EACs, which is generally likely to be sufficient to minimize that risk. Similarly, with respect to the modeled or demonstrated approach described in part V.C.2.a.ii of this Explanation of Provisions, the Treasury Department and the IRS request comments on whether there are formulaic approaches that might be used instead of an application-based pre-qualification process and the broad five-percent allowance.

For each of these possible alternative approaches to establish incrementality, the Treasury Department and the IRS request comments on how eligibility for the approach may be reliably verified by an unrelated party and administered by the IRS.

b. Temporal Matching

Proposed § 1.45V-4(d)(3)(ii)(A) would provide the general rule that an EAC satisfies the temporal matching requirement if the electricity represented by the EAC is generated in the same hour that the taxpayer's hydrogen production facility uses electricity to produce hydrogen. Proposed § 1.45V-4(d)(3)(ii)(B) would

¹⁸ Office of Energy Efficiency & Renewable Energy, DOE, "Land-Based Wind Market Report: 2023 Edition," Aug. 24, 2023, available at <https://www.energy.gov/eere/wind/articles/land-based-wind-market-report-2023-edition>.

¹⁹ Berkeley Lab, Electricity Markets & Policy, The Renewables and Wholesale Electricity Prices (ReWEP) Tool, available at <https://emp.lbl.gov/renewables-and-wholesale-electricity-prices-rewep>.

²⁰ For example, see New York State Energy Research and Development Authority (NYSERDA). 2022 "Projected Emission Factors for New York State Grid Electricity," NYSERDA Report Number 22-18, available at <https://www.nyserdny.gov/-/media/Project/Nyserda/Files/Publications/Energy-Analysis/22-18-Projected-Emission-Factors-for-New-York-Grid-Electricity.pdf>.

²¹ See National Renewable Energy Laboratory, Energy Analysis, Cambium, available at <https://www.nrel.gov/analysis/cambium.html>. Long-run marginal emissions rates at or near zero defined as under 25 kg CO₂e/MWh.

provide a transition rule to allow an EAC that represents electricity generated before January 1, 2028 to fall within the general rule provided in proposed § 1.45V–4(d)(3)(ii)(A) if the electricity represented by the EAC is generated in the same calendar year that the taxpayer's hydrogen production facility uses electricity to produce hydrogen. The DOE has advised that hourly matching is necessary to properly address significant indirect emissions from electricity use and that the tracking systems and related contractual structures for hourly matching will take some time to develop to an appropriate level of maturity.²² This transition rule is intended to provide time for the EAC market to develop the hourly tracking capability necessary to verify compliance with this requirement.

Hourly tracking systems for EACs are not yet broadly available across the country and will take some time to develop.²³ In a recent survey of nine existing tracking systems,²⁴ two of the tracking systems indicated that they are already tracking on an hourly basis, although software functionality in these two systems remains limited. Fully developing the functionality of these systems will take time, as will creating and developing the functionality of hourly tracking infrastructure in other regions of the country. Of the other tracking systems, assuming that challenges are overcome, four gave a timeline of less than one year to two years, and one gave a timeline of three to five years; in the latter case, the respondent noted that the timeline could be closer to three years if there is full state agency buy-in, clear instructions are received from federal or state agencies, and funding for stakeholder participation is made available. Two tracking systems declined to give a timeline to develop this functionality. In the same survey, tracking systems identified a number of challenges to hourly tracking that will need to be overcome, including cost, regulatory approval, interactions with state policy, sufficient stakeholder

engagement, data availability and management, and user confusion. Moreover, once the tracking software infrastructure is in place nationally, it may take additional time for transactional structures and efficient hourly EAC markets to develop. Among the issues that require resolution as EAC tracking systems move to hourly resolution is the treatment of electricity storage.²⁵

Given the state of tracking systems, the expected responses to this proposed rule, and the impact of demand to drive development of the tracking systems, the Treasury Department and the IRS anticipate that the proposed duration of the transition rule would allow sufficient time for systems to develop hourly tracking mechanisms and for the associated trading markets to develop. The Treasury Department and the IRS acknowledge uncertainty in the timing of implementing an hourly matching requirement, however, and request comments on the appropriate duration of this transition rule to hourly matching, including specific data regarding current industry practices, the predicted timelines for development of hourly tracking mechanisms, and the predicted timeline for market development for hourly EACs.

c. Deliverability

Proposed § 1.45V–4(d)(3)(iii) would provide that an EAC meets the deliverability requirements if the electricity represented by the EAC is generated by a source that is in the same region (as defined in proposed § 1.45V–4(d)(2)(vi)) as the relevant hydrogen production facility. This approach provides reasonable assurances of deliverability of electricity because the regions, as defined earlier, were developed by the DOE in consideration of transmission constraints and congestion and, in many cases, match power-systems operation. The Treasury Department and the IRS recognize that transmission limitations also exist within these specified regions but are not aware of readily administrable options to reflect those grid constraints. The DOE has generally found that inter-regional transmission constraints tend to be greater than within-region constraints.²⁶ The Treasury Department and the IRS request comments on

whether there are additional ways to establish deliverability, such as circumstances indicating that electricity is actually deliverable from an electricity generating facility to a hydrogen production facility, even if the two are not located in the same region or if the clean electricity generator is located outside of the United States.

VI. Procedures for Verification of Qualified Clean Hydrogen Production and Sale or Use

Section 45V(c)(2)(B)(ii) provides that hydrogen is not qualified clean hydrogen unless “the production and sale or use of such hydrogen is verified by an unrelated party.”

A. Requirements for Verification Reports

Proposed § 1.45V–5(a) would provide that a verification report must be attached to the taxpayer's Form 7210, *Clean Hydrogen Production Credit*, or any successor form(s), and included with the taxpayer's Federal income tax return or information return for each qualified clean hydrogen production facility and for each taxable year in which the taxpayer claims the section 45V credit. Proposed § 1.45V–5(b) would provide that the verification report specified in § 1.45V–5(a) must be prepared by a qualified verifier (as defined in § 1.45V–5(h)) under penalties of perjury. Proposed § 1.45V–5(b)(1) through (6) would describe the following information that a verification report must contain: (i) an attestation from the qualified verifier regarding the taxpayer's production of qualified clean hydrogen for sale or use during the taxable year (production attestation), (ii) an attestation from the qualified verifier regarding the amount of such qualified clean hydrogen sold or used (sale or use attestation), (iii) an attestation from the qualified verifier regarding conflicts of interest (conflict attestation), (iv) certain information regarding the qualified verifier, including documentation of the qualified verifier's qualifications (qualified verifier statement), (v) certain general information about the taxpayer's hydrogen production facility where the hydrogen production undergoing verification occurred, and (vi) any documentation necessary to substantiate the verification process given the standards and best practices prescribed by the qualified verifier's accrediting body and the circumstances of the taxpayer and the taxpayer's hydrogen production facility.

²² DOE. 2023. “Assessing Lifecycle Greenhouse Gas Emissions Associated with Electricity Use for the Section 45V Clean Hydrogen Production Tax Credit,” Washington, DC: U.S. Department of Energy, available at www.energy.gov/45vresources.

²³ Electric Power Research Institute, “24/7 Carbon-free Energy: Matching Carbon-free Energy Procurement to Hourly Electric Load,” Dec. 15, 2022, available at <https://www.epri.com/research/products/000000003002025290>.

²⁴ Center for Research Solutions, “Readiness for Hourly: U.S. Renewable Energy Tracking Systems,” June 15, 2023, available at <https://resource-solutions.org/wp-content/uploads/2023/06/Readiness-for-Hourly-U.S.-Renewable-Energy-Tracking-Systems.pdf>.

²⁵ DOE. 2023. “Assessing Lifecycle Greenhouse Gas Emissions Associated with Electricity Use for the Section 45V Clean Hydrogen Production Tax Credit,” Washington, DC: U.S. Department of Energy, available at www.energy.gov/45vresources.

²⁶ DOE, National Transmission Needs Study, Oct. 2023, available at https://www.energy.gov/sites/default/files/2023-10/National_Transmission_Needs_Study_2023.pdf.

B. Requirements for Production Attestation

Proposed § 1.45V–5(c)(1) would provide that a production attestation must state, under penalties of perjury, that the qualified verifier performed a verification sufficient to determine that the operation, during the applicable taxable year, of the hydrogen production facility that produced the hydrogen for which the section 45V credit is claimed, and any EACs applied pursuant to proposed § 1.45V–4(d), are accurately reflected in: (i) the amount of qualified clean hydrogen produced by the taxpayer that is claimed on the Form 7210, *Clean Hydrogen Production Credit*, or any successor form(s), to which the verification report is attached; and (ii) either the data the taxpayer entered into the most recent GREET model (as defined in proposed § 1.45V–1(a)(8)(ii)) to determine the lifecycle GHG emissions rate that is claimed on the Form 7210, or the data the taxpayer submitted in the PER petition relating to the hydrogen for which the section 45V credit is claimed, and which was provided to the DOE in support of the taxpayer's request for the emissions value provided in the PER petition. For any acquisition and retirement of qualifying EACs, the verification must include validation that any purchases of EACs from specified sources as entered into the most recent GREET model or used as part of a PER application meet all requirements for being qualifying EACs, and that any required technical parameters of the generating source (for example, CCS capture rate, or sources of biomass) as entered into 45VH2–GREET or as part of a PER application are accurate.

Proposed § 1.45V–5(c)(2) would provide that, if the production attestation attests to the information specified in proposed § 1.45V–5(c)(1)(ii)(B), then the production attestation must also specify the emissions value received from the DOE that was calculated using such data, expressed in kilograms of CO₂e per kilogram of hydrogen.

Proposed § 1.45V–5(c)(3) would provide that the production attestation must specify the lifecycle GHG emissions rate (expressed in kilograms of CO₂e per kilogram of hydrogen) and the amount of qualified clean hydrogen produced by the taxpayer, (expressed in kilograms), that are claimed on the Form 7210, *Clean Hydrogen Production Credit*, or any successor form(s), to which the verification report is attached.

C. Requirements for Sale or Use Attestation

Proposed § 1.45V–5(d)(1) would provide that the sale or use attestation must be an attestation, made under penalties of perjury, that the qualified verifier performed a verification sufficient to determine that the amount of qualified clean hydrogen that is specified in the production attestation (described in proposed § 1.45V–5(c)), and that is claimed on the Form 7210, *Clean Hydrogen Production Credit*, or any successor form(s), to which the verification report is attached, has been sold or used.

Proposed § 1.45V–5(d)(2) would provide that, for purposes of section 45V(c)(2)(B)(ii) and § 1.45V–1(a)(9)(ii), the hydrogen specified in proposed § 1.45V–5(d)(1) has been used if a person makes a verifiable use of such hydrogen. Section 45V does not deny a section 45V credit if the hydrogen is sold or used outside the United States (as defined in section 638(1) or a United States territory (having the meaning of the term “possession” as defined in section 638(2))). Thus, a verifiable use can occur within or outside the United States. A verifiable use can be made by the taxpayer or a person other than the taxpayer. For example, in a tolling arrangement pursuant to which a service recipient provides raw materials or inputs such as water or electricity to a third-party service provider that owns a hydrogen production facility (the toller), and the toller produces hydrogen for the service recipient using the service recipient's raw materials or inputs in exchange for a fee, use of the hydrogen by the service recipient would be a verifiable use. However, a verifiable use includes neither (i) use of hydrogen to generate electricity that is then directly or indirectly used in the production of more hydrogen, nor (ii) venting or flaring hydrogen.

Excluding those activities from qualifying as a verifiable use is intended to prevent the wasteful production of hydrogen and abusive section 45V credit generation schemes. For example, without this restriction, the section 45V credit could be exploited through the production of qualified clean hydrogen that is used to generate electricity that is, in turn, used to produce additional qualified clean hydrogen. The primary purpose of these arrangements would be the exploitation of the section 45V credit and possibly other Federal income tax credits. Such arrangements are inconsistent with the intent of section 45V and with the statutory “use” requirement because they would incentivize the inefficient production of

qualified clean hydrogen for unproductive use and would result in excessive claims of the section 45V credit. The Treasury Department and the IRS request comments on whether there are additional safeguards that the regulations could adopt to prevent this or similar types of abusive section 45V credit claims, including section 45V credit claims arising if such circular arrangements are coordinated among multiple parties.

D. Requirements for Conflict Attestation

Proposed § 1.45V–5(e)(1) would provide that the verification report must also include a conflict attestation, made under penalties of perjury, that (i) the qualified verifier has not received a fee based to any extent on the value of any section 45V credit that has been or is expected to be claimed by any taxpayer and no arrangement has been made for such fee to be paid at some time in the future; (ii) the qualified verifier was not a party to any transaction in which the taxpayer sold qualified clean hydrogen it had produced or in which the taxpayer purchased inputs for the production of such hydrogen; (iii) the qualified verifier is not related, within the meaning of section 267(b) or 707(b)(1), to, or an employee of, the taxpayer; (iv) the qualified verifier is not married to an individual described in proposed § 1.45V–5(e)(1)(iii); and (v) if the qualified verifier is acting in his or her capacity as a partner in a partnership, an employee of any person, whether an individual, corporation, or partnership, or an independent contractor engaged by a person other than the taxpayer, the attestations under proposed § 1.45V–5(e)(1)(i) through (iv) must be made with respect to the partnership or the person who employs or engages the qualified verifier.

Proposed § 1.45V–5(e)(2) would provide that, if a transfer election has been made under section 6418(a) of the Code with respect to the section 45V credit, then the attestation requirements under proposed § 1.45V–5(e)(1) would need to be made with respect to the qualified verifier's independence from both the eligible taxpayer (as defined in section 6418(f)(2) and § 1.6418–1(b)) and the transferee taxpayer (as described in section 6418(a) and defined in § 1.6418–1(m)).

E. Requirements for Qualified Verifier Statement

Proposed § 1.45V–5(f) would provide that the qualified verifier statement must contain (i) the qualified verifier's name, address, and taxpayer identification number; (ii) the qualified verifier's qualifications to conduct the

verification, including the qualified verifier's education and experience and a photocopy of the qualified verifier's certificate received from their accrediting body; (iii) if the qualified verifier is acting in his or her capacity as a partner in a partnership, an employee of any person, whether an individual, corporation, or partnership, or an independent contractor engaged by a person other than the taxpayer, the name, address, and taxpayer identification number of the partnership or the person who employs or engages the qualified verifier; (iv) the signature of the qualified verifier and the date signed by the qualified verifier; and (v) a statement that the verification was conducted for Federal income tax purposes.

F. General Information Required To Be Included in Verification Report

Proposed § 1.45V–5(g) would provide that the verification report must include (i) the location of the hydrogen production facility; (ii) a description of the hydrogen production facility, including its method of producing hydrogen; (iii) the type(s) of feedstock(s) used by the hydrogen production facility during the taxable year of production; (iv) the amount(s) of feedstock(s) used by the hydrogen production facility during the taxable year of production; and (v) a list of the metering devices used to record any data used by the qualified verifier to support the production attestation along with a statement that the qualified verifier is reasonably assured that the device(s) underwent industry-appropriate quality assurance and quality control, and that the accuracy and calibration of the device has been tested in the last year.

G. Definitions Related to Verifications

Proposed § 1.45V–5(h) would define the term “qualified verifier” to mean any individual or organization with active accreditation (i) as a validation and verification body from the American National Standards Institute National Accreditation Board; or (ii) as a verifier, lead verifier, or verification body under the California Air Resources Board Low Carbon Fuel Standard program. The Treasury Department and the IRS request comment on this definition of “qualified verifier,” including on whether additional accreditations that demonstrate sufficient expertise for verification of lifecycle analysis for the section 45V credit should be included.

Proposed § 1.45V–5(i) would define the term “unrelated party” (as described in section 45V(c)(2)(B)(ii)) to mean a

qualified verifier who meets the conflict attestation requirements as provided in proposed § 1.45V–5(e).

H. Requirements for Taxpayers Claiming Both the Section 45V Credit and the Section 45U Credit

Proposed § 1.45V–5(j) would provide requirements that, in the case of a taxpayer who produces electricity for which either the section 45 credit or section 45U credit is claimed and the taxpayer or a related person (as defined in section 45(e)(4)) uses such electricity (and related EACs) to produce hydrogen for which the section 45V credit is claimed, the verification report must also contain attestations that the qualified verifier performed a verification sufficient to determine that (i) the electricity used to produce hydrogen was produced at the relevant facility for which either the section 45 credit or section 45U credit was claimed, (ii) the given amount of such electricity (in kilowatt hours) used to produce hydrogen at the relevant qualified clean hydrogen production facility is reasonably assured of being accurate, and (iii) the electricity for which a section 45 or section 45U credit was claimed is represented by EACs that are retired in connection with the production of such hydrogen.

I. Required Time for Filing a Verification Report

Proposed § 1.45V–5(k) would provide that a verification report must be signed and dated by the qualified verifier no later than (i) the due date, including extensions, of the Federal income tax return or information return for the taxable year during which the hydrogen undergoing verification is produced; or (ii) in the case of a section 45V credit first claimed on an amended return or administrative adjustment request (AAR), the date on which the amended return or AAR is filed.

VII. Placed in Service Date for Existing Facility That Is Modified or Retrofitted To Produce Qualified Clean Hydrogen

A. Modification of an Existing Facility

Under section 45V(d)(4), in the case of any facility that was originally placed in service before January 1, 2023, and, prior to the modification (described in section 45V(d)(4)(B)), did not produce qualified clean hydrogen, and after the date the facility was originally placed in service (i) is modified to produce qualified clean hydrogen, and (ii) amounts paid or incurred with respect to the modification are properly chargeable to the taxpayer's capital

account, the facility will be deemed to have been originally placed in service as of the date the property required to complete the modification is placed in service. The rule in section 45V(d)(4) for modification of existing facilities applies to modifications made after December 31, 2022. See section 13204(a)(5)(C) of the IRA.

Proposed § 1.45V–6(a)(1) would incorporate the statutory provisions of section 45V(d)(4). Proposed § 1.45V–6(a)(2) would further provide that an existing facility will not be deemed to have been originally placed in service as of the date the property required to complete the modification is placed in service unless the modification is made for the purpose of enabling the facility to produce qualified clean hydrogen and the taxpayer pays or incurs an amount with respect to such modification that is properly chargeable to the taxpayer's capital account for the facility. Proposed § 1.45V–6(a)(2) would also provide that a modification is made for the purpose of enabling the facility to produce qualified clean hydrogen if the facility could not produce hydrogen with a lifecycle GHG emissions rate that is less than or equal to 4 kilograms of CO₂e per kilogram hydrogen but for the modification. Changing fuel inputs to the hydrogen production process, such as switching from conventional natural gas to renewable natural gas, would not qualify as a facility modification for purposes of proposed § 1.45V–6(a)(2).

Examples 1, 2, and 3 of proposed § 1.45V–6(c) would provide examples illustrating the application of the rules provided by section 45V(d)(4) and proposed § 1.45V–6(a).

B. Retrofit of an Existing Facility (80/20 Rule)

Proposed § 1.45V–6(b) would provide that an existing facility may establish a new date on which it is considered originally placed in service for purposes of section 45V, even though the facility contains some used property, provided the fair market value of the used property is not more than 20 percent of the facility's total value (the cost of the new property plus the value of the used property) (80/20 Rule). Proposed § 1.45V–6(b) would further provide that for purposes of the 80/20 Rule, the cost of new property includes all properly capitalized costs of the new property included within the facility. Proposed § 1.45V–6(b) would provide that, if a facility satisfies the requirements of the 80/20 Rule, then the date on which such facility is considered originally placed in service for purposes of section 45V(a)(1) is the date on which the new property added to the facility is placed

in service. Proposed § 1.45V–6(b) would also provide that the 80/20 Rule applies to any existing facility, regardless of whether the facility previously produced qualified clean hydrogen and regardless of when the facility was originally placed in service (before application of proposed § 1.45V–6(b)). Examples 4 and 5 of proposed § 1.45V–6(c) would provide examples illustrating the application of the 80/20 Rule.

VIII. Election To Treat a Clean Hydrogen Production Facility as Energy Property for Purposes of the Section 48 Credit

A. Overview

Section 48(a)(15) allows a taxpayer that owns and places in service a specified clean hydrogen production facility (as defined in section 48(a)(15)(C)) to make an irrevocable election to claim the section 48 credit in lieu of the section 45V credit for any qualified property (as defined in section 48(a)(5)(D)) that is part of the facility. This provision is effective for property placed in service after December 31, 2022. For any property that is placed in service after December 31, 2022, and the construction of which begins before January 1, 2023, section 13204(c)(3) of the IRA provides that section 48(a)(15) applies only to the extent of the basis of such property that is attributable to construction, reconstruction, or erection occurring after December 31, 2022.

Proposed § 1.48–15(a) would provide that a taxpayer that owns and places in service a specified clean hydrogen production facility (as defined in section 48(a)(15)(C) and proposed § 1.48–15(b)) can make an irrevocable election under section 48(a)(15)(C)(ii)(II) to treat any qualified property (as defined in section 48(a)(5)(D)) that is part of the facility as energy property for purposes of section 48.

Proposed § 1.48–15(b) would define the term “specified clean hydrogen production facility” to mean any qualified clean hydrogen production facility (within the meaning of section 45V(c)(3)) and proposed § 1.45V–1(a)(10)): (i) that is placed in service after December 31, 2022; (ii) with respect to which no section 45V credit or section 45Q credit has been allowed, and for which the taxpayer makes an irrevocable election to have section 48(a)(15) apply; and (iii) for which an unrelated party has verified in the manner specified in proposed § 1.48–15(e) that such facility produces hydrogen through a process that results in lifecycle GHG emissions that are consistent with the hydrogen that such

facility was designed and expected to produce under section 48(a)(15)(A)(ii) and proposed § 1.48–15(c).

Proposed § 1.48–15(c)(1) would provide the energy percentage (used by a taxpayer to calculate a section 48 credit) for a specified clean hydrogen production facility that is designed and reasonably expected to produce qualified clean hydrogen through a process that results in a lifecycle GHG emissions rate of not greater than 4 kilograms of CO₂e per kilogram of hydrogen. Proposed § 1.48–15(c)(2) would further provide that “designed and reasonably expected to produce” means hydrogen produced through a process that results in the lifecycle GHG emissions rate specified in the annual verification report for the taxable year in which the section 48(a)(15) election is made. The Treasury Department and the IRS request comments on this proposed rule and whether there are any challenges to using the lifecycle GHG emissions rate achieved in the taxable year in which the section 48(a)(15) election is made to determine the facility’s energy percentage for purposes of calculating the section 48 credit amount.

B. Election Procedures

1. Time and Manner of Making Election

Proposed § 1.48–15(d)(1) would provide that, to make an election under section 48(a)(15)(C)(ii)(II), a taxpayer must claim the section 48 credit with respect to a specified clean hydrogen production facility on a Form 3468, *Investment Credit*, or any successor form(s), and file the form with the taxpayer’s Federal income tax return or information return for the taxable year in which the specified clean hydrogen production facility is originally placed in service. Proposed § 1.48–15(d)(1) would provide that the taxpayer must also attach a statement to its Form 3468, *Investment Credit*, or any successor form(s), filed with its Federal income tax return or information return that includes all the information required by the instructions to Form 3468, *Investment Credit*, or any successor form(s), for each specified clean hydrogen production facility subject to an election. Proposed § 1.48–15(d)(1) would provide that a separate election must be made for each specified clean hydrogen production facility that meets the requirements provided in section 48(a)(15) to treat the qualified property that is part of the facility as energy property.

Proposed § 1.48–15(d)(1) would further provide that, if any taxpayer owning an interest in a specified clean

hydrogen production facility makes an election with respect to the facility, then that election would be binding on all taxpayers that directly or indirectly own an interest in the facility. Thus, consistent with section 48(a)(15)(B), if a taxpayer owning an interest in a specified clean hydrogen production facility makes an election under section 48(a)(15)(C)(ii)(II), then no other taxpayer owning an interest in the same facility will be allowed a section 45V credit or section 45Q credit with respect to the facility.

The Treasury Department and the IRS request comments on whether, in the context of a specified clean hydrogen production facility that is directly owned through an arrangement properly treated as a tenancy-in-common for Federal income tax purposes or through an organization that has made a valid election under section 761(a) of the Code, each co-owner’s or member’s undivided ownership share of the qualified property comprised in the facility should be treated for purposes of section 48(a)(15)(C)(ii)(II) as a separate facility owned by such co-owner or member, with each such co-owner or member eligible to make a separate election under section 48(a)(15)(C)(ii)(II) to claim the section 48 credit in lieu of the section 45V credit with respect to its undivided ownership interest in the facility or share of the underlying qualified property.

2. Special Rule for Partnerships and S Corporations

Proposed § 1.48–15(d)(2) would provide that, in the case of a specified clean hydrogen production facility owned by a partnership or an S corporation, the election under section 48(a)(15)(C)(ii)(II) would be made by the partnership or S corporation and would be binding on all ultimate credit claimants (as defined in § 1.50–1(b)(3)(ii)). Proposed § 1.48–15(d)(2) would provide that the partnership or S corporation must file a Form 3468, *Investment Credit*, or any successor forms(s), with its partnership or S corporation return for the taxable year in which the specified clean hydrogen production facility is placed in service to indicate that it is making the election, and attach a statement that includes all the information required by the instructions to Form 3468, *Investment Credit*, or any successor form(s), for each specified clean hydrogen production facility subject to the election. Proposed § 1.48–15(d)(2) would provide that the ultimate credit claimant’s section 48 must be based on each claimant’s share of the basis (as defined in § 1.46–3(f)) of the specified

clean hydrogen production facility on a completed Form 3468, *Investment Credit*, or any successor forms(s), and file such form with a Federal income tax return or information return for the taxable year that ends with or within the taxable year in which the partnership or S corporation made the election. Proposed § 1.48–15(d)(2) would provide that the partnership or S corporation making the election must provide the ultimate credit claimants with the necessary information to complete Form 3468, *Investment Credit*, or any successor forms(s), to claim the section 48 credit.

3. Election Irrevocable

Proposed § 1.48–15(d)(3) would provide that the election to treat any qualified property that is part of a specified clean hydrogen production facility as energy property would be irrevocable.

4. Election Availability Date

Proposed § 1.48–15(d)(4) would provide that the election to treat any qualified property that is part of a specified clean hydrogen production facility as energy property would be available for property placed in service after December 31, 2022, and, for any property that began construction before January 1, 2023, only to the extent of the basis thereof attributable to the construction, reconstruction, or erection after December 31, 2022.

C. Third-Party Verification

Proposed § 1.48–15(e)(1) would provide that, in the case of a taxpayer that makes an election under section 48(a)(15)(c)(ii)(II) to treat any qualified property that is part of a specified clean hydrogen production facility as energy property for purposes of the section 48 credit, the taxpayer must obtain an annual verification report for the taxable year in which the election is made and for each taxable year thereafter of the recapture period specified in proposed § 1.48–15(f)(3). Proposed § 1.48–15(e)(1) would further provide that the taxpayer must also submit the annual verification report as an attachment to the Form 3468, *Investment Credit*, or any successor form(s), for the taxable year in which the election is made.

Further, proposed § 1.48–15(e)(2)(i) would provide that the annual verification report must be signed under penalties of perjury by a qualified verifier (as defined in proposed § 1.45V–5(h)) and contain (i) the information specified in §§ 1.45V–5(b) and 1.45V–5(d) through § 1.45V–5(h); (ii) a statement attesting to the lifecycle GHG emissions rate (determined under

section 45V(c) and § 1.45V–4) of the hydrogen produced at the specified clean hydrogen production facility for the taxable year to which the annual verification report relates and that the operation, during such taxable year, of the specified clean hydrogen production facility, and any EACs applied pursuant to § 1.45V–4(d) for the purpose of accounting for such facility's emissions, are accurately reflected in the data the taxpayer entered into the most recent GREET model (as defined in § 1.45V–1(a)(8)(ii)) (or in the data the taxpayer provided to the DOE in support of the taxpayer's request for an emissions value), to determine the lifecycle GHG emissions rate of the hydrogen undergoing verification; and (iii) an attestation that the facility produced hydrogen through a process that results in a lifecycle GHG emissions rate that is consistent with, or lower than, the lifecycle GHG emissions rate of the hydrogen that such facility was designed and expected to produce.

Proposed § 1.48–15(e)(2)(ii) would provide that if a transfer election has been made under section 6418(a) of the Code with respect to the section 48 credit for a specified clean hydrogen production facility, then the conflict attestation containing the information specified in proposed § 1.45V–5(e)(1) must be made with respect to the qualified verifier's independence from both the eligible taxpayer (as defined in section 6418(f)(2) and § 1.6418–1(b)) and the transferee taxpayer (as described in section 6418(a) and defined in § 1.6418–1(m)), and without regard to the requirements under proposed § 1.45V–5(e)(2).

Proposed § 1.48–15(e)(2)(iii) would provide that in the event the facility produces qualified clean hydrogen through a process that results in a lifecycle GHG emissions rate greater than the lifecycle GHG emissions rate such facility was designed and expected to produce (and thus the qualified verifier cannot provide the attestation specified in proposed § 1.48–15(e)(2)(i)(B)), resulting in a reduced energy percentage under section 48(a)(15)(A)(ii) with respect to such facility, an emissions tier recapture event under proposed § 1.48–15(f)(2) will occur. Proposed § 1.48–15(e)(2)(iv) would provide that the hydrogen a facility was “designed and expected to produce” would mean hydrogen produced through a process that results in the lifecycle GHG emissions rate specified in proposed § 1.48–15(c)(2).

Additionally, proposed § 1.48–15(e)(2)(v) would require that the annual verification report must be signed and dated by the qualified

verifier no later than the due date, including extensions, of the Federal income tax return or information return for the taxable year in which the hydrogen undergoing verification was produced. Proposed § 1.48–15(e)(2)(vi) would provide that in addition to the recordkeeping requirements set forth in § 1.48–15(g), the taxpayer must retain the annual verification report for at least six years after the due date, with extensions, for filing the Federal income tax return or information return for the taxable year in which the hydrogen undergoing verification was produced.

D. Credit Recapture

Section 48(a)(15)(E) directs the Secretary to issue such regulations or other guidance as determined necessary to carry out the purposes of section 48, including regulations or other guidance addressing recapture of so much of the credit allowed under section 48 as exceeds the amount of the credit that would have been allowed if the expected production were consistent with the actual verified production or all of the credit so allowed in the absence of such verification.

1. Emissions Tier Recapture Events Under Section 48(a)(15)(E)

Proposed § 1.48–15(f)(1), would provide that, for purposes of section 48(a)(15)(E), in any taxable year of the recapture period specified in proposed § 1.48–15(f)(3) in which an emissions tier recapture event (as defined in proposed § 1.48–15(f)(2)) occurs, the tax imposed on the taxpayer under chapter 1 of the Code for the taxable year of the emissions tier recapture event is increased by the recapture amount specified in proposed § 1.48–15(f)(4).

Proposed § 1.48–15(f)(2) would provide that an emissions tier recapture event under section 48(a)(15)(E) occurs during any taxable year of the recapture period specified in proposed § 1.48–15(f)(3) under the following circumstances: (i) the taxpayer fails to obtain an annual verification report by the deadline for filing its Federal income tax return or information return (including extensions) for any taxable year in which an annual verification report was required under proposed § 1.48–15(e)(1); (ii) the specified clean hydrogen production facility actually produced hydrogen through a process that results in a lifecycle GHG emissions rate that can only support a lower energy percentage than the energy percentage used to calculate the amount of the section 48 credit for such facility for the year in which the facility is placed in service; or (iii) the specified clean hydrogen production facility

actually produced hydrogen through a process that results in a lifecycle GHG emissions rate of greater than 4 kilograms of CO₂e per kilogram of hydrogen.

2. Recapture Period Under Section 48(a)(15)(E)

Proposed § 1.48–15(f)(3) would provide that the recapture period begins on the first day of the first taxable year after the taxable year in which the facility was placed in service and ends on the last day of the fifth taxable year after the close of the taxable year in which the facility was placed in service. For example, if a calendar-year taxpayer places in service a specified clean hydrogen production facility on June 1, 2023, then the last day of the fifth taxable year following the close of the taxable year in which the facility was placed in service is December 31, 2028. Therefore, the recapture period is January 1, 2024, through December 31, 2028.

3. Recapture Amount

Proposed § 1.48–15(f)(4) would provide that, if an emissions tier recapture event has occurred under proposed § 1.48–15(f)(2), the recapture amount for the taxable year in which the emissions tier recapture event occurred is equal to 20 percent of the excess of (i) the section 48 credit allowed to the taxpayer for the specified clean hydrogen production facility for the taxable year in which the facility was placed in service, over (ii) the section 48 credit that would have been allowed to the taxpayer for the facility if the taxpayer had used the energy percentage supported by the actual production to calculate the amount of the section 48 credit. Proposed § 1.48–15(f)(4)(ii) would provide that, in the case of any emissions tier recapture event described in proposed § 1.48–15(f)(2), the carrybacks and carryovers under section 39 must be adjusted by reason of the emissions tier recapture event. Proposed § 1.48–15(f)(4)(iii) would further provide that, if the specified clean hydrogen production facility produced hydrogen through a process that results in a lifecycle GHG emissions rate of greater than 4 kilograms of CO₂e per kilogram of hydrogen, or if the taxpayer fails to submit an annual verification report with its Federal income tax return or information return with respect to a specified clean hydrogen production facility for any taxable year of the recapture period, then the section 48 credit that would have been allowed to the taxpayer for the facility would be zero. Thus, in that case, the recapture amount in the taxable year of the

emissions tier recapture event would be 20 percent of the section 48 credit allowed to the taxpayer with respect to such specified clean hydrogen production facility. Proposed § 1.48–15(f)(5) would provide an example illustrating the application of proposed § 1.48–15(f)(1) through (4).

Unless modified in future guidance, any reporting of emissions tier recapture under proposed § 1.48–15(f) is made on the taxpayer's annual tax return. The Secretary may issue future guidance and/or prescribe tax forms and instructions to address the reporting of emissions tier recapture under proposed § 1.48–15(f) and any additional annual reporting obligations. The Treasury Department and IRS therefore request comments on the reporting of recapture and any additional annual reporting obligations.

4. Coordination With Recapture Rules Under Sections 50 and 48(a)(10)(C)

Proposed § 1.48–15(f)(6) would provide that, during any taxable year of the recapture period for any credit allowed under section 48(a) with respect to qualified property that is part of a specified clean hydrogen production facility, the recapture rules would be applied, if applicable, in the following order: (i) section 50(a) (recapture in case of dispositions, etc.); (ii) section 48(a)(10)(C) (recapture relating to the prevailing wage requirements); and (iii) section 48(a)(15)(E) (emissions tier recapture).

E. Recordkeeping Requirements

Proposed § 1.45V–2(c) would provide that a taxpayer claiming the section 45V credit would need to meet the general recordkeeping requirements under section 6001 necessary to substantiate the amount of the section 45V credit claimed by the taxpayer. Section 6001 provides that every person liable for any tax imposed by the Code, or for the collection thereof, must keep such records as the Secretary may from time to time prescribe. Section 1.6001–1(a) provides that any person subject to income tax must keep such permanent books of account or records as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax. Section 1.6001–1(e) provides that the books and records required by § 1.6001–1 must be retained so long as the contents thereof may become material in the administration of any internal revenue law.

Proposed § 1.45V–2(c) would also provide that taxpayers must retain all raw data used for submission of the

request for an emissions value to the DOE for at least six years after the due date (including extensions) for filing the Federal income tax return or information return to which the PER petition is ultimately attached.

Proposed § 1.48–15(g) would provide corresponding recordkeeping rules.

IX. Renewable Natural Gas and Fugitive Sources of Methane

The Treasury Department and the IRS intend to provide rules addressing hydrogen production pathways that use renewable natural gas (RNG) or other fugitive sources of methane (for example, from coal mine operations) for purposes of the section 45V credit. In the context of this guidance, the term RNG refers to biogas that has been upgraded to be equivalent in nature to fossil natural gas. Fugitive methane refers to the release of methane through, for example, equipment leaks, or venting during the extraction, processing, transformation, and delivery of fossil fuels to the point of final use, such as coal mine methane or coal bed methane. Such rules would apply to all RNG used for the purposes of the section 45V credit and would provide conditions that must be met before certificates for RNG or fugitive methane (representations of the environmental attributes of the methane) and the GHG emissions benefits they are meant to represent may be taken into account in determining lifecycle GHG emissions rates for purposes of the section 45V credit. Such conditions would be logically consistent with but not identical to the incrementality, temporal matching, and deliverability requirements for electricity derived EACs, in that they would be designed to reflect the ways in which additional RNG or demand for fugitive methane can impact lifecycle GHG emissions and also to address the differences between electricity and methane, including but not limited to the different sources of emissions, markets, available tracking and verification methods, and potential for perverse incentives.

The Treasury Department and the IRS anticipate requiring that for purposes of the section 45V credit, for biogas or biogas-based RNG to receive an emissions value consistent with that gas (and not standard natural gas), the RNG used during the hydrogen production process must originate from the first productive use of the relevant methane. For any specific source of biogas,²⁷

²⁷ Biogas is gas resulting from the decomposition of organic matter under anaerobic conditions, and the principal constituent is methane (50–75 percent).

productive use is generally defined as any valuable application of biogas (including to provide heat or cooling, generate electricity, or upgraded to RNG), and specifically excludes venting to the atmosphere or capture and flaring. The Treasury Department and the IRS further propose to define “first productive use” of the relevant methane as the time when a producer of that gas first begins using or selling it for productive use in the same taxable year as (or after) the relevant hydrogen production facility was placed in service. The implication of this proposal is that biogas from any source that had been productively used in a taxable year prior to taxable year in which the relevant hydrogen production facility was placed in service would not receive an emission value consistent with biogas-based RNG but would instead receive a value consistent with natural gas in the determination of the emissions value for that specific hydrogen production pathway. This proposal would limit emissions associated with the diversion of biogas or RNG from other pre-existing productive uses.

For existing biogas sources that typically productively use or sell a portion of the biogas and flare or vent the remaining excess, the flared or vented portion may be eligible for first productive use as defined above if the flaring or venting volume can be adequately demonstrated and verified. In such circumstances, the flared or vented volume may be determined based on the previous taxable year’s flared or vented volume as demonstrated via reported data to programs such as the Greenhouse Gas Reporting Program. Requirements would be established to reduce the risk that entities will deliberately generate additional biogas for purposes of the section 45V credit, above historic and expected future levels or an equivalent metric, for example by generating biogas through the intentional generation of waste, and to ensure that other factors affecting the emissions rate of hydrogen produced with biogas-based RNG or RNG procurement via RNG certificates are taken into account. The Treasury Department and the IRS request comment on these and other potential conditions. Any fugitive sources of methane would be treated in the same fashion as described above for RNG.

For purposes of the section 45V credit, hydrogen producers using RNG or fugitive methane would be required to acquire and retire corresponding attribute certificates through a book-and-claim system that can verify in an electronic tracking system that all

applicable requirements are met. Hydrogen producers would also be required to have a pipeline interconnection and measurement using a revenue grade meter. These rules would apply to the use of certificates with both direct and non-direct claims of RNG or fugitive methane use. Direct use would involve the production of hydrogen with a direct exclusive pipeline connection to a facility that generates RNG or from which fugitive methane is being sourced, while non-direct use would involve producing hydrogen using RNG or fugitive methane sourced from a commercial or common-carrier natural gas pipeline. In all cases, attribute certificates would need to document the RNG or fugitive methane procurement for qualified clean hydrogen production claims and that the environmental attributes of the RNG or fugitive methane being used are not sold to other parties or used for compliance with other policies or programs.

The Treasury Department and the IRS request comments on these and other rules related to RNG and fugitive methane. Regarding fugitive methane, the Treasury Department and the IRS request comment on the appropriate lifecycle analysis considerations associated with specific fugitive methane sources, such as counterfactual scenarios, to account for direct and significant indirect emissions, and also the manner in which to assess methane from these sources if the current practice is flaring. These comments may inform future versions of 45VH2–GREET. In particular, the Treasury Department and the IRS request comments on the following questions:

(1) What data sources and peer reviewed studies provide information on RNG production systems (including biogas production and reforming systems), markets, monitoring, reporting, and verification processes, and GHG emissions associated with these production systems and markets?

(2) What conditions for the use of biogas and RNG would ensure that emissions accounting for purposes of the section 45V credit reflects and reduces the risk of indirect emissions effects from hydrogen production using biogas and RNG? How can taxpayers verify that they have met these requirements?

(3) How broadly available and reliable are existing electronic tracking systems for RNG certificates in book and claim systems? What developments may be required, if any, before such systems are appropriate for use with RNG certificates used to claim the section 45V credit?

(4) How should RNG or fugitive methane resulting from the first productive use of methane be defined, documented, and verified? What industry best practices or alternative methods would enable such verification to be reflected in an RNG or methane certificate or other documentation? What additional information should be included in RNG certificates to help certify compliance?

(5) What are the emissions associated with different methods of transporting RNG or fugitive methane to hydrogen producers (for example, vehicular transport, pipeline)?

(6) How can the section 45V regulations reflect and mitigate indirect emissions effects from the diversion of biogas or RNG or fugitive methane from potential future productive uses? What other new uses of biogas or RNG or fugitive methane could be affected in the future if more gas from new capture and productive use of methane from these sources is used in the hydrogen production process?

(7) How can the potential for the generation of additional emissions from the production of additional waste, waste diversion from lower-emitting disposal methods, and changes in waste management practices be limited through emissions accounting or rules for biogas and RNG use established for purposes of the section 45V credit?

(8) To limit the additional production of waste, should the final regulations limit eligibility to methane sources that existed as of a certain date or waste or waste streams that were produced before a certain date, such as the date that the IRA was enacted? If so, how can that be documented or verified? How should any changes in volumes of waste and waste capacity at existing methane sources be documented and treated for purposes of the section 45V credit? How should additional capture of existing waste or waste streams be documented and treated?

(9) Are geographic or temporal deliverability requirements needed to reflect and reduce the risk of indirect emissions effects from biogas and RNG or fugitive methane use in the hydrogen production process? If so, what should these requirements be and are electronic tracking systems able to capture these details?

(10) How should variation in methane leakage across the existing natural gas pipeline system be taken into account in estimating the emissions from the transportation of RNG or fugitive methane or establishing rules for RNG or fugitive methane use? How should methane leakage rates be estimated based on factors such as the location

where RNG or fugitive methane is injected and withdrawn, the distance between the locations where RNG or fugitive methane is injected and withdrawn, season of year, age of pipelines, or other factors? Are data or analysis available to support this?

(11) What counterfactual assumptions and data should be used to assess the lifecycle GHG emissions of hydrogen production pathways that rely on RNG? Is venting an appropriate counterfactual assumption for some pathways? If not, what other factors should be considered?

(12) What criteria should be used in assessing biogas and RNG-based PERs? What practices should be put in place to reduce the risk of unintended consequences (for example, gaming)? Should conservative default parameters and counterfactuals be used unless proven otherwise by a third party?

The Treasury Department and the IRS understand that, before final regulations addressing the section 45V credit are issued, taxpayers will use 45VH2–GREET or the PER process to determine a lifecycle GHG emissions rate for hydrogen production facilities that rely on direct use of landfill gas or any fugitive methane feedstock, provided they meet the requirement that the gas being used results from the first productive use of methane from the landfill source or fugitive methane source. The term “direct use” means that there is a direct, exclusive pipeline connection between the hydrogen production facility and the source of the gas that is procured (for example, the upgrading or processing facility that produces RNG from landfill gas). Relative to a book-and-claim system, the direct connection between a gas supplier and a hydrogen production facility can reduce the uncertainty of pipeline leakage, tracking, and verification. The Treasury Department and the IRS are considering providing a rule that taxpayers would need to provide and maintain documentation to substantiate that (i) the RNG being used results from the first productive use of the methane at the landfill source and is not displacing a previous productive use; and (ii) the environmental attributes of the RNG being used, including those of the underlying biogas, are not sold to other parties or used for compliance with other policies or programs. When additional conditions addressing hydrogen production pathways that use RNG or fugitive methane for purposes of the section 45V credit are determined at a later date, taxpayers would also be required to maintain documentation that the RNG or fugitive methane being

used meets those requirements and to acquire and retire any RNG or fugitive methane certificates that are established. The Treasury Department and IRS are also considering providing rules for using RNG certificates and documentation required in the event additional conditions for use of RNG are later imposed.

Tracking and verification mechanisms for RNG or fugitive methane specific to the needs of the section 45V credit are not yet available, and existing systems have limited capabilities for tracking and verifying RNG pathways, especially in the part of the production process before the methane has been reformed to RNG. Existing tracking and verification systems do not clearly distinguish between inputs, verify or require verification of underlying practices claimed by RNG production sources, require proof of generator interconnection or revenue-quality metering, provide validation of generation methodology, include exclusively United States based-generation, verify generator registration, and track the vintage of generator interconnection. The Treasury Department and IRS are considering providing rules to address whether or how book-and-claim systems with sufficient tracking and verification mechanisms may be used to attribute the environmental benefits of RNG or fugitive methane to hydrogen producers in the final regulations. Additional certainty is also needed to accurately account for emissions from pathways that do not yet exist in 45VH2–GREET and from RNG that is injected into a commercial or common-carrier pipeline. The Treasury Department and IRS understand that, before final regulations are issued, taxpayers will determine a lifecycle GHG emissions rate for hydrogen production pathways using landfill gas by using 45VH2–GREET in cases in which the hydrogen production facility is receiving RNG through a direct dedicated pipeline connection and measurement using a revenue grade meter. The PER process will not address other hydrogen production pathways using biogas and RNG until after the final regulations are issued.

Proposed Applicability Dates

These regulations are proposed to apply to taxable years beginning after these proposed regulations are published in the **Federal Register**. Taxpayers may rely on these proposed regulations for taxable years beginning after December 31, 2022, and before the date the final regulations are published in the **Federal Register**, provided the taxpayers follow the proposed

regulations in their entirety and in a consistent manner.

Special Analyses

I. Regulatory Planning and Review

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

II. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA) generally requires that a Federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collections of information in these proposed regulations would include reporting, third-party disclosure, and recordkeeping requirements. These collections are necessary for taxpayers to claim the section 45V credit, or the section 48 credit with respect to a specified clean hydrogen production facility, and for the IRS to validate that taxpayers have met the regulatory requirements and are entitled to claim either credit.

The recordkeeping requirements in these proposed regulations would include the requirement that taxpayers claiming the section 45V credit, or the section 48 credit with respect to a specified clean hydrogen production facility, need to meet the general recordkeeping provisions under section 6001 necessary to substantiate the amount of the section 45V credit or section 48 credit claimed by the taxpayer as detailed in proposed §§ 1.45V–2(c) and 1.48–15(g). These recordkeeping requirements are considered general tax records under § 1.6001–1(e). For PRA purposes, general tax records are already approved by OMB under 1545–0074 for individuals/sole proprietors, 1545–0123 for business entities, and 1545–0047 for tax-exempt organizations, and 1545–0092 for trust and estate filers.

The proposed regulations would reference the DOE’s process for applicants to request an emissions value from the DOE that could then be used

to file a petition with the Secretary for a PER determination as detailed in proposed § 1.45V–4. The petition made to IRS will be performed by attaching the emissions value obtained from the DOE to the filing of Form 7210. The burden for these requirements will be included within the Form and Instructions for 7210. Form 7210 will be approved by OMB, in accordance with 5 CFR 1320.10, under the following OMB Control Numbers: 1545–0074 for individuals, 1545–0123 for businesses, 1545–0047 for tax-exempt organizations, and 1545–NEW for trust and estate filers.

The proposed regulations mention the collection of information associated with the process for taxpayers to request an emissions value from the DOE and is reflected in the DOE's Paperwork Reduction Act Submission relating to such process. These proposed regulations are not creating or changing any of the collection requirements submitted by DOE to OMB for approval. Approval of the DOE's Paperwork Reduction Act Submission is pending with OMB. These proposed regulations are not creating or changing any of the collection requirements being approved by OMB under the DOE OMB Control Number 1910–XXXX.

The proposed regulations would include reporting requirements that taxpayers claiming the section 45V credit provide a verification report with their annual Federal income tax return or information return for each taxable year in which they claim the section 45V credit as detailed in proposed § 1.45V–5. The proposed regulation also includes a third-party disclosure requirement that a verification report must be certified by an unrelated third party. The verification report must contain an attestation regarding the taxpayer's production of qualified clean hydrogen for sale or use, the amount of qualified clean hydrogen sold or used by the taxpayer, conflicts of interest, the verifier's qualifications, and documentation necessary to substantiate the verification process. The taxpayer must submit the verification report to the IRS by attaching it to Form 7210, *Clean Hydrogen Production Credit*, or any successor form(s). The burden for these requirements will be included within the Form and Instructions for Form 7210. Form 7210 will be approved by OMB, in accordance with 5 CFR 1320.10, under the following OMB Control Numbers: 1545–0074 for individuals, 1545–0123 for businesses, 1545–0047 for tax-exempt organizations, and 1545–NEW for trust and estate filers.

The proposed regulations include reporting, third-party disclosure, and recordkeeping requirements that taxpayers making the election under section 48(a)(15) to claim the energy credit under section 48 with respect to a specified clean hydrogen production facility. The reporting requirement is that taxpayers submit an annual verification report with their Federal income tax return or information return for the year in which they claim the section 48 credit. The third-party disclosure requirement is that an annual verification report must be certified by an unrelated third-party. The annual verification report must contain an attestation regarding the taxpayer's production of qualified clean hydrogen for sale or use, the amount of qualified clean hydrogen sold or used by the taxpayer, conflicts of interest, the verifier's qualifications, the lifecycle GHG emissions rate of the hydrogen that the specified clean hydrogen production facility produced, and documentation necessary to substantiate the verification process. The proposed regulations also include a requirement that the taxpayer obtain and retain an annual verification report for each taxable year of the recapture period. The taxpayer must obtain the annual verification report by the return filing deadline (with extensions) for the taxable year to which the annual verification report relates. The annual verification report must contain an attestation regarding the taxpayer's production of qualified clean hydrogen for sale or use during the taxable year, the amount of qualified clean hydrogen sold or used by the taxpayer during the taxable year, the lifecycle GHG emissions rate of the hydrogen that the specified clean hydrogen production facility produced during the taxable year, conflicts of interest, the verifier's qualifications, and documentation necessary to substantiate the verification process. The annual verification report for the taxable year in which the section 48(a)(15) election is made will be attached to Form 3468. The annual verification report for each taxable year of the recapture period will be retained by the taxpayer for at least six years after the due date (with extensions) for filing the Federal income tax return or information return for the year to which the report relates. The burden for these requirements will be included within the Form and Instructions for 3468. The revisions to Form 3468 will be approved by OMB, in accordance with 5 CFR 1320.10, under the following OMB Control Numbers: 1545–0074 for individuals, 1545–0123 for businesses, 1545–0047 for tax-

exempt organizations, and 1545–0155 for trust and estate filers.

III. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis (IRFA) of the proposed rule. The Treasury Department and the IRS have not determined whether the proposed rule, when finalized, will likely have a significant economic impact on a substantial number of small entities. This determination requires further study. However, because there is a possibility of significant economic impact on a substantial number of small entities, an IRFA is provided in these proposed regulations. The Treasury Department and the IRS invite comments on both the number of entities affected and the economic impact on small entities.

Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel of the Office of Advocacy of the Small Business Administration for comment on its impact on small business.

A. Need for and Objectives of the Rule

The proposed regulations provide guidance to taxpayers intending to claim the section 45V credit for the production of qualified clean hydrogen or make the election under section 48(a)(15) to treat qualified property that is part of a specified clean hydrogen production facility as energy property and claim the section 48 credit. The proposed regulations would provide needed guidance for taxpayers on use of the GREET model to determine the lifecycle GHG emissions rate resulting from the hydrogen production process, procedures for petitioning the Secretary for a PER determination, requirements for the verification of the production and sale or use of the hydrogen, requirements for modifications to an existing hydrogen production facility, and procedures for making the election under section 48(a)(15).

B. Affected Small Entities

The RFA directs agencies to provide a description of, and if feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted. The Small Business Administration's Office of Advocacy estimates in its 2023 Frequently Asked Questions that 99.9 percent of American businesses meet the definition of a small business. The applicability of these proposed regulations does not depend on the size of the business, as defined by the Small Business Administration. As described more fully in the preamble to this proposed regulation and in this IRFA, sections 45V and 48(a)(15) and these proposed regulations may affect a variety of different businesses across several different industries. Because the potential credit claimants can vary widely, it is difficult to estimate at this time the impact of these proposed regulations, if any, on small businesses. Although there is uncertainty as to the exact number of small businesses within this group, the current estimated number of respondents to these proposed rules is between 800 and 1000 taxpayers.

The Treasury Department and the IRS expect to receive more information on the impact on small businesses through comments on these proposed rules and again when taxpayers start using the guidance and procedures provided in these proposed regulations to claim the section 45V credit, or the section 48 credit with respect to a specified clean hydrogen production facility.

C. Impact of the Rules

The proposed regulations provide rules for how taxpayers can claim the section 45V credit, or the section 48 credit with respect to a specified clean hydrogen production facility. Taxpayers that claim the section 45V credit, or the section 48 credit with respect to a specified clean hydrogen production facility, will have administrative costs related to reading and understanding the rules as well as recordkeeping and reporting requirements because of the verification and Federal income tax return or information return requirements. The costs will vary across different-sized entities and across the type of project(s) in which such entities are engaged.

To claim a section 45V credit, a taxpayer must determine the lifecycle GHG emissions rate for all hydrogen produced at a qualified clean hydrogen production facility during the taxable year. If the hydrogen production technology or feedstock used by the taxpayer to produce hydrogen is

addressed in the most recent 45VH2-GREET, the taxpayer must use 45VH2-GREET to determine the emissions rate for the hydrogen produced during that taxable year at the qualified clean hydrogen production facility. If the hydrogen production technology or feedstock used by the taxpayer to produce hydrogen is not included in the most recent 45VH2-GREET, the taxpayer must petition the Secretary for a provisional emissions rate (PER). As part of the process for a taxpayer to petition for a PER, a taxpayer must submit an application to the DOE for an emissions value that it may use to claim the section 45V credit.

In addition to determining the lifecycle GHG emissions rate for hydrogen produced by the taxpayer at a qualified clean hydrogen production facility during the taxable year, before claiming the section 45V credit, a taxpayer must submit a verification report, certified by an unrelated third party, attesting to the taxpayer's production of qualified clean hydrogen for sale or use, the amount of qualified clean hydrogen sold or used by the taxpayer, conflicts of interest, the verifier's qualifications, and documentation necessary to substantiate the verification process. The process for claiming the section 48 credit with respect to a specified clean hydrogen production facility requires a taxpayer to submit an annual verification report with its Federal income tax return or information return for the taxable year in which it claims the section 48 credit, as well as to obtain an annual verification report for the five taxable years following the taxable year in which the section 48(a)(15) election is made. Additionally, the taxpayer would need to retain records sufficient to establish compliance with these proposed regulations for as long as may be relevant.

Although the Treasury Department and the IRS do not have sufficient data to determine precisely the likely extent of the increased costs of compliance, the estimated burden of complying with the recordkeeping and reporting requirements are described in the Paperwork Reduction Act section of the preamble.

D. Alternatives Considered

The Treasury Department and the IRS considered alternatives to the proposed regulations. The proposed regulations were designed to minimize burdens for taxpayers while ensuring that the statutory requirements of sections 45V and 48(a)(15) are met. For example, in providing rules related to the information required to be submitted to

claim the section 45V credit, or the section 48 credit with respect to a specified hydrogen production facility, the Treasury Department and the IRS considered whether the production and sale or use of the hydrogen could be verified by an unrelated party without requiring the unrelated party to possess certain qualifications or conflict of interest characteristics. Such an option would, however, increase the opportunity for fraud or excessive payments under section 45V or section 48. Section 45V(f) specifically authorizes the IRS to promulgate regulations or other guidance providing for requirements for recordkeeping or information reporting for purposes of administering the requirements of section 45V. As described in the preamble to these proposed regulations, these proposed rules carry out that Congressional intent as the verification requirements allow the IRS to verify the taxpayer's entitlement to the section 45V credit.

Additionally, the Treasury Department and the IRS considered whether to require taxpayers to submit an annual verification report with their Federal income tax returns or information returns claiming the section 45V credit. Section 45V requires the taxpayer to obtain an annual verification report, and the Treasury Department and the IRS determined that requiring the taxpayer to attach such a report to their federal income tax return or information return is the most efficient way of ensuring the completion and accuracy of the report.

Additionally, the Treasury Department and the IRS considered allowing taxpayers to treat the section 45V credit as determined in the taxable year of hydrogen production or verification. However, such an option would create administrability issues and potentially a mismatch between the taxable year in which the hydrogen is produced and the taxable year in which the section 45V credit for such production is claimed. Thus, the proposed regulations would require the credit to be determined in the taxable year of production.

Comments are requested on the requirements in the proposed regulations, including specifically whether there are less burdensome alternatives that do not increase the risk of duplication, fraud, or improper payments under section 45V.

E. Duplicative, Overlapping, or Conflicting Federal Rules

The proposed regulations would not duplicate, overlap, or conflict with any relevant Federal rules. As discussed

above, the proposed regulations would merely provide procedures and definitions to allow taxpayers to claim the section 45V credit, or the section 48 credit with respect to a specified clean hydrogen production facility. The Treasury Department and the IRS invite input from interested members of the public on identifying and avoiding overlapping, duplicative, or conflicting requirements.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of \$100 million (updated annually for inflation). This proposed rule does not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

V. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This proposed rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive order.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to comments regarding the notice of proposed rulemaking that are submitted timely to the IRS as prescribed in the preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. All comments will be made available at <https://www.regulations.gov>. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn.

A public hearing has been scheduled for March 25, 2024, beginning at 10 a.m. (ET), in the Auditorium at the Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC. Due to building security procedures, visitors

must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. Participants may alternatively attend the public hearing by telephone.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit an outline of the topics to be discussed and the time to be devoted to each topic by March 4, 2024. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing. If no outline of the topics to be discussed at the hearing is received by March 4, 2024, the public hearing will be cancelled. If the public hearing is cancelled, a notice of cancellation of the public hearing will be published in the **Federal Register**.

Individuals who want to testify in person at the public hearing must send an email to publichearings@irs.gov to have your name added to the building access list. The subject line of the email must contain the regulation number REG-117631-23 and the language TESTIFY in Person. For example, the subject line may say: Request to TESTIFY in Person at Hearing for REG-117631-23.

Individuals who want to testify by telephone at the public hearing must send an email to publichearings@irs.gov to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-117631-23 and the language TESTIFY Telephonically. For example, the subject line may say: Request to TESTIFY Telephonically at Hearing for REG-117631-23.

Individuals who want to attend the public hearing in person without testifying must also send an email to publichearings@irs.gov to have your name added to the building access list. The subject line of the email must contain the regulation number REG-117631-23 and the language ATTEND In Person. For example, the subject line may say: Request to ATTEND Hearing in Person for REG-117631-23. Requests to attend the public hearing must be received by 5:00 p.m. EST on March 18, 2024.

Hearings will be made accessible to people with disabilities. To request special assistance during a hearing please contact the Publications and

Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to publichearings@irs.gov (preferred) or by telephone at (202) 317-6901 (not a toll-free number) by at least March 18, 2024.

Statement of Availability of IRS Documents

IRS guidance cited in this preamble is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <https://www.irs.gov>.

Drafting Information

The principal author of these proposed regulations is the Office of the Associate Chief Counsel (Passthroughs and Special Industries). However other personnel from the Treasury Department, the DOE, the EPA, and the IRS participated in the development of the proposed regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries in numerical order for §§ 1.45V-1 through 1.45V-6 and 1.48-15 to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
 * * * * *
 Section 1.45V-1 also issued under 26 U.S.C. 45V(f).
 Section 1.45V-2 also issued under 26 U.S.C. 45V(f).
 Section 1.45V-3 also issued under 26 U.S.C. 45V(e) and (f).
 Section 1.45V-4 also issued under 26 U.S.C. 45V(f).
 Section 1.45V-5 also issued under 26 U.S.C. 45V(f).
 Section 1.45V-6 also issued under 26 U.S.C. 45V(c) and (d).
 * * * * *
 Section 1.48-15 also issued under 26 U.S.C. 48(a)(15).
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■ **Par. 2.** Sections 1.45V-0 through 1.45V-6 are added to read as follows: Sec.

* * * * *
 1.45V-0 Table of contents.
 1.45V-1 Credit for production of qualified clean hydrogen.
 1.45V-2 Special rules.

- 1.45V–3 [Reserved]
 1.45V–4 Procedures for determining lifecycle greenhouse gas emissions rates for qualified clean hydrogen.
 1.45V–5 Procedures for verification of qualified clean hydrogen production and sale or use.
 1.45V–6 Rules for determining the placed in service date for an existing facility that is modified to produce qualified clean hydrogen.

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§ 1.45V–0 Table of contents.

This section lists the captions contained in §§ 1.45V–1 through 1.45V–6.

§ 1.45V–1 Credit for production of qualified clean hydrogen.

- (a) Overview.
 (1) In general.
 (2) Applicable amount.
 (i) In general.
 (ii) Inflation adjustment.
 (3) Applicable percentage.
 (4) Claim.
 (5) Code.
 (6) DOE.
 (7) Facility.
 (i) In general.
 (ii) Treatment of certain indirect production and post-production equipment.
 (iii) Multipurpose components.
 (iv) Example.
 (8) Lifecycle GHG emissions.
 (i) In general.
 (ii) Most recent GREET model.
 (iii) Emissions through the point of production (well-to-gate).
 (9) Qualified clean hydrogen.
 (i) In general.
 (ii) For sale or use.
 (10) Qualified clean hydrogen production facility.
 (11) Secretary.
 (12) Section 45V credit.
 (13) Section 45V regulations.
 (b) Amount of credit.
 (1) In general.
 (2) Producer of qualified clean hydrogen.
 (3) Increased credit amount for qualified clean hydrogen production facilities.
 (c) Determination of credit.
 (d) Applicability date.

§ 1.45V–2 Special rules.

(a) Coordination with credit for carbon oxide sequestration.

- (b) Anti-abuse rule.
 (1) In general.
 (2) Example.
 (i) Facts.
 (ii) Analysis.
 (c) Recordkeeping.
 (d) Applicability date.

§ 1.45V–3 [Reserved]

§ 1.45V–4 Procedures for determining lifecycle greenhouse gas emissions rates for qualified clean hydrogen.

- (a) In general.
 (b) Use of the most recent GREET model.
 (c) Provisional emissions rate (PER).
 (1) In general.
 (2) Rate not determined.
 (i) In general.
 (ii) Subsequent inclusion in 45VH2–GREET.

- (3) Process for filing a PER petition.
 (4) PER determination.
 (5) Department of Energy emissions value request process.
 (6) Effect of PER.
 (d) Use of Energy Attribute Certificates (EACs).

- (1) In general.
 (2) Definitions.
 (i) Commercial operations date.
 (ii) Energy attribute certificate.
 (iii) Eligible EAC.
 (iv) Qualifying EAC.
 (v) Qualified EAC registry or accounting system.
 (vi) Region.
 (3) Qualifying EAC requirements.
 (i) Incrementality.
 (ii) Temporal matching.
 (iii) Deliverability.
 (e) Applicability date.

§ 1.45V–5 Procedures for verification of qualified clean hydrogen production and sale or use.

- (a) In general.
 (b) Requirements for verification reports.
 (c) Requirements for the production attestation.
 (d) Requirements for the sale or use attestation.
 (1) In general.
 (2) Verifiable use.
 (e) Requirements for the conflict attestation.
 (1) In general.
 (2) Special rule for transfer elections.
 (f) Requirements for the qualified verifier statement.
 (g) General information on the taxpayer's hydrogen production facility.
 (h) Qualified verifier.
 (i) Unrelated party.
 (j) Requirements for taxpayers claiming both the section 45V credit and the section 45 credit or the section 45U credit.
 (k) Timely verification report.
 (l) Applicability date.

§ 1.45V–6 Rules for determining the placed in service date for an existing facility that is modified to produce qualified clean hydrogen.

- (a) Modification of an existing facility.
 (1) In general.
 (2) Modification requirements.
 (b) Retrofit of an Existing Facility (80/20 Rule).
 (c) Examples.
 (1) Example 1: Modification of an existing facility.
 (i) Facts.
 (ii) Analysis.
 (2) Example 2: Modification of an existing facility; coordination with the section 45Q credit previously allowed.
 (i) Facts.
 (ii) Analysis.
 (3) Example 3: Modification of an existing facility and coordination with section 45Q credit not previously allowed.
 (i) Facts.
 (ii) Analysis.
 (4) Example 4: Retrofit of an Existing Facility (80/20 Rule) and coordination with section 45Q credit previously allowed.
 (i) Facts.
 (ii) Analysis.

(5) Example 5: Retrofit of an Existing Facility (80/20 Rule) and coordination with section 45Q credit previously allowed.

- (i) Facts.
 (ii) Analysis.
 (d) Applicability date.

§ 1.45V–1 Credit for production of clean hydrogen.

(a) *Overview*—(1) *In general*. For purposes of section 38 of the Code, the section 45V credit is determined under section 45V of the Code, so much of sections 6417 and 6418 of the Code that relate to section 45V, and the section 45V regulations (as defined in paragraph (a)(13) of this section). Paragraphs (a)(2) through (13) of this section provide generally applicable definitions of terms that, unless otherwise provided, apply for purposes of section 45V, the section 45V regulations, and any provision of the Code or this chapter that expressly refers to any provision of section 45V or the section 45V regulations. Paragraph (b) of this section provides rules for determining the amount of the section 45V credit for any taxable year, which generally depends on the kilograms of qualified clean hydrogen produced during the taxable year and the emissions intensity of the process used to produce such hydrogen, as well as whether certain requirements, including the requirements under § 1.45V–3, are satisfied. Paragraph (c) of this section provides rules regarding the taxable year for which a section 45V credit is determined. *See* § 1.45V–2 for special rules, including rules to coordinate the section 45V credit with the credit for carbon oxide sequestration determined under section 45Q of the Code, an anti-abuse rule, and recordkeeping requirements. *See* § 1.45V–3 for rules relating to the increased credit amount for satisfying the prevailing wage and apprenticeship requirements. *See* § 1.45V–4 for procedures to determine lifecycle greenhouse gas (GHG) emissions rates for qualified clean hydrogen and § 1.45V–5 for procedures for verification of qualified clean hydrogen production and sale or use. *See* § 1.45V–6 for rules to determine the placed in service date for an existing facility that is modified or retrofitted to produce qualified clean hydrogen. *See also* § 1.48–15 for procedures to elect to treat any qualified property that is part of a specified clean hydrogen production facility as energy property for purposes of section 48 of the Code.

(2) *Applicable amount*—(i) *In general*. The term *applicable amount* means the amount equal to the applicable percentage of \$0.60, provided that if any such amount is not a multiple of 0.1

cent, such amount is rounded to the nearest multiple of 0.1 cent.

(ii) *Inflation adjustment.* The \$0.60 amount specified in section 45V(b)(1) and paragraph (a)(2)(i) of this section is adjusted annually by multiplying such amount by the inflation adjustment factor (as determined under section 45(e)(2) of the Code, determined by substituting “2022” for “1992” in section 45(e)(2)(B)) for the calendar year in which the qualified clean hydrogen is produced, provided that if any such amount as adjusted is not a multiple of 0.1 cent, such amount is rounded to the nearest multiple of 0.1 cent.

(3) *Applicable percentage.* The term *applicable percentage* means the percentage set forth in paragraphs (a)(3)(i) through (iv) of this section, which is determined according to the lifecycle GHG emissions rate of the process by which the qualified clean hydrogen is produced:

(i) In the case of any qualified clean hydrogen that is produced through a process that results in a lifecycle GHG emissions rate of not greater than 4 kilograms of carbon dioxide equivalent (CO₂e) per kilogram of hydrogen, and not less than 2.5 kilograms of CO₂e per kilogram of hydrogen, the applicable percentage is 20 percent.

(ii) In the case of any qualified clean hydrogen that is produced through a process that results in a lifecycle GHG emissions rate of less than 2.5 kilograms of CO₂e per kilogram of hydrogen, and not less than 1.5 kilograms of CO₂e per kilogram of hydrogen, the applicable percentage is 25 percent.

(iii) In the case of any qualified clean hydrogen that is produced through a process that results in a lifecycle GHG emissions rate of less than 1.5 kilograms of CO₂e per kilogram of hydrogen, and not less than 0.45 kilograms of CO₂e per kilogram of hydrogen, the applicable percentage is 33.4 percent.

(iv) In the case of any qualified clean hydrogen that is produced through a process that results in a lifecycle GHG emissions rate of less than 0.45 kilograms of CO₂e per kilogram of hydrogen, the applicable percentage is 100 percent.

(4) *Claim.* With respect to the section 45V credit determined for qualified clean hydrogen produced by the taxpayer at a qualified clean hydrogen production facility, the term *claim* means the filing of a completed Form 7210, *Clean Hydrogen Production Credit*, or any successor form(s), with the taxpayer's Federal income tax return or annual information return for the taxable year in which the credit is determined, and includes the making of an election under section 6417 or 6418

and the regulations in this chapter under section 6417 or 6418, as applicable, with respect to such section 45V credit on the applicable entity's or eligible taxpayer's timely filed (including extensions) Federal income tax return or annual information return.

(5) *Code.* The term *Code* means the Internal Revenue Code.

(6) *DOE.* The term *DOE* means the U.S. Department of Energy.

(7) *Facility*—(i) *In general.* For purposes of the definition of *qualified clean hydrogen production facility* provided at section 45V(c)(3) and paragraph (a)(10) of this section, unless otherwise specified, the term *facility* means a single production line that is used to produce qualified clean hydrogen. A single production line includes all components of property that function interdependently to produce qualified clean hydrogen. Components of property function interdependently to produce qualified clean hydrogen if the placing in service of each component is dependent upon the placing in service of each of the other components to produce qualified clean hydrogen.

(ii) *Treatment of certain indirect production and post-production equipment.* The term *facility* does not include—

(A) Equipment that is used to condition or transport hydrogen beyond the point of production; or

(B) Notwithstanding paragraph (a)(7)(iii) of this section, electricity production equipment used to power the hydrogen production process, including any carbon capture equipment associated with the electricity production process.

(iii) *Multipurpose components.* Components that have a purpose in addition to the production of qualified hydrogen may be part of a facility if such components function interdependently with other components to produce qualified clean hydrogen.

(iv) *Example.* The following example illustrates the definition of facility provided in this paragraph (a)(7). A hydrogen production facility is equipped with carbon capture equipment (as defined in § 1.45Q–2(c)), as distinguished from the carbon capture equipment described in paragraph (a)(7)(ii)(B) of this section. One purpose of this equipment is the capture of carbon oxides. The facility produces hydrogen through a process that results in a lifecycle GHG emissions rate falling within the range specified in section 45V(b)(2)(C). Without the carbon capture equipment, the facility could not produce hydrogen through a process

that results in a lifecycle GHG emissions rate falling within the range specified in section 45V(b)(2)(C). Because the carbon capture equipment is functionally interdependent with other components of property to produce qualified clean hydrogen within the meaning of paragraph (a)(9)(i) of this section, the carbon capture equipment is part of the facility for purposes of section 45V(c)(3) and the regulations in this part under section 45V, along with all other components of property that function interdependently with the carbon capture equipment to produce qualified clean hydrogen.

(8) *Lifecycle GHG emissions*—(i) *In general.* Subject to section 45V(c)(1)(B) and paragraphs (a)(8)(ii) and (iii) of this section, and unless otherwise specified in the section 45V regulations, the term *lifecycle GHG emissions* has the meaning given the term *lifecycle greenhouse gas emissions* by 42 U.S.C. 7545(o)(1)(H), as in effect on August 16, 2022. For purposes of section 45V, lifecycle GHG emissions include emissions only through the point of production (well-to-gate), as determined under the most recent Greenhouse gases, Regulated Emissions, and Energy use in Transportation model (GREET model) developed by Argonne National Laboratory, or a successor model.

(ii) *Most recent GREET model.* Unless otherwise specified in the section 45V regulations, for purposes of the section 45V credit, the term *most recent GREET model* means the latest version of 45VH2–GREET developed by Argonne National Laboratory that is publicly available, as provided in the instructions to the latest version of Form 7210, *Clean Hydrogen Production Credit*, or any successor form(s), on the first day of the taxable year during which the qualified clean hydrogen for which the taxpayer is claiming the section 45V credit was produced. If a version of 45VH2–GREET becomes publicly available after the first day of the taxable year of production (but still within such taxable year), then the taxpayer may, in its discretion, treat such later version of 45VH2–GREET as the most recent GREET model.

(iii) *Emissions through the point of production (well-to-gate).* The term *emissions through the point of production (well-to-gate)* means the aggregate lifecycle GHG emissions related to hydrogen produced at a hydrogen production facility during the taxable year through the point of production. It includes emissions associated with feedstock growth, gathering, extraction, processing, and delivery to a hydrogen production facility. It also includes the emissions

associated with the hydrogen production process, inclusive of the electricity used by the hydrogen production facility and any capture and sequestration of carbon dioxide generated by the hydrogen production facility.

(9) *Qualified clean hydrogen*—(i) *In general.* The term *qualified clean hydrogen* means hydrogen that is produced through a process that results in a lifecycle GHG emissions rate of not greater than 4 kilograms of CO₂e per kilogram of hydrogen. Such term does not include any hydrogen unless the production and sale or use of such hydrogen is verified by an unrelated party in accordance with, and satisfying the requirements of, § 1.45V–5, and such hydrogen is produced—

(A) In the United States (as defined in section 638(1) of the Code) or a United States territory, which, for purposes of section 45V and the regulations in this part under section 45V, has the meaning of the term *possession* provided in section 638(2) of the Code;

(B) In the ordinary course of a trade or business of the taxpayer; and

(C) For sale or use.

(ii) *For sale or use.* The term *for sale or use* means for the primary purpose of making ready and available for sale or use. Storage of hydrogen following production does not disqualify such hydrogen from being considered produced for sale or use.

(10) *Qualified clean hydrogen production facility.* The term *qualified clean hydrogen production facility* means a facility—

(i) Owned by the taxpayer;

(ii) That produces qualified clean hydrogen; and

(iii) The construction of which begins before January 1, 2033.

(11) *Secretary.* The term *Secretary* means the Secretary of the Treasury or her delegate.

(12) *Section 45V credit.* The term *section 45V credit* means the credit for production of clean hydrogen determined under section 45V of the Code, so much of sections 6417 and 6418 of the Code that relate to section 45V, and the section 45V regulations.

(13) *Section 45V regulations.* The term *section 45V regulations* means this section, §§ 1.45V–2 through 1.45V–6, and the regulations in this chapter under sections 6417 and 6418 of the Code that relate to the section 45V credit.

(b) *Amount of credit*—(1) *In general.* The amount of the section 45V credit determined under section 45V(a) and the section 45V regulations for any taxable year is the product of the kilograms of qualified clean hydrogen

produced by the taxpayer during such taxable year at a qualified clean hydrogen production facility during the 10-year period beginning on the date such facility was originally placed in service, multiplied by the applicable amount with respect to such hydrogen.

(2) *Producer of qualified clean hydrogen.* The term *taxpayer* means the taxpayer that owns the qualified clean hydrogen production facility at the time of the facility's production of hydrogen for which the section 45V credit is claimed, regardless of whether such taxpayer is treated as a producer under section 263A of the Code or under any other provision of law with respect to such hydrogen.

(3) *Increased credit amount for qualified clean hydrogen production facilities.* Pursuant to section 45V(e)(1), § 1.45V–3 provides rules that permit the amount of the section 45V credit determined under section 45V(a) and paragraph (b)(1) of this section to be multiplied by five if certain requirements related to prevailing wages and apprenticeships are met. *See* § 1.45V–3(a).

(c) *Determination of credit.* Subject to any applicable sections of the Code that may limit the section 45V credit amount, the section 45V credit for any taxable year of a taxpayer who produces qualified clean hydrogen and claims such credit is determined with respect to the qualified clean hydrogen produced by the taxpayer during that taxable year, regardless of whether the verification of the production and sale or use of that hydrogen occurs in a later taxable year. Although the section 45V credit is determined with respect to the taxable year in which the qualified clean hydrogen is produced, a taxpayer is not eligible to claim the section 45V credit with respect to the production of that hydrogen until all relevant verification requirements, and the verification itself, have been completed for both the production of the hydrogen and the sale or use of that hydrogen. Accordingly, although the sale or use of the hydrogen and the verification thereof may occur in a taxable year after the taxable year of production, the section 45V credit is properly claimed with respect to the taxable year of production and is subject to the general period of limitations for filing a claim for credit or refund under section 6511 and other applicable provisions of the Code.

(d) *Applicability date.* This section applies to taxable years beginning after December 26, 2023.

§ 1.45V–2 Special rules.

(a) *Coordination with credit for carbon oxide sequestration.* In the case of any qualified clean hydrogen produced at a qualified clean hydrogen production facility that includes carbon capture equipment for which a credit is allowed to any taxpayer under section 45Q of the Code (section 45Q credit) for the taxable year or any prior taxable year, no section 45V credit is allowed under section 45V of the Code. However, if the 80/20 Rule provided in § 1.45Q–2(g)(5) is satisfied with respect to such carbon capture equipment, and no new section 45Q credit has been allowed to any taxpayer for such carbon capture equipment, then the unit of carbon capture equipment (as defined in § 1.45Q–2(c)(3)) for which the 80/20 rule is satisfied will not be treated as carbon capture equipment for which a section 45Q credit was allowed to any taxpayer for any prior taxable year for purposes of section 45V(d)(2) and this paragraph (a).

(b) *Anti-abuse rule*—(1) *In general.* The rules of section 45V of the Code (and so much of sections 6417 and 6418 of the Code related to the section 45V credit) and the section 45V regulations (as defined in § 1.45V–1(a)(13)) must be applied in a manner consistent with the purposes of section 45V and the section 45V regulations. A purpose of section 45V and the regulations in this part under section 45V (and so much of sections 6417 and 6418 and the regulations in this chapter under sections 6417 and 6418 related to the section 45V credit) is to provide taxpayers an incentive to produce qualified clean hydrogen for a productive use. Accordingly, the section 45V credit is not allowable if the primary purpose of the production and sale or use of qualified clean hydrogen is to obtain the benefit of the section 45V credit in a manner that is wasteful, such as the production of qualified clean hydrogen that the taxpayer knows or has reason to know will be vented, flared, or used to produce hydrogen. A determination of whether the production and sale or use of qualified clean hydrogen is inconsistent with the purposes of section 45V and the regulations in this part under section 45V of the Code is based on all facts and circumstances.

(2) *Example*—(i) *Facts.* Taxpayer is a C corporation that has a calendar year taxable year. In 2031, Taxpayer places Facility in service in the United States. Facility produces qualified clean hydrogen that qualifies for the highest applicable amount of the section 45V credit at a production cost of \$2 per

kilogram of hydrogen (assuming Taxpayer also claims the increased credit under section 45V(e), without taking into account any future inflation adjustment, the amount of the section 45V credit would be \$3 per kilogram of qualified clean hydrogen). The cost of producing each kilogram of qualified clean hydrogen is less than the amount of the section 45V credit that would be available if Taxpayer qualified for the section 45V credit. In 2031, Taxpayer sells all the qualified clean hydrogen produced at Facility that year to Customer at a price that is well below the current market price. Taxpayer knows or reasonably expects that Customer will vent or flare a portion of the qualified clean hydrogen it purchased from Taxpayer. In addition, Taxpayer intends to obtain the benefit from the section 45V credit by claiming such credit itself or monetizing such credits through an election under section 6417 or 6418 of the Code.

(ii) *Analysis.* Based on all the facts and circumstances, the primary purpose of Taxpayer's production and sale of qualified clean hydrogen is to obtain the benefit of the section 45V credit in a manner that is wasteful. Taxpayer is not eligible for the section 45V credit with respect to the qualified clean hydrogen that Taxpayer produced and sold in 2031 to Customer that is subsequently vented or flared by Customer.

(c) *Recordkeeping.* Consistent with section 6001 of the Code, a taxpayer claiming the section 45V credit for qualified clean hydrogen produced at a qualified clean hydrogen production facility must maintain and preserve records sufficient to establish the amount of the section 45V credit claimed by the taxpayer. At a minimum, those records must include records to substantiate the information required to be included in the verification report under § 1.45V–5, records establishing that the facility meets the definition of a qualified clean hydrogen production facility under section 45V(c)(3) and § 1.45V–1(a)(10), records of past credit claims under section 45Q by any taxpayer with respect to carbon capture equipment included at the facility, and records establishing the date the qualified clean hydrogen production facility was placed in service. If the requirements under section 45V(e) and § 1.45V–3(b) for the increased credit amount were satisfied, then the taxpayer must also maintain records in accordance with § 1.45–12. Taxpayers must also retain all raw data used for submission of a request for an emissions value to the DOE for at least six years after the due date (including extensions) for filing the Federal income tax return

or information return to which the provisional emissions rate (PER) (as defined in § 1.45V–4(c)(1)) petition is ultimately attached.

(d) *Applicability date.* This section applies to taxable years beginning after December 26, 2023.

§ 1.45V–3 [Reserved]

§ 1.45V–4 Procedures for determining lifecycle greenhouse gas emissions rates for qualified clean hydrogen.

(a) *In general.* The amount of the section 45V credit is determined under section 45V(a) of the Code and § 1.45V–1(b) according to the lifecycle GHG emissions rate of all hydrogen produced at a hydrogen production facility during the taxable year. The lifecycle GHG emissions rate of such hydrogen is determined under the most recent GREET model. In the case of any hydrogen for which a lifecycle GHG emissions rate has not been determined under the most recent GREET model for purposes of section 45V, a taxpayer producing such hydrogen may file a petition for a provisional emissions rate (PER) with the IRS for the Secretary's determination of the lifecycle GHG emissions rate with respect to such hydrogen.

(b) *Use of the most recent GREET model.* For each taxable year during the period described in section 45V(a)(1), a taxpayer claiming the section 45V credit determines the lifecycle GHG emissions rate of hydrogen produced at a hydrogen production facility under the most recent GREET model separately for each hydrogen production facility the taxpayer owns. This determination is made following the close of each such taxable year and must include all hydrogen production during the taxable year. In using the most recent GREET model to calculate the lifecycle GHG emissions rate for purposes of determining the amount of the section 45V credit under section 45V(a) and § 1.45V–1(b), the taxpayer must accurately enter all information about its facility requested within the interface of 45VH2–GREET (as described in § 1.45V–1(a)(8)(ii)). Information regarding where taxpayers may access 45VH2–GREET and accompanying documentation will be included in the instructions to the Form 7210, *Clean Hydrogen Production Credit*, or any successor form(s).

(c) *Provisional emissions rate (PER)*—(1) *In general.* For purposes of section 45V(c)(2)(C) and paragraph (a) of this section, the term *provisional emissions rate* or *PER* means the lifecycle GHG emissions rate of the process by which qualified clean hydrogen is produced by

the taxpayer at a hydrogen production facility as determined by the Secretary under this paragraph (c).

(2) *Rate not determined*—(i) *In general.* For purposes of section 45V(c)(2)(C), a taxpayer may not file a petition for a PER unless a lifecycle GHG emissions rate has not been determined under the most recent GREET model with respect to hydrogen produced by the taxpayer at a hydrogen production facility. A lifecycle GHG emissions rate has not been determined under the most recent GREET model with respect to hydrogen produced by the taxpayer at a hydrogen production facility if either the feedstock used by such facility or the facility's hydrogen production technology is not included in the most recent GREET model. A facility's hydrogen production pathway is not included in the most recent GREET model if the feedstock used by such facility or the facility's hydrogen production technology is not included in the most recent GREET model. If a taxpayer's request for an emissions value pursuant to paragraph (c)(5) of this section with respect to the hydrogen produced by the taxpayer at a hydrogen production facility is pending at the time such facility's hydrogen production pathway becomes included in an updated version of 45VH2–GREET, the taxpayer's request for an emissions value will be automatically denied. In such case, the taxpayer must determine the lifecycle GHG emissions rate with respect to such hydrogen under paragraph (c)(2)(ii) of this section.

(ii) *Subsequent inclusion in 45VH2–GREET.* Notwithstanding the definition of the most recent GREET model provided at § 1.45V–1(a)(8)(ii), for the taxable year in which the hydrogen production facility's hydrogen production pathway is first included in an updated version of 45VH2–GREET, the updated version of 45VH2–GREET will be considered the most recent GREET model with respect to the hydrogen produced by the taxpayer at the hydrogen production facility during such taxable year, and for purposes of section 45V(c)(2)(C), a lifecycle GHG emissions rate for such hydrogen will be considered to have been determined.

(3) *Process for filing a PER petition.* To file a PER petition with the Secretary, a taxpayer must submit a PER petition attached to the taxpayer's Federal income tax return for the first taxable year of hydrogen production ending within the 10-year period described in section 45V(a)(1) for which the taxpayer claims the section 45V credit for hydrogen to which the PER petition relates and for which a lifecycle GHG emissions rate has not been

determined, as defined under paragraph (c)(2)(i) of this section. A PER petition must contain an emissions value obtained from the DOE setting forth DOE's analytical assessment of the lifecycle GHG emissions associated with the facility's hydrogen production pathway, which must be consistent with the lifecycle GHG emissions framework provided in the section 45V regulations, and a copy of the taxpayer's request to the DOE for an emissions value, including any information provided by the taxpayer to the DOE pursuant to the emissions value request process provided in paragraph (c)(5) of this section. If the taxpayer obtained more than one emissions value from the DOE, the PER petition must contain the emissions value setting forth the lifecycle GHG emissions rate of the hydrogen for which the section 45V credit is claimed on the Form 7210, *Clean Hydrogen Production Credit*, to which the PER petition is attached.

(4) *PER determination.* Upon the IRS's acceptance of the taxpayer's Federal income tax return containing a PER petition, the emissions value of the hydrogen specified on such petition will be deemed accepted. A taxpayer would be able to rely upon an emissions value provided by the DOE for purposes of calculating and claiming a section 45V credit, provided that any information, representations, or other data provided to the DOE in support of the request for an emissions value are accurate. The IRS's deemed acceptance of such emissions value is the Secretary's determination of the PER. However, the production and sale or use of such hydrogen must be verified by an unrelated party under section 45V(c)(2)(B)(ii) and § 1.45V-5. Such verification and any information, representations, or other data provided to the DOE in support of the request for an emissions value are subject to later examination by the IRS.

(5) *Department of Energy (DOE) emissions value request process.* An applicant that submits a request for an emissions value must follow the procedures specified by the DOE to request and obtain such emissions value. Emissions values will be evaluated using the same well-to-gate system boundary that is employed in 45VH2-GREET. Additionally, if applicable, background data parameters in 45VH2-GREET will also be treated as background data (with fixed values that an applicant cannot change) in the emissions value request process. Treatment of EACs and other proposals outlined in the regulations in this part under section 45V will be consistently applied in the emissions value request

process. An applicant may request an emissions value from the DOE only after a front-end engineering and design (FEED) study or similar indication of project maturity, as determined by the DOE, such as project specification and cost estimation sufficient to inform a final investment decision has been completed for the hydrogen production facility. The DOE may decline to review applications that are not responsive, including those applications that use a hydrogen production technology and feedstock already in 45VH2-GREET or applications that are incomplete. Guidance and procedures for applicants to request and obtain an emissions value from the DOE will be published by the DOE, including a process for, under limited circumstances, a revision to the DOE's initial analytical assessment of an emissions value on the basis of revised technical information or facility design and operation.

(6) *Effect of PER.* A taxpayer may use a PER determined by the Secretary to calculate the amount of the section 45V credit under section 45V(a) and § 1.45V-1(b) with respect to qualified clean hydrogen produced at a qualified clean hydrogen production facility, provided all other requirements of section 45V are met, until the lifecycle GHG emissions rate of such hydrogen has been determined (for purposes of section 45V(c)(2)(C)) under the most recent GREET model. The Secretary's PER determination is not an examination or inspection of books of account for purposes of section 7605(b) of the Code and does not preclude or impede the IRS (under section 7605(b) or any administrative provisions adopted by the IRS) from later examining a return or inspecting books or records with respect to any taxable year for which the section 45V credit is claimed. For example, the verification report submitted under section 45V(c)(2)(B)(ii) and § 1.45V-5 and any information, representations, or other data provided to the DOE in support of the request for an emissions value are still subject to examination. Further, a PER determination does not signify that the IRS has determined that the requirements of section 45V have been satisfied for any taxable year.

(d) *Use of Energy Attribute Certificates (EACs)*—(1) *In general.* For purposes of the section 45V credit, if a taxpayer determines a lifecycle GHG emissions rate for hydrogen produced at a hydrogen production facility using the most recent GREET model or the Secretary determines a provisional emissions rate for hydrogen produced at a hydrogen production facility subject to a PER petition, then the taxpayer may

treat such hydrogen production facility's use of electricity as being from a specific electricity generating facility rather than being from the regional electricity grid (as represented in 45VH2-GREET) only if the taxpayer acquires and retires qualifying EACs (as defined in paragraph (d)(2)(iv) of this section) for each unit of electricity that the taxpayer claims from such source. For example, one megawatt-hour of electricity use to produce hydrogen would need to be matched with one megawatt-hour of qualifying EACs. Further, to satisfy this requirement, a taxpayer's acquisition and retirement of qualifying EACs must also be recorded in a qualified EAC registry or accounting system (as defined in paragraph (d)(2)(v) of this section) so that the acquisition and retirement of such EACs may be verified by a qualified verifier (as defined in § 1.45V-5(h)). The requirements of this paragraph (d)(1) apply regardless of whether the electricity generating facility is grid connected, directly connected, or co-located with the hydrogen production facility.

(2) *Definitions.* For purposes of this section—

(i) *Commercial operations date.* The term *commercial operations date* or *COD* means the date on which a facility that generates electricity begins commercial operations.

(ii) *Energy attribute certificate.* The term *energy attribute certificate* (EAC) means a tradeable contractual instrument, issued through a qualified EAC registry or accounting system (as defined in paragraph (d)(2)(v) of this section), that represents the energy attributes of a specific unit of energy produced. An EAC may be traded with or separately from the underlying energy it represents. An EAC can be retired by or on behalf of its owner, which is the party that has the right to claim the underlying attributes represented by an EAC. Renewable energy certificates (RECs) and other similar energy certificates issued through a registry or accounting system are forms of EACs.

(iii) *Eligible EAC.* The term *eligible EAC* means an EAC that, with respect to the electricity to which the EAC relates, provides, at a minimum, the information described in paragraphs (d)(2)(iii)(A) through (F) of this section—

(A) A description of the facility, including the technology and feedstock used to generate the electricity;

(B) The amount and units of electricity;

(C) The COD of the facility that generated the electricity;

(D) For electricity that is generated before January 1, 2028, the calendar year in which such electricity was generated;

(E) For electricity that is generated after December 31, 2027, the date and hour in which such electricity was generated; and

(F) The project identification number or assigned identifier.

(iv) *Qualifying EAC*. The term *qualifying EAC* means an eligible EAC that meets the requirements of paragraph (d)(3) of this section and for which the satisfaction of those requirements has been verified by a qualified verifier (as defined in § 1.45V–5(h)).

(v) *Qualified EAC registry or accounting system*. The term *qualified EAC registry or accounting system* means a tracking system that—

(A) Assigns a unique identification number to each EAC tracked by such system;

(B) Enables verification that only one EAC is associated with each unit of electricity;

(C) Verifies that each EAC is claimed and retired only once;

(D) Identifies the owner of each EAC; and

(E) Provides a publicly accessible view (for example, through an application programming interface) of all currently registered generators in the tracking system to prevent the duplicative registration of generators.

(vi) *Region*. The term *region* means a region derived from the National Transmission Needs Study that was released by the DOE on October 30, 2023. Alaska, Hawaii, and each U.S. territory will be treated as separate regions.

(3) *Qualifying EAC requirements*. An eligible EAC meets the requirements of this paragraph (d)(3) if it meets the requirements of paragraphs (d)(3)(i) through (iii) of this section.

(i) *Incrementality*. An EAC meets the requirements of this paragraph (d)(3)(i) if it meets the requirements of paragraph (d)(3)(i)(A) or (B) of this section. Paragraph (d)(3)(i)(C) of this section provides an example that illustrates the application of paragraph (d)(3)(i)(B) of this section.

(A) An EAC meets the requirements of this paragraph (d)(3)(i)(A) if the electricity generation facility that produced the unit of electricity to which the EAC relates has a COD that is no more than 36 months before the hydrogen production facility for which the EAC is retired was placed in service.

(B) *Upgrades*. An EAC meets the requirements of this paragraph (d)(3)(i)(B) if the electricity represented by the EAC is produced by an electricity

generating facility that had an uprate no more than 36 months before the hydrogen production facility with respect to which the EAC is retired was placed in service and such electricity is part of such electricity generating facility's uprated production. The term *uprate* means an increase in an electricity generating facility's rated nameplate capacity (in nameplate megawatts). The term *pre-uprate capacity* means the nameplate capacity of an electricity generating facility immediately before an uprate. The term *post-uprate capacity* means the nameplate capacity of an electricity generating facility immediately after an uprate. The term *incremental generation capacity* means the increase in an electricity generating facility's rated nameplate capacity from the pre-uprate capacity to the post-uprate capacity. The term *uprated production rate* means the incremental generation capacity (in nameplate megawatts) divided by the post-uprate capacity (in nameplate megawatts). The term *uprated production* means the uprated production rate of an electricity generating facility multiplied by its total generation output (in megawatt hours). An uprated electricity generating facility's production must be prorated to each hour of such facility's generation by multiplying the production for each hour or each year, consistent with the requirements in paragraph (d)(3)(ii) of this section, by the uprated production rate to determine the electricity to which the uprate relates.

(C) *Example*. Power Plant undergoes an uprate that expands its rated nameplate capacity from a pre-uprate capacity of 10 megawatts (MW) to a post-uprate capacity of 12 MW. After the uprate, its generation output increases to a total of 40,000 MW hours for the year. Power Plant's incremental generation capacity is 2 MW, its uprated production rate is 0.167 (2 MW divided by 12 MW), and its total uprated production for the year is 6,667 megawatt hours (MWh) (2 megawatts divided by 12 MW multiplied by 40,000 MWh). Two-twelfths (0.167) of each hour of the Power Plant's production may be considered uprated production.

(ii) *Temporal matching*—(A) *In general*. An EAC meets the requirements of this paragraph (d)(3)(ii) if the electricity represented by the EAC is generated in the same hour that the taxpayer's hydrogen production facility uses electricity to produce hydrogen.

(B) *Transition rule*. For EACs that represent electricity generated before January 1, 2028, the EAC will be considered generated in the same hour that the taxpayer's hydrogen production

facility uses electricity to produce hydrogen as required in paragraph (d)(3)(ii)(A) of this section if the electricity represented by the EAC is generated in the same calendar year that the taxpayer's hydrogen production facility uses electricity to produce hydrogen.

(iii) *Deliverability*. An EAC meets the requirements of this paragraph (d)(3)(iii) if the electricity represented by the EAC is generated by a facility that is in the same region (as defined in paragraph (d)(2)(vi) of this section) as the hydrogen production facility.

(e) *Applicability date*. This section applies to taxable years beginning after December 26, 2023.

§ 1.45V–5 Procedures for verification of qualified clean hydrogen production and sale or use.

(a) *In general*. For each qualified clean hydrogen production facility for which a taxpayer claims a section 45V credit, a verification report must be attached to the taxpayer's Form 7210, *Clean Hydrogen Production Credit*, or any successor form(s), for each qualified clean hydrogen production facility and for each taxable year in which the taxpayer claims the section 45V credit.

(b) *Requirements for verification reports*. A verification report specified in paragraph (a) of this section must be prepared by a qualified verifier under penalties of perjury and must contain—

(1) An attestation from the qualified verifier regarding the taxpayer's production of qualified clean hydrogen for sale or use (production attestation);

(2) An attestation from the qualified verifier regarding the amount of qualified clean hydrogen sold or used (sale or use attestation);

(3) An attestation from the qualified verifier regarding conflicts of interest (conflict attestation);

(4) Certain information regarding the qualified verifier, including documentation of the qualified verifier's qualifications (qualified verifier statement);

(5) Certain general information about the taxpayer's hydrogen production facility where the hydrogen production undergoing verification occurred; and

(6) Any documentation necessary to substantiate the verification process given the standards and best practices prescribed by the qualified verifier's accrediting body and the circumstances of the taxpayer and the taxpayer's hydrogen production facility.

(c) *Requirements for the production attestation*. The following requirements apply to the production attestation.

(1) The production attestation must be an attestation, made under penalties of

perjury, that the qualified verifier performed a verification sufficient to determine that the operation, during the applicable taxable year, of the hydrogen production facility that produced the hydrogen for which the section 45V credit is claimed, and any energy attribute certificates (EACs) applied pursuant to § 1.45V-4(d) for the purpose of accounting for such facility's emissions, are accurately reflected in—

(i) The amount of qualified clean hydrogen produced by the taxpayer that is claimed on the Form 7210, *Clean Hydrogen Production Credit*, or any successor form(s), to which the verification report is attached; and

(ii) Either—

(A) The data the taxpayer entered into the most recent GREET model to determine the lifecycle GHG emissions rate that is claimed on the Form 7210, *Clean Hydrogen Production Credit*, or any successor form(s), to which the verification report is attached; or

(B) The data the taxpayer submitted in the PER petition relating to the hydrogen for which the section 45V credit is claimed, and which was provided to the DOE in support of the taxpayer's request for the emissions value provided in the PER petition.

(2) If the production attestation attests to the information specified in paragraph (c)(1)(ii)(B) of this section, then the production attestation must also specify the emissions value received from the DOE that was calculated using such data, expressed in kilograms of CO₂e per kilogram of hydrogen.

(3) The production attestation must specify the lifecycle GHG emissions rate (expressed in kilograms of CO₂e per kilogram of hydrogen) and the amount of qualified clean hydrogen produced by the taxpayer (expressed in kilograms), that are claimed on the Form 7210, *Clean Hydrogen Production Credit*, or any successor form(s), to which the verification report is attached.

(d) *Requirements for the sale or use attestation*—(1) *In general.* The sale or use attestation must be an attestation, made under penalties of perjury, that the qualified verifier performed a verification sufficient to determine that the amount of qualified clean hydrogen that is specified in the production attestation pursuant to paragraph (c)(1)(i) of this section, and that is claimed on the Form 7210, *Clean Hydrogen Production Credit*, or any successor form(s), to which the verification report is attached, has been sold or used by a person who makes a verifiable use of such hydrogen.

(2) *Verifiable use.* For purposes of section 45V(c)(2)(B)(ii) of the Code and

the section 45V regulations (as defined in § 1.45V-1(a)(13)), a person's *verifiable use* of the hydrogen specified in paragraph (d)(1) of this section can occur within or outside the United States. A verifiable use can be made by the taxpayer or a person other than the taxpayer. For example, a verifiable use includes a tolling arrangement pursuant to which a service recipient provides raw materials or inputs, such as water or electricity, to a toller (that is, a third-party service provider that owns a hydrogen production facility), and the toller produces hydrogen for the service recipient using the service recipient's raw materials or inputs in exchange for a fee, use of the hydrogen by the service recipient would be a verifiable use. However, a verifiable use does not include—

(i) Use of hydrogen to generate electricity that is then directly or indirectly used in the production of more hydrogen; or

(ii) Venting or flaring of hydrogen.

(e) *Requirements for the conflict attestation*—(1) *In general.* The conflict attestation must include attestations, made under penalties of perjury, that—

(i) The qualified verifier has not received a fee based to any extent on the value of any section 45V credit that has been or is expected to be claimed by any taxpayer and no arrangement has been made for such fee to be paid at some time in the future;

(ii) The qualified verifier was not a party to any transaction in which the taxpayer sold qualified clean hydrogen it had produced or in which the taxpayer purchased inputs for the production of such hydrogen;

(iii) The qualified verifier is not related, within the meaning of section 267(b) or 707(b)(1) of the Code, to, or an employee of, the taxpayer;

(iv) The qualified verifier is not married to an individual described in paragraph (e)(1)(iii) of this section; and

(v) If the qualified verifier is acting in his or her capacity as a partner in a partnership, an employee of any person, whether an individual, corporation, or partnership, or an independent contractor engaged by a person other than the taxpayer, the attestations under paragraphs (e)(1)(i) through (iv) of this section must also be made with respect to the partnership or the person who employs or engages the qualified verifier.

(2) *Special rule for transfer elections.* If an election has been made under section 6418(a) of the Code with respect to the section 45V credit, then the attestations under paragraph (e)(1) of this section must be made with respect to the qualified verifier's independence

from both the *eligible taxpayer* and the *transferee taxpayer* (as those terms are defined in section 6418 and the regulations in this chapter thereunder).

(f) *Requirements for the qualified verifier statement.* The qualified verifier statement must include the following—

(1) The qualified verifier's name, address, and taxpayer identification number;

(2) The qualified verifier's qualifications to conduct the verification, including a description of the qualified verifier's education and experience and a photocopy of the qualified verifier's certificate received from their accrediting body;

(3) If the qualified verifier is acting in his or her capacity as a partner in a partnership, an employee of any person, whether an individual, corporation, or partnership, or an independent contractor engaged by a person other than the taxpayer, the name, address, and taxpayer identification number of the partnership or the person who employs or engages the qualified verifier;

(4) The signature of the qualified verifier and the date signed by the qualified verifier; and

(5) A statement that the verification was conducted for Federal income tax purposes.

(g) *General information on the taxpayer's hydrogen production facility.* The verification report must include the following information for the taxpayer's hydrogen production facility where the hydrogen production undergoing verification occurred:

(1) The location of the hydrogen production facility;

(2) A description of the hydrogen production facility, including its method of producing hydrogen;

(3) The type(s) of feedstock(s) used by the hydrogen production facility during the taxable year of production;

(4) The amount(s) of feedstock(s) used by the hydrogen production facility during the taxable year of production; and

(5) A list of the metering devices used to record any data used by the qualified verifier to support the production attestation under paragraph (c) of this section along with a statement that the qualified verifier is reasonably assured that the device(s) underwent industry-appropriate quality assurance and quality control, and the accuracy and calibration of the device has been tested in the last year.

(h) *Qualified verifier.* The term *qualified verifier* means any individual or organization with active accreditation—

(1) As a validation and verification body from the American National Standards Institute National Accreditation Board; or

(2) As a verifier, lead verifier, or verification body under the California Air Resources Board Low Carbon Fuel Standard program.

(i) *Unrelated party.* For purposes of section 45V(c)(2)(B)(ii), the term *unrelated party* means a qualified verifier who meets the requirements of paragraph (e) of this section.

(j) *Requirements for taxpayers claiming both the section 45V credit and the section 45 credit or the section 45U credit.* In the case of a taxpayer who produces electricity for which either the section 45 or section 45U credit is claimed and the taxpayer or a related person uses such electricity to produce hydrogen for which the section 45V credit is claimed, the verification report must also contain attestations that the qualified verifier performed a verification sufficient to determine that—

(1) The electricity used to produce such hydrogen was produced at the relevant facility for which a section 45 or section 45U credit is claimed;

(2) The given amount of electricity (in kilowatt hours) used to produce such hydrogen at the relevant hydrogen production facility is reasonably assured of being accurate; and

(3) The electricity for which a section 45 or 45U credit was claimed is represented by EACs that are retired in connection with the production of such hydrogen.

(k) *Timely verification report.* A verification report must be signed and dated by the qualified verifier no later than—

(1) The due date, including extensions, of the Federal income tax return or information return for the taxable year during which the hydrogen undergoing verification is produced; or

(2) In the case of a credit first claimed on an amended return or administrative adjustment request, the date on which the amended return or administrative adjustment request is filed.

(l) *Applicability date.* This section applies to taxable years beginning after December 26, 2023.

§ 1.45V–6 Rules for determining the placed in service date for an existing facility that is modified or retrofitted to produce qualified clean hydrogen.

(a) *Modification of an existing facility—(1) In general.* Under section 45V(d)(4) of the Code, in the case of an existing facility that—

(i) Was originally placed in service before January 1, 2023, and, prior to the

modification described in this paragraph (a), did not produce qualified clean hydrogen, and after the date such facility was originally placed in service—

(A) Is modified to produce qualified clean hydrogen; and

(B) Amounts paid or incurred with respect to such modification are properly chargeable to the taxpayer's capital account for the facility.

(ii) Such facility will be deemed to have been originally placed in service as of the date the property required to complete the modification described in this paragraph (a) is placed in service.

(2) *Modification requirements.* For purposes of section 45V(d)(4) and paragraph (a)(1) of this section, an existing facility will not be deemed to have been originally placed in service as of the date the property required to complete the modification is placed in service unless the modification is made for the purpose of enabling the facility to produce qualified clean hydrogen and the taxpayer pays or incurs an amount that is properly chargeable to the taxpayer's capital account with respect to the facility. A modification is made for the purpose of enabling the facility to produce qualified clean hydrogen if the facility could not produce hydrogen with a lifecycle greenhouse gas (GHG) emissions rate that is less than or equal to 4 kilograms of CO₂e per kilogram of hydrogen but for the modification. For example, if a taxpayer solely pays or incurs capital expenses to modify existing components of a hydrogen production facility that are not necessary for the production of hydrogen with a lifecycle GHG emissions rate that is less than or equal to 4 kilograms of CO₂e per kilogram of hydrogen, such modification does not entitle the facility to a new placed in service date.

(b) *Retrofit of an Existing Facility (80/20 Rule).* For purposes of section 45V(a)(1), a facility may establish a new date on which it is considered originally placed in service, even though the facility contains some used property, provided the fair market value of the used property is not more than 20 percent of the facility's total value, calculated by adding the cost of the new property to the value of the used property (80/20 Rule). For purposes of the 80/20 Rule, the cost of new property includes all properly capitalized costs of the new property included within the facility. The 80/20 Rule applies to any existing facility, regardless of whether the facility previously produced qualified clean hydrogen and regardless of when the facility was originally placed in service (before application of

this paragraph (b)). If a facility satisfies the requirements of the 80/20 Rule, then the date on which such facility is considered originally placed in service for purposes of section 45V(a)(1) is the date on which the new property added to the facility is placed in service.

(c) *Examples.* The following examples illustrate the application of paragraphs (a) and (b) of this section:

(1) *Example 1: Modification of an existing facility—(i) Facts.* Facility X, a hydrogen production facility that was originally placed in service on January 1, 2018, could not produce qualified clean hydrogen as described in section 45V(c)(2). After January 1, 2023, Facility X was modified to produce qualified clean hydrogen, and all amounts paid or incurred with respect to such modifications were properly chargeable to the taxpayer's capital account for Facility X. The property required to complete the modification was placed in service on June 1, 2023.

(ii) *Analysis.* Under section 45V(d)(4) and paragraph (a) of this section, because Facility X was originally placed in service before January 1, 2023, and before the modification could not produce qualified clean hydrogen, it is deemed to be originally placed in service as of the date the property required to complete the modification is placed in service. Accordingly, for purposes of section 45V(a)(1) and (d)(4), Facility X is deemed to have been originally placed in service on June 1, 2023.

(2) *Example 2: Modification of an existing facility; coordination with the section 45Q credit previously allowed—(i) Facts.* The facts are the same as in paragraph (c)(1) of this section (*Example 1*), except that taxpayer was allowed a section 45Q credit with respect to carbon capture equipment (CCE) included at Facility X before June 1, 2023.

(ii) *Analysis.* Under paragraph (a) of this section and § 1.45V–2(a), although Facility X is deemed to have been originally placed in service on June 1, 2023, because taxpayer had previously been allowed a section 45Q credit with respect to the CCE included at Facility X, no section 45V credit is allowable for qualified clean hydrogen produced at Facility X, despite the modification.

(3) *Example 3: Modification of an existing facility and coordination with section 45Q credit not previously allowed—(i) Facts.* Facility Y, a hydrogen production facility that was originally placed in service on February 1, 2020, could not previously produce qualified clean hydrogen as described in section 45V(c)(2). On February 1, 2026, Facility Y was modified to produce

qualified clean hydrogen by adding new CCE to allow Facility Y to capture, process, and prepare carbon dioxide for transport for disposal, injection, or utilization. All amounts paid or incurred with respect to such modifications were properly chargeable to the taxpayer's capital account for Facility Y. The property required to complete the modification of Facility Y was placed in service on February 1, 2026, and as a result, Facility Y, including the new CCE, is deemed to be originally placed in service on February 1, 2026, for purposes of sections 45V and 45Q. No section 45Q credit has been allowed to any taxpayer with respect to the new carbon capture equipment located at Facility Y.

(ii) *Analysis.* Under paragraph (a) of this section and § 1.45V-2(a), because no section 45Q credit has been allowed to any taxpayer with respect to the new CCE located at Facility Y, a section 45V credit is allowable for the qualified clean hydrogen produced at Facility Y, assuming all other requirements of section 45V are met.

(4) *Example 4: Retrofit of an Existing Facility (80/20 Rule)*—(i) *Facts.* Facility Z, a hydrogen production facility that was originally placed in service on February 1, 2023, does not produce qualified clean hydrogen as described in section 45V(c)(2). On January 1, 2026, Facility Z was retrofitted to produce qualified clean hydrogen. After the retrofit, the cost of the new property included in Facility Z is greater than 80 percent of Facility Z's total value.

(ii) *Analysis.* Even though Facility Z does not satisfy the requirements of section 45V(d)(4) because Facility Z was not originally placed in service before January 1, 2023, under paragraph (b) of this section, Facility Z is deemed to be originally placed in service on January 1, 2026, because Facility Z meets the 80/20 Rule. Thus, a section 45V credit is allowable for qualified clean hydrogen produced at Facility Z during the 10-year period beginning on January 1, 2026, assuming all other requirements of section 45V are met.

(5) *Example 5: Retrofit of an Existing Facility (80/20 Rule) and coordination with section 45Q credit previously allowed*—(i) *Facts.* The facts are the same as in paragraph (c)(4) of this section (*Example 4*), except that before the retrofit, Facility Z included CCE for which a section 45Q credit was allowed to a taxpayer.

(ii) *Analysis.* Under paragraph (b) of this section and § 1.45V-2(a), Facility Z is deemed to be originally placed in service on January 1, 2026, because Facility Z meets the 80/20 Rule. However, a section 45V credit is not

allowable for qualified clean hydrogen produced at Facility Z during the 10-year period beginning on January 1, 2026, because a section 45Q credit has been allowed to a taxpayer with regard to the CCE included in Facility Z.

(d) *Applicability date.* This section applies to taxable years beginning after December 26, 2023.

■ **Par. 3.** Section 1.48-15 is added to read as follows:

§ 1.48-15 Election to treat clean hydrogen production facility as energy property.

(a) *In general.* Under section 48(a)(15) of the Internal Revenue Code (Code), a taxpayer that owns and places in service a specified clean hydrogen production facility (as defined in section 48(a)(15)(C) and paragraph (b) of this section) can make an irrevocable election under section 48(a)(15)(C)(ii)(II) to treat any qualified property (as defined in section 48(a)(5)(D)) that is part of the facility as energy property for purposes of section 48.

(b) *Specified clean hydrogen production facility.* The term *specified clean hydrogen production facility* means any qualified clean hydrogen production facility—

(1) That is placed in service after December 31, 2022;

(2) With respect to which no credit has been allowed under section 45V or 45Q of the Code, and for which the taxpayer makes an irrevocable election to have section 48(a)(15) apply; and

(3) For which an unrelated party has verified in the manner specified in paragraph (e) of this section that such facility produces hydrogen through a process that results in lifecycle greenhouse gas (GHG) emissions that are consistent with the hydrogen that such facility was designed and expected to produce under section 48(a)(15)(A)(ii) and paragraph (c) of this section.

(c) *Energy percentage*—(1) *In general.* In the case of a specified clean hydrogen production facility that is designed and reasonably expected to produce qualified clean hydrogen through a process that results in a lifecycle GHG emissions rate of:

(i) Not greater than 4 kilograms of carbon dioxide equivalent (CO₂e) per kilogram of hydrogen, and not less than 2.5 kilograms of CO₂e per kilogram of hydrogen, the energy percentage is 1.2 percent;

(ii) Less than 2.5 kilograms of CO₂e per kilogram of hydrogen, and not less than 1.5 kilograms of CO₂e per kilogram of hydrogen, the energy percentage is 1.5 percent;

(iii) Less than 1.5 kilograms of CO₂e per kilogram of hydrogen, and not less than 0.45 kilograms of CO₂e per

kilogram of hydrogen, the energy percentage is 2 percent; and

(iv) Less than 0.45 kilograms of CO₂e per kilogram of hydrogen, the energy percentage is 6 percent.

(2) *Designed and reasonably expected to produce.* Hydrogen that a facility is *designed and reasonably expected to produce* means hydrogen produced through a process that results in the lifecycle GHG emissions rate specified in the annual verification report described in paragraph (e)(2) of this section for the taxable year in which the election is made.

(d) *Time and manner of making the election*—(1) *In general.* To make an election under section 48(a)(15)(C)(ii)(II), a taxpayer must claim the section 48 credit with respect to a specified clean hydrogen production facility on a completed Form 3468, *Investment Credit*, or any successor form(s), and file the form with the taxpayer's Federal income tax return or information return for the taxable year in which the specified clean hydrogen production facility is placed in service. The taxpayer must also attach a statement to its Form 3468, *Investment Credit*, or any successor form(s), filed with its Federal income tax return or information return that includes the information required by the instructions to Form 3468, *Investment Credit*, or any successor form(s), for each specified clean hydrogen production facility subject to an election. A separate election must be made for each specified clean hydrogen production facility that meets the requirements provided in section 48(a)(15) to treat the qualified property that is part of the facility as energy property. If any taxpayer owning an interest in a specified clean hydrogen production facility makes an election under section 48(a)(15)(C)(ii)(II) with respect to the specified clean hydrogen production facility, then that election is binding on all taxpayers that directly or indirectly own an interest in the specified clean hydrogen production facility.

(2) *Special rule for partnerships and S corporations.* In the case of a specified clean hydrogen production facility owned by a partnership or an S corporation, the election under section 48(a)(15)(C)(ii)(II) is made by the partnership or S corporation and is binding on all ultimate credit claimants (as defined in § 1.50-1(b)(3)(ii)). The partnership or S corporation must file a Form 3468, *Investment Credit*, or any successor forms(s), with its partnership or S corporation return for the taxable year in which the specified clean hydrogen production facility is placed

in service to indicate that it is making the election, and attach a statement that includes all the information required by the instructions to Form 3468,

Investment Credit, or any successor form(s), for each specified clean hydrogen production facility subject to the election. The ultimate credit claimant's section 48 credit must be based on each claimant's share of the basis (as defined in § 1.46–3(f)) of the specified clean hydrogen production facility on a completed Form 3468, *Investment Credit*, or any successor form(s), and file such form with a Federal income tax return for the taxable year that ends with or within the taxable year in which the partnership or S corporation made the election. The partnership or S corporation making the election must provide the ultimate credit claimants with the necessary information to complete Form 3468, *Investment Credit*, or any successor form(s), to claim the section 48 credit.

(3) *Election irrevocable.* The election to treat qualified property that is part of a specified clean hydrogen production facility as energy property is irrevocable.

(4) *Election availability date.* The election to treat qualified property that is part of a specified clean hydrogen production facility as energy property is available for property placed in service after December 31, 2022. In the case of any property placed in service after December 31, 2022, for which construction began before January 1, 2023, the election under section 48(a)(15)(C)(ii)(II) applies only to the extent of the basis of such property that is attributable to construction, reconstruction, or erection occurring after December 31, 2022.

(e) *Third party verification*—(1) *In general.* In the case of a taxpayer that makes an election under section 48(a)(15)(C)(ii)(II) to treat any qualified property that is part of a specified clean hydrogen production facility as energy property for purposes of the section 48 credit, the taxpayer must obtain an annual verification report for the taxable year in which the election under section 48(a)(15)(C)(ii)(II) is made for the facility and for each taxable year thereafter during the recapture period specified in paragraph (f)(3) of this section. The taxpayer must also submit the annual verification report as an attachment to the Form 3468, *Investment Credit*, or any successor form(s), for the taxable year in which the election under section 48(a)(15)(C)(ii)(II) is made for the facility.

(2) *Annual verification report*—(i) *In general.* For purposes of paragraph (e)(1) of this section, the annual verification

report must be signed under penalties of perjury by a qualified verifier (as defined in § 1.45V–5(h)) and contain an attestation providing all of the following—

(A) The information specified in § 1.45V–5(b) and (d) through (h);

(B) A statement attesting to the lifecycle GHG emissions rate (determined under section 45V(c) and § 1.45V–4) of the hydrogen produced at the specified clean hydrogen production facility for the taxable year to which the annual verification report relates and that the operation, during such taxable year, of the specified clean hydrogen production facility, and any energy attribute certificates (EACs) applied pursuant to § 1.45V–4(d) for the purpose of accounting for such facility's emissions, are accurately reflected in the data that the taxpayer entered into the most recent GREET model (as defined in § 1.45V–1(a)(8)(ii)) (or that the taxpayer provided to the Department of Energy (DOE) in support of the taxpayer's request for an emissions value), to determine the lifecycle GHG emissions rate of the hydrogen undergoing verification; and

(C) A statement attesting that the facility produced hydrogen through a process that results in a lifecycle GHG emissions rate that is consistent with, or lower than, the lifecycle GHG emissions rate of the hydrogen that such facility was designed and expected to produce.

(ii) *Conflict attestation in the case of a transfer election.* If a transfer election has been made under section 6418(a) of the Code with respect to the section 48 credit for a specified clean hydrogen production facility, then a conflict attestation containing the information specified in § 1.45V–5(e)(1), must be made with respect to the qualified verifier's independence from both the eligible taxpayer (as defined in section 6418(f)(2) and § 1.6418–1(b)) and the transferee taxpayer (as described in section 6418(a) and defined in § 1.6418–1(m)), and without regard to the requirements under § 1.45V–5(e)(2).

(iii) *Inconsistent lifecycle GHG emissions.* In the event the facility produces hydrogen through a process that results in a lifecycle GHG emissions rate that is greater than the lifecycle GHG emissions rate that such facility was designed and expected to produce (and thus the qualified verifier cannot provide the attestation specified in paragraph (e)(2)(i)(C) of this section), resulting in a reduced energy percentage under section 48(a)(15)(A)(ii) with respect to such facility, an emissions tier recapture event under paragraph (f)(2) of this section will occur.

(iv) *Designed and expected to produce.* Hydrogen that the facility was designed and expected to produce means hydrogen specified in paragraph (c)(2) of this section.

(v) *Timely annual verification report.* The annual verification report must be signed and dated by the qualified verifier no later than the due date, including extensions, of the Federal income tax return for the taxable year in which the hydrogen undergoing verification was produced.

(vi) *Records retention.* In addition to the recordkeeping requirements set forth in paragraph (g) of this section, the taxpayer must retain the annual verification report for at least six years after the due date, with extensions, for filing the Federal income tax return for the taxable year in which the hydrogen undergoing verification was produced.

(f) *Recapture*—(1) *In general.* For purposes of section 48(a)(15)(E), in any taxable year of the recapture period specified in paragraph (f)(3) of this section in which an emissions tier recapture event (as defined in paragraph (f)(2) of this section) occurs, the tax imposed on the taxpayer under chapter 1 of the Code for the taxable year of the emissions tier recapture event is increased by the recapture amount specified in paragraph (f)(4) of this section.

(2) *Emissions tier recapture event.* For purposes of paragraph (f)(1) of this section, an *emissions tier recapture event* occurs in any taxable year of the recapture period specified in paragraph (f)(3) of this section under the following circumstances—

(i) The taxpayer fails to obtain an annual verification report by the deadline for filing its Federal income tax return (including extensions) for any taxable year in which an annual verification report is required under paragraph (e)(1) of this section;

(ii) The specified clean hydrogen production facility actually produced hydrogen through a process that results in a lifecycle GHG emissions rate that can only support a lower energy percentage than the energy percentage used to calculate the amount of the section 48 credit for the facility for the taxable year in which the facility is placed in service; or

(iii) The specified clean hydrogen production facility actually produced hydrogen through a process that results in a lifecycle GHG emissions rate of greater than 4 kilograms of CO₂e per kilogram of hydrogen.

(3) *Recapture period.* For purposes of paragraph (f) of this section, the recapture period begins on the first day of the taxable year after the taxable year

in which the facility was placed in service and ends on the close of the fifth taxable year following the close of the taxable year in which the facility was placed in service.

(4) *Recapture amount*—(i) *In general.* In the case of an emissions tier recapture event under paragraph (f)(2) of this section, the recapture amount for the taxable year in which the emissions tier recapture event occurred is equal to 20 percent of the excess of the section 48 credit allowed to the taxpayer for the specified clean hydrogen production facility for the taxable year in which the facility was placed in service, over the section 48 credit that would have been allowed to the taxpayer for the facility if the taxpayer had used the energy percentage supported by the actual production to calculate the amount of the section 48 credit. Such increase in tax is the *recapture amount*.

(ii) *Carrybacks and carryovers.* In the case of any emissions tier recapture event described in paragraph (f)(2) of this section, the carrybacks and carryovers under section 39 must be adjusted by reason of the emissions tier recapture event.

(iii) *Recapture amount in case of recapture events under paragraph (f)(2)(i) or (iii) of this section.* For purposes of paragraph (f)(4)(i) of this section, in the case of an emissions tier recapture event under paragraph (f)(2)(i) or (iii), the amount of the section 48 credit that would have been allowed to the taxpayer for the specified clean hydrogen production facility if the taxpayer had used the energy percentage supported by the actual production is zero. Accordingly, the recapture amount in the taxable year of an emissions tier recapture event under paragraph (f)(2)(i) or (iii) is 20 percent of the section 48 credit allowed to the taxpayer for such specified clean hydrogen production facility.

(5) *Example.* The following example illustrates the application of paragraphs (f)(1) through (4) of this section.

(i) *Facts.* On June 1, 2023, Taxpayer, a calendar-year taxpayer, originally places in service Facility X, a specified clean hydrogen production facility. At such time, Taxpayer's basis in qualified property that is part of Facility X is \$100,000,000. In the taxable year in which Facility X was originally placed in service (taxable year 2023), Facility X produces qualified clean hydrogen through a process that results in a lifecycle GHG emissions rate of 0.44kg/CO₂e per kilogram of hydrogen. Taxpayer submits with its 2023 Federal income tax return an annual verification report attesting that, for the taxable year 2023, Facility X produced hydrogen

through a process that resulted in a lifecycle GHG emissions rate of 0.44kg/CO₂e, which is consistent with the lifecycle GHG emissions rate of the hydrogen that the facility was designed and expected to produce. Taxpayer makes a valid election under section 48(a)(15)(C)(ii)(II) with respect to Facility X on its Federal income tax return for the taxable year 2023. In the first year of the recapture period (taxable year 2024), Taxpayer fails to obtain an annual verification report by the deadline (including extensions) for filing its 2024 Federal income tax return. In the second year of the recapture period (taxable year 2025), Facility X produces qualified clean hydrogen through a process that results in a lifecycle GHG emissions rate of 1.4kg/CO₂e per kilogram of hydrogen and obtains an annual verification report attesting to such lifecycle GHG emissions rate. In the third, fourth, and fifth years of the recapture period (taxable years 2026, 2027, and 2028), Facility X produces qualified clean hydrogen through a process that results in a lifecycle GHG emissions rate of 0.44kg/CO₂e per kilogram of hydrogen and obtains an annual verification report attesting to such lifecycle GHG emissions rate, and attesting that such lifecycle GHG emissions rate is consistent with the lifecycle GHG emissions rate of the hydrogen that the facility was designed and expected to produce, by the deadline (including extensions) for filing its 2026, 2027, and 2028 Federal income tax returns, respectively.

(ii) *Analysis.* Facility X is designed and reasonably expected to produce hydrogen through a process that results in a lifecycle GHG emissions rate of 0.44kg/CO₂e, which is the rate specified in Taxpayer's annual verification report submitted with Taxpayer's Federal income tax return for the taxable year in which the election under section 48(a)(15)(C)(ii)(II) with respect to Facility X was made. Under paragraph (c)(1)(iv) of this section, Facility X's energy percentage is therefore 6 percent. For the taxable year 2023, the year in which Taxpayer places in service Facility X, Taxpayer claims a section 48 credit for its basis in qualified property that is part of Facility X in the amount of \$6,000,000 (6 percent of \$100,000,000). In taxable year 2024, there is an emissions tier recapture event under paragraph (f)(2)(i) of this section because Taxpayer failed to obtain an annual verification report. Under paragraph (f)(4)(i) of this section, the amount of the section 48 credit recaptured in 2024 is \$1,200,000. This

reflects 20 percent of the section 48 credit allowed (\$6,000,000) for Facility X. In taxable year 2025, there is an emissions tier recapture event under paragraph (f)(2)(ii) of this section because Facility X produced hydrogen through a process that resulted in a lifecycle GHG emissions rate that could only support an energy percentage of 2 percent, which is lower than the energy percentage used to calculate the amount of the section 48 credit for Facility X. Under paragraph (f)(4)(i) of this section, the amount of the section 48 credit recaptured in 2025 is \$800,000. This reflects 20 percent of the difference between the amount of the section 48 credit allowed (\$6,000,000) and the amount of the section 48 credit that would have been allowed for Facility X if Taxpayer had used the energy percentage supported by the actual production (\$2,000,000). There is no emissions tier recapture event in taxable years 2026, 2027, or 2028 because, in those years, Facility X produced hydrogen through a process that resulted in a lifecycle GHG emissions rate that was consistent with the lifecycle GHG emissions rate of the hydrogen that Facility X was designed and expected to produce, and Taxpayer obtained an annual verification report attesting to such by the deadline (with extensions) for filing its Federal income tax return for each of those taxable years.

(6) *Coordination with sections 50(a) and 48(a)(10)(C) of the Code.* In each taxable year of the recapture period specified in paragraph (f)(3) of this section for any credit allowed under section 48 with respect to a specified clean hydrogen production facility, the recapture rules, if applicable, apply in the following order:

- (i) Section 50(a);
- (ii) Section 48(a)(10)(C); and
- (iii) Section 48(a)(15)(E).

(g) *Recordkeeping.* Consistent with section 6001 of the Code, a taxpayer making the election under section 48(a)(15)(C)(ii)(II) with respect to a specified clean hydrogen production facility must maintain and preserve records sufficient to establish the amount of the section 48 credit claimed by the taxpayer. At a minimum, those records include records to substantiate the information required to be included in the annual verification report under paragraph (e)(2) of this section, records establishing that the facility meets the definition of a specified qualified clean hydrogen production facility under section 48(a)(15)(C) and paragraph (b) of this section, and records establishing the date the specified clean hydrogen production facility was placed in

service. If the increased section 48 credit amount was allowed under section 48(a)(9), then the taxpayer must

also maintain records in accordance with § 1.45–12.

(h) *Applicability date.* This section applies to taxable years beginning after December 26, 2023.

Douglas W. O'Donnell,
Deputy Commissioner for Services and Enforcement.

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Part V

The President

Executive Order 14113—Adjustments of Certain Rates of Pay
Executive Order 14114—Taking Additional Steps With Respect to the
Russian Federation's Harmful Activities

Presidential Documents

Title 3—**Executive Order 14113 of December 21, 2023****The President****Adjustments of Certain Rates of Pay**

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Statutory Pay Systems.* The rates of basic pay or salaries of the statutory pay systems (as defined in 5 U.S.C. 5302(1)), as adjusted under 5 U.S.C. 5303, are set forth on the schedules attached hereto and made a part hereof:

(a) The General Schedule (5 U.S.C. 5332(a)) at Schedule 1;

(b) The Foreign Service Schedule (22 U.S.C. 3963) at Schedule 2; and

(c) The schedules for the Veterans Health Administration of the Department of Veterans Affairs (38 U.S.C. 7306, 7401, 7404; section 301(a) of Public Law 102–40) at Schedule 3.

Sec. 2. *Senior Executive Service.* The ranges of rates of basic pay for senior executives in the Senior Executive Service, as established pursuant to 5 U.S.C. 5382, are set forth on Schedule 4 attached hereto and made a part hereof.

Sec. 3. *Certain Executive, Legislative, and Judicial Salaries.* The rates of basic pay or salaries for the following offices and positions are set forth on the schedules attached hereto and made a part hereof:

(a) The Executive Schedule (5 U.S.C. 5311–5318) at Schedule 5;

(b) The Vice President (3 U.S.C. 104) and the Congress (2 U.S.C. 4501) at Schedule 6; and

(c) Justices and judges (28 U.S.C. 5, 44(d), 135, 252, and 461(a)) at Schedule 7.

Sec. 4. *Uniformed Services.* The rates of monthly basic pay (37 U.S.C. 203(a)) for members of the uniformed services, as adjusted under 37 U.S.C. 1009, and the rate of monthly cadet or midshipman pay (37 U.S.C. 203(c)) are set forth on Schedule 8 attached hereto and made a part hereof.

Sec. 5. *Locality-Based Comparability Payments.*

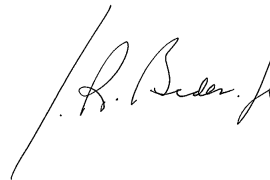
(a) Pursuant to section 5304 of title 5, United States Code, and my authority to implement an alternative level of comparability payments under section 5304a of title 5, United States Code, locality-based comparability payments shall be paid in accordance with Schedule 9 attached hereto and made a part hereof.

(b) The Director of the Office of Personnel Management shall take such actions as may be necessary to implement these payments and to publish appropriate notice of such payments in the *Federal Register*.

Sec. 6. *Administrative Law Judges.* Pursuant to section 5372 of title 5, United States Code, the rates of basic pay for administrative law judges are set forth on Schedule 10 attached hereto and made a part hereof.

Sec. 7. *Effective Dates.* Schedule 8 is effective January 1, 2024. The other schedules contained herein are effective on the first day of the first applicable pay period beginning on or after January 1, 2024.

Sec. 8. *Prior Order Superseded.* Executive Order 14090 of December 23, 2022, is superseded as of the effective dates specified in section 7 of this order.

A handwritten signature in black ink, appearing to read "R. Biden Jr.", is positioned in the upper right quadrant of the page. The signature is written in a cursive, flowing style.

THE WHITE HOUSE,
December 21, 2023.

Schedule 1--General Schedule

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2024)

Grade	1	2	3	4	5	6	7	8	9	10
GS-1	\$21,986	\$22,724	\$23,454	\$24,183	\$24,912	\$25,339	\$26,063	\$26,792	\$26,821	\$27,502
GS-2	24,722	25,310	26,129	26,821	27,124	27,922	28,720	29,518	30,316	31,114
GS-3	26,975	27,874	28,773	29,672	30,571	31,470	32,369	33,268	34,167	35,066
GS-4	30,280	31,289	32,298	33,307	34,316	35,325	36,334	37,343	38,352	39,361
GS-5	33,878	35,007	36,136	37,265	38,394	39,523	40,652	41,781	42,910	44,039
GS-6	37,765	39,024	40,283	41,542	42,801	44,060	45,319	46,578	47,837	49,096
GS-7	41,966	43,365	44,764	46,163	47,562	48,961	50,360	51,759	53,158	54,557
GS-8	46,475	48,024	49,573	51,122	52,671	54,220	55,769	57,318	58,867	60,416
GS-9	51,332	53,043	54,754	56,465	58,176	59,887	61,598	63,309	65,020	66,731
GS-10	56,528	58,412	60,296	62,180	64,064	65,948	67,832	69,716	71,600	73,484
GS-11	62,107	64,177	66,247	68,317	70,387	72,457	74,527	76,597	78,667	80,737
GS-12	74,441	76,922	79,403	81,884	84,365	86,846	89,327	91,808	94,289	96,770
GS-13	88,520	91,471	94,422	97,373	100,324	103,275	106,226	109,177	112,128	115,079
GS-14	104,604	108,091	111,578	115,065	118,552	122,039	125,526	129,013	132,500	135,987
GS-15	123,041	127,142	131,243	135,344	139,445	143,546	147,647	151,748	155,849	159,950

Schedule 2--Foreign Service Schedule

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2024)

Step	Class 1	Class 2	Class 3	Class 4	Class 5	Class 6	Class 7	Class 8	Class 9
1	\$123,041	\$99,700	\$80,787	\$65,461	\$53,043	\$47,419	\$42,391	\$37,896	\$33,878
2	126,732	102,691	83,211	67,425	54,634	48,842	43,663	39,033	34,894
3	130,534	105,772	85,707	69,448	56,273	50,307	44,973	40,204	35,941
4	134,450	108,945	88,278	71,531	57,962	51,816	46,322	41,410	37,019
5	138,484	112,213	90,926	73,677	59,700	53,371	47,711	42,652	38,130
6	142,638	115,580	93,654	75,887	61,491	54,972	49,143	43,932	39,274
7	146,917	119,047	96,464	78,164	63,336	56,621	50,617	45,250	40,452
8	151,325	122,618	99,358	80,509	65,236	58,319	52,136	46,607	41,666
9	155,865	126,297	102,339	82,924	67,193	60,069	53,700	48,006	42,916
10	159,950	130,086	105,409	85,412	69,209	61,871	55,311	49,446	44,203
11	159,950	133,988	108,571	87,974	71,285	63,727	56,970	50,929	45,529
12	159,950	138,008	111,828	90,613	73,424	65,639	58,679	52,457	46,895
13	159,950	142,148	115,183	93,332	75,627	67,608	60,439	54,031	48,302
14	159,950	146,413	118,638	96,132	77,895	69,636	62,253	55,652	49,751

**Schedule 3--Veterans Health Administration Schedules
Department of Veterans Affairs**

(Effective on the first day of the first applicable pay period
beginning on or after January 1, 2024)

Schedule for the Office of the Under Secretary for Health
(38 U.S.C. 7306) and Directors of Medical Centers and Veterans Integrated Service
Networks (38 U.S.C. 7401(4)) *

	<u>Minimum</u>	<u>Maximum</u>
	\$147,649	\$221,900**
Physician, Podiatrist, and Dentist Base and Longevity Pay Schedule***	<u>Minimum</u>	<u>Maximum</u>
Physician Grade	\$121,020	\$177,496
Dentist Grade	121,020	177,496
Podiatrist Grade.	121,020	177,496
Chiropractor and Optometrist Schedule	<u>Minimum</u>	<u>Maximum</u>
Chief Grade	\$123,041	\$159,950
Senior Grade.	104,604	135,987
Intermediate Grade.	88,520	115,079
Full Grade.	74,441	96,770
Associate Grade	62,107	80,737
Expanded-Function Dental Auxiliary Schedule****	<u>Minimum</u>	<u>Maximum</u>
Director Grade.	\$123,041	\$159,950
Assistant Director Grade.	104,604	135,987
Chief Grade	88,520	115,079
Senior Grade.	74,441	96,770
Intermediate Grade.	62,107	80,737
Full Grade.	51,332	66,731
Associate Grade	44,173	57,421
Junior Grade.	37,765	49,096

* Pursuant to 38 U.S.C. 7404(a)(2)(A) and (e), this schedule does not apply to the Director of Nursing Service or any incumbents who are physicians, podiatrists, or dentists. Pursuant to 38 U.S.C. 7404(a)(2)(B), this schedule also does not apply to the basic pay of any incumbents who are registered nurses or physician assistants if that basic pay is determined by the Secretary under subchapter IV of chapter 74 of title 38, United States Code.

** Pursuant to 38 U.S.C. 7404(a)(3)(B), for positions that are covered by a certified performance appraisal system, the maximum rate of basic pay may not exceed the rate of basic pay payable for level II of the Executive Schedule. For positions that are not covered by a certified performance appraisal system, the maximum rate of basic pay may not exceed the rate of basic pay payable for level III of the Executive Schedule.

*** Pursuant to 38 U.S.C. 7431, Veterans Health Administration physicians, podiatrists, and dentists paid under the Physician, Podiatrist, and Dentist Base and Longevity Pay schedule may also be paid market pay and performance pay.

**** Pursuant to section 301(a) of Public Law 102-40, these positions are paid according to the Nurse Schedule in 38 U.S.C. 4107(b), as in effect on August 14, 1990, with subsequent adjustments.

Schedule 4--Senior Executive Service

(Effective on the first day of the first applicable pay period
beginning on or after January 1, 2024)

	<u>Minimum</u>	<u>Maximum</u>
Agencies with a Certified SES		
Performance Appraisal System	\$147,649	\$221,900
Agencies without a Certified SES		
Performance Appraisal System	\$147,649	\$204,000

Schedule 5--Executive Schedule

(Effective on the first day of the first applicable pay period
beginning on or after January 1, 2024)

Level I	\$246,400
Level II	221,900
Level III.	204,000
Level IV	191,900
Level V	180,000

Schedule 6--Vice President and Members Of Congress

(Effective on the first day of the first applicable pay period
beginning on or after January 1, 2024)

Vice President	\$284,600
Senators	174,000
Members of the House of Representatives.	174,000
Delegates to the House of Representatives.	174,000
Resident Commissioner from Puerto Rico	174,000
President pro tempore of the Senate.	193,400
Majority leader and minority leader of the Senate.	193,400
Majority leader and minority leader of the House of Representatives	193,400
Speaker of the House of Representatives.	223,500

Schedule 7--Judicial Salaries

(Effective on the first day of the first applicable pay period
beginning on or after January 1, 2024)

Chief Justice of the United States	\$312,200
Associate Justices of the Supreme Court.	298,500
Circuit Judges	257,900
District Judges.	243,300
Judges of the Court of International Trade	243,300

**Schedule 8--Pay of The Uniformed Services
(Effective January 1, 2024)**

**Part I--Monthly Basic Pay
Years of Service (Computed Under 37 U.S.C. 205)**

Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12	Over 14	Over 16	Over 18
Commissioned Officers											
O-10*	-	-	-	-	-	-	-	-	-	-	-
O-9*	-	-	-	-	-	-	-	-	-	-	-
O-8	\$12,803.70	\$13,223.70	\$13,501.80	\$13,579.20	\$13,926.90	\$14,506.50	\$14,641.80	\$15,192.60	\$15,351.30	\$15,825.90	\$16,512.90
O-7	10,638.90	11,133.00	11,361.90	11,544.00	11,872.80	12,198.30	12,574.20	12,948.90	13,325.40	14,506.50	15,504.30
O-6**	8,067.90	8,863.20	9,444.90	9,444.90	9,481.20	9,887.40	9,941.40	9,941.40	10,506.30	11,505.00	12,091.20
O-5	6,725.70	7,576.50	8,100.90	8,199.60	8,527.20	8,722.50	9,153.00	9,469.80	9,878.10	10,501.80	10,799.10
O-4	5,803.20	6,717.30	7,166.40	7,265.40	7,681.50	8,127.90	8,684.10	9,116.10	9,416.70	9,589.50	9,689.10
O-3***	5,102.10	5,783.70	6,241.80	6,806.10	7,132.80	7,490.70	7,721.70	8,102.10	8,301.00	8,301.00	8,301.00
O-2***	4,408.50	5,020.80	5,782.80	5,978.10	6,100.80	6,100.80	6,100.80	6,100.80	6,100.80	6,100.80	6,100.80
O-1***	3,826.20	3,982.80	4,814.70	4,814.70	4,814.70	4,814.70	4,814.70	4,814.70	4,814.70	4,814.70	4,814.70
Commissioned Officers with Over 4 Years Active Duty Service as an Enlisted Member or Warrant Officer****											
O-3E	-	-	-	\$6,806.10	\$7,132.80	\$7,490.70	\$7,721.70	\$8,102.10	\$8,423.40	\$8,607.90	\$8,859.00
O-2E	-	-	-	5,978.10	6,100.80	6,294.90	6,622.80	6,876.60	7,065.00	7,065.00	7,065.00
O-1E	-	-	-	4,814.70	5,141.10	5,331.30	5,525.70	5,716.50	5,978.10	5,978.10	5,978.10
Warrant Officers											
W-5	-	-	-	-	-	-	-	-	-	-	-
W-4	\$5,273.10	\$5,671.50	\$5,834.40	\$5,994.60	\$6,270.60	\$6,543.60	\$6,820.20	\$7,235.40	\$7,599.90	\$7,946.70	\$8,231.10
W-3	4,815.60	5,015.70	5,222.10	5,289.00	5,504.40	5,928.90	6,370.80	6,579.00	6,819.90	7,067.40	7,513.80
W-2	4,260.90	4,663.80	4,787.70	4,873.20	5,149.20	5,578.50	5,791.80	6,001.20	6,257.40	6,457.80	6,639.00
W-1	3,739.80	4,143.00	4,250.70	4,479.60	4,749.90	5,148.30	5,334.30	5,595.30	5,850.90	6,052.20	6,237.60

* Basic pay is limited to the rate of basic pay for level II of the Executive Schedule in effect during calendar year 2024, which is \$18,491.70 per month for officers at pay grades O-7 through O-10. This includes officers serving as Chairman or Vice Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, Chief of Space Operations, Commandant of the Coast Guard, Chief of the National Guard Bureau, or commander of a unified or specified combatant command (as defined in 10 U.S.C. 161(c)).

** Basic pay is limited to the rate of basic pay for level V of the Executive Schedule in effect during calendar year 2024, which is \$15,000.00 per month, for officers at pay grades O-6 and below.

*** Does not apply to commissioned officers who have been credited with over 4 years of active duty service as an enlisted member or warrant officer.

**** Reservists with at least 1,460 points as an enlisted member, a warrant officer, or a warrant officer and an enlisted member, which are creditable toward reserve retirement, also qualify for these rates.

Schedule 8--Pay of The Uniformed Services (Page 2)
(Effective January 1, 2024)
Part I--Monthly Basic Pay
Years of Service (Computed Under 37 U.S.C. 205)

Pay Grade	Over 20	Over 22	Over 24	Over 26	Over 28	Over 30	Over 32	Over 34	Over 36	Over 38	Over 40
Commissioned Officers											
O-10*	\$18,491.70*	\$18,491.70*	\$18,491.70*	\$18,491.70*	\$18,491.70*	\$18,491.70*	\$18,491.70*	\$18,491.70*	\$18,491.70*	\$18,491.70*	\$18,491.70*
O-9	18,096.00	18,357.30	18,491.70*	18,491.70*	18,491.70*	18,491.70*	18,491.70*	18,491.70*	18,491.70*	18,491.70*	18,491.70*
O-8	17,145.60	17,568.60	17,568.60	17,568.60	17,568.60	18,008.40	18,008.40	18,458.10	18,458.10	18,458.10	18,458.10
O-7	15,504.30	15,504.30	15,504.30	15,584.10	15,584.10	15,895.80	15,895.80	15,895.80	15,895.80	15,895.80	15,895.80
O-6**	12,677.10	13,010.70	13,348.50	14,002.80	14,002.80	14,282.40	14,282.40	14,282.40	14,282.40	14,282.40	14,282.40
O-5	11,093.10	11,426.70	11,426.70	11,426.70	11,426.70	11,426.70	11,426.70	11,426.70	11,426.70	11,426.70	11,426.70
O-4	9,689.10	9,689.10	9,689.10	9,689.10	9,689.10	9,689.10	9,689.10	9,689.10	9,689.10	9,689.10	9,689.10
O-3***	8,301.00	8,301.00	8,301.00	8,301.00	8,301.00	8,301.00	8,301.00	8,301.00	8,301.00	8,301.00	8,301.00
O-2***	6,100.80	6,100.80	6,100.80	6,100.80	6,100.80	6,100.80	6,100.80	6,100.80	6,100.80	6,100.80	6,100.80
O-1***	4,814.70	4,814.70	4,814.70	4,814.70	4,814.70	4,814.70	4,814.70	4,814.70	4,814.70	4,814.70	4,814.70
Commissioned Officers with Over 4 Years Active Duty Service As An Enlisted Member Or Warrant Officer****											
O-3E	\$8,859.00	\$8,859.00	\$8,859.00	\$8,859.00	\$8,859.00	\$8,859.00	\$8,859.00	\$8,859.00	\$8,859.00	\$8,859.00	\$8,859.00
O-2E	7,065.00	7,065.00	7,065.00	7,065.00	7,065.00	7,065.00	7,065.00	7,065.00	7,065.00	7,065.00	7,065.00
O-1E	5,978.10	5,978.10	5,978.10	5,978.10	5,978.10	5,978.10	5,978.10	5,978.10	5,978.10	5,978.10	5,978.10
Warrant Officers											
W-5	\$9,375.60	\$9,851.10	\$10,205.70	\$10,597.20	\$10,597.20	\$11,128.20	\$11,128.20	\$11,683.50	\$11,683.50	\$12,269.10	\$12,269.10
W-4	8,508.30	8,914.50	9,248.70	9,629.70	9,629.70	9,821.70	9,821.70	9,821.70	9,821.70	9,821.70	9,821.70
W-3	7,814.70	7,994.70	8,186.10	8,447.10	8,447.10	8,447.10	8,447.10	8,447.10	8,447.10	8,447.10	8,447.10
W-2	6,856.20	6,998.70	7,111.80	7,111.80	7,111.80	7,111.80	7,111.80	7,111.80	7,111.80	7,111.80	7,111.80
W-1	6,462.90	6,462.90	6,462.90	6,462.90	6,462.90	6,462.90	6,462.90	6,462.90	6,462.90	6,462.90	6,462.90

* Basic pay is limited to the rate of basic pay for level II of the Executive Schedule in effect during calendar year 2024, which is \$18,491.70 per month for officers at pay grades O-7 through O-10. This includes officers serving as Chairman or Vice Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, Chief of Space Operations, Commandant of the Coast Guard, Chief of the National Guard Bureau, or commander of a unified or specified combatant command (as defined in 10 U.S.C. 161(c)).

** Basic pay is limited to the rate of basic pay for level V of the Executive Schedule in effect during calendar year 2024, which is \$15,000.00 per month, for officers at pay grades O-6 and below.

*** Does not apply to commissioned officers who have been credited with over 4 years of active duty service as an enlisted member or warrant officer.

**** Reservists with at least 1,460 points as an enlisted member, a warrant officer, or a warrant officer and an enlisted member, which are creditable toward reserve retirement, also qualify for these rates.

Schedule 8--Pay of The Uniformed Services (Page 3)
(Effective January 1, 2024)

Part I--Monthly Basic Pay

Years Of Service (Computed Under 37 U.S.C. 205)

Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12	Over 14	Over 16	Over 18
Enlisted Members											
E-9*	-	-	-	-	-	-	\$6,370.50	\$6,514.80	\$6,696.60	\$6,910.50	\$7,127.10
E-8	-	-	-	-	-	\$5,214.90	5,445.60	5,588.40	5,759.40	5,944.50	6,279.30
E-7	\$3,624.90	\$3,956.40	\$4,108.20	\$4,308.30	\$4,465.50	4,734.60	4,886.40	5,155.20	5,379.30	5,532.30	5,694.90
E-6	3,135.60	3,450.60	3,603.00	3,750.90	3,904.80	4,252.50	4,387.80	4,649.70	4,729.80	4,788.00	4,856.40
E-5	2,872.20	3,065.70	3,214.20	3,365.70	3,601.80	3,848.70	4,052.10	4,076.40	4,076.40	4,076.40	4,076.40
E-4	2,633.70	2,768.40	2,918.40	3,066.30	3,197.40	3,197.40	3,197.40	3,197.40	3,197.40	3,197.40	3,197.40
E-3	2,377.50	2,526.90	2,680.20	2,680.20	2,680.20	2,680.20	2,680.20	2,680.20	2,680.20	2,680.20	2,680.20
E-2	2,261.10	2,261.10	2,261.10	2,261.10	2,261.10	2,261.10	2,261.10	2,261.10	2,261.10	2,261.10	2,261.10
E-1**	2,017.20	2,017.20	2,017.20	2,017.20	2,017.20	2,017.20	2,017.20	2,017.20	2,017.20	2,017.20	2,017.20
E-1***	1,865.10	-	-	-	-	-	-	-	-	-	-

* For noncommissioned officers serving as Sergeant Major of the Army, Master Chief Petty Officer of the Navy or Coast Guard, Chief Master Sergeant of the Air Force, Sergeant Major of the Marine Corps, Chief Master Sergeant of the Space Force, Senior Enlisted Advisor to the Chairman of the Joint Chiefs of Staff, or Senior Enlisted Advisor to the Chief of the National Guard Bureau, basic pay for this grade is \$10,294.80 per month, regardless of cumulative years of service under 37 U.S.C. 205.

** Applies to personnel who have served 4 months or more on active duty.

*** Applies to personnel who have served less than 4 months on active duty.

Schedule 8--Pay of The Uniformed Services (Page 4)
(Effective January 1, 2024)

Part I--Monthly Basic Pay

Years Of Service (Computed Under 37 U.S.C. 205)

Pay Grade	Over 20	Over 22	Over 24	Over 26	Over 28	Over 30	Over 32	Over 34	Over 36	Over 38	Over 40
Enlisted Members											
E-9*	\$7,472.10	\$7,765.20	\$8,072.70	\$8,544.00	\$8,544.00	\$8,970.30	\$8,970.30	\$9,419.40	\$9,419.40	\$9,891.30	\$9,891.30
E-8	6,449.10	6,737.40	6,897.30	7,291.20	7,291.20	7,437.30	7,437.30	7,437.30	7,437.30	7,437.30	7,437.30
E-7	5,757.90	5,969.70	6,083.10	6,515.70	6,515.70	6,515.70	6,515.70	6,515.70	6,515.70	6,515.70	6,515.70
E-6	4,856.40	4,856.40	4,856.40	4,856.40	4,856.40	4,856.40	4,856.40	4,856.40	4,856.40	4,856.40	4,856.40
E-5	4,076.40	4,076.40	4,076.40	4,076.40	4,076.40	4,076.40	4,076.40	4,076.40	4,076.40	4,076.40	4,076.40
E-4	3,197.40	3,197.40	3,197.40	3,197.40	3,197.40	3,197.40	3,197.40	3,197.40	3,197.40	3,197.40	3,197.40
E-3	2,680.20	2,680.20	2,680.20	2,680.20	2,680.20	2,680.20	2,680.20	2,680.20	2,680.20	2,680.20	2,680.20
E-2	2,261.10	2,261.10	2,261.10	2,261.10	2,261.10	2,261.10	2,261.10	2,261.10	2,261.10	2,261.10	2,261.10
E-1**	2,017.20	2,017.20	2,017.20	2,017.20	2,017.20	2,017.20	2,017.20	2,017.20	2,017.20	2,017.20	2,017.20
E-1***	-	-	-	-	-	-	-	-	-	-	-

* For noncommissioned officers serving as Sergeant Major of the Army, Master Chief Petty Officer of the Navy or Coast Guard, Chief Master Sergeant of the Air Force, Sergeant Major of the Marine Corps, Chief Master Sergeant of the Space Force, Senior Enlisted Advisor to the Chairman of the Joint Chiefs of Staff, or Senior Enlisted Advisor to the Chief of the National Guard Bureau, basic pay for this grade is \$10,294.80 per month, regardless of cumulative years of service under 37 U.S.C. 205.

** Applies to personnel who have served 4 months or more on active duty.

*** Applies to personnel who have served less than 4 months on active duty.

Schedule 8--Pay of The Uniformed Services (Page 5)

Part II--Rate of Monthly Cadet or Midshipman Pay

The rate of monthly cadet or midshipman pay authorized by 37 U.S.C. 203(c) is \$1,339.50.

Schedule 9--Locality-Based Comparability Payments

(Effective on the first day of the first applicable pay period
beginning on or after January 1, 2024)

Locality Pay Area*	Rate
Alaska.....	31.96%
Albany-Schenectady, NY-MA.....	20.25%
Albuquerque-Santa Fe-Las Vegas, NM.....	18.05%
Atlanta-Athens-Clarke County-Sandy Springs, GA-AL.....	23.45%
Austin-Round Rock-Georgetown, TX.....	19.99%
Birmingham-Hoover-Talladega, AL.....	17.91%
Boston-Worcester-Providence, MA-RI-NH-CT-ME-VT.....	31.97%
Buffalo-Cheektowaga-Olean, NY.....	21.99%
Burlington-South Burlington-Barre, VT.....	18.97%
Charlotte-Concord, NC-SC.....	19.26%
Chicago-Naperville, IL-IN-WI.....	30.41%
Cincinnati-Wilmington-Maysville, OH-KY-IN.....	21.69%
Cleveland-Akron-Canton, OH-PA.....	22.01%
Colorado Springs, CO.....	19.73%
Columbus-Marion-Zanesville, OH.....	21.80%
Corpus Christi-Kingsville-Alice, TX.....	17.40%
Dallas-Fort Worth, TX-OK.....	26.91%
Davenport-Moline, IA-IL.....	18.66%
Dayton-Springfield-Kettering, OH.....	21.14%
Denver-Aurora, CO.....	29.88%
Des Moines-Ames-West Des Moines, IA.....	17.68%
Detroit-Warren-Ann Arbor, MI.....	28.82%
Fresno-Madera-Hanford, CA.....	17.15%
Harrisburg-Lebanon, PA.....	19.10%
Hartford-East Hartford, CT-MA.....	31.62%
Hawaii.....	21.79%
Houston-The Woodlands, TX.....	34.72%
Huntsville-Decatur, AL-TN.....	21.48%
Indianapolis-Carmel-Muncie, IN.....	17.89%
Kansas City-Overland Park-Kansas City, MO-KS.....	18.65%
Laredo, TX.....	21.33%
Las Vegas-Henderson, NV-AZ.....	19.23%
Los Angeles-Long Beach, CA.....	35.84%
Miami-Port St. Lucie-Fort Lauderdale, FL.....	24.42%
Milwaukee-Racine-Waukesha, WI.....	22.15%
Minneapolis-St. Paul, MN-WI.....	27.15%
New York-Newark, NY-NJ-CT-PA.....	37.24%
Omaha-Council Bluffs-Fremont, NE-IA.....	17.94%
Palm Bay-Melbourne-Titusville, FL.....	17.60%
Philadelphia-Reading-Camden, PA-NJ-DE-MD.....	28.55%
Phoenix-Mesa, AZ.....	22.02%
Pittsburgh-New Castle-Weirton, PA-OH-WV.....	20.78%
Portland-Vancouver-Salem, OR-WA.....	25.66%
Raleigh-Durham-Cary, NC.....	21.90%
Reno-Fernley, NV.....	17.11%
Richmond, VA.....	21.91%
Rochester-Batavia-Seneca Falls, NY.....	17.35%
Sacramento-Roseville, CA-NV.....	29.16%
San Antonio-New Braunfels-Pearsall, TX.....	18.49%
San Diego-Chula Vista-Carlsbad, CA.....	33.05%
San Jose-San Francisco-Oakland, CA.....	45.41%
Seattle-Tacoma, WA.....	30.81%
Spokane-Spokane Valley-Coeur d'Alene, WA-ID.....	17.18%
St. Louis-St. Charles-Farmington, MO-IL.....	19.63%
Tucson-Nogales, AZ.....	18.92%
Virginia Beach-Norfolk, VA-NC.....	18.46%
Washington-Baltimore-Arlington, DC-MD-VA-WV-PA.....	33.26%
Rest of U.S.....	16.82%

* Locality Pay Areas are defined in 5 CFR 531.603.

SCHEDULE 10--ADMINISTRATIVE LAW JUDGES

(Effective on the first day of the first applicable pay period
beginning on or after January 1, 2024)

AL-3/A.....	\$128,200
AL-3/B.....	138,000
AL-3/C.....	147,900
AL-3/D.....	157,900
AL-3/E.....	167,900
AL-3/F.....	177,600
AL-2.....	187,300
AL-1*.....	191,900

* Pursuant to 5 U.S.C. 5372(b) (1) (C), the rate of basic pay for AL-1 may
not exceed the rate for level IV of the Executive Schedule.

Presidential Documents

Executive Order 14114 of December 22, 2023

Taking Additional Steps With Respect to the Russian Federation's Harmful Activities

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and section 301 of title 3, United States Code,

I, JOSEPH R. BIDEN JR., President of the United States of America, in view of the Russian Federation's continued use of its military-industrial base to aid its effort to undermine security in countries and regions important to United States national security, including its reliance on the international financial system for the procurement of dual-use and other critical items from third countries, and in order to take additional steps with respect to the national emergency declared in Executive Order 14024 of April 15, 2021, expanded by Executive Order 14066 of March 8, 2022, and relied on for additional steps taken in Executive Order 14039 of August 20, 2021, Executive Order 14068 of March 11, 2022, and Executive Order 14071 of April 6, 2022, hereby order:

Section 1. *Amendments to Executive Order 14024.* Executive Order 14024 is hereby amended by redesignating section 11 of that order as section 12 and adding a new section 11 to read as follows:

“**Sec. 11.** (a) The Secretary of the Treasury, in consultation with the Secretary of State, and with respect to subsection (a)(ii) of this section, in consultation with the Secretary of State and the Secretary of Commerce, is hereby authorized to impose on a foreign financial institution the sanctions described in subsection (b) of this section, upon determining that the foreign financial institution has:

(i) conducted or facilitated any significant transaction or transactions for or on behalf of any person designated pursuant to section 1(a)(i) of this order for operating or having operated in the technology, defense and related materiel, construction, aerospace, or manufacturing sectors of the Russian Federation economy, or other such sectors as may be determined to support Russia's military-industrial base by the Secretary of the Treasury, in consultation with the Secretary of State; or

(ii) conducted or facilitated any significant transaction or transactions, or provided any service, involving Russia's military-industrial base, including the sale, supply, or transfer, directly or indirectly, to the Russian Federation of any item or class of items as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Commerce.

(b) With respect to any foreign financial institution determined to meet the criteria set forth in subsection (a) of this section, the Secretary of the Treasury, in consultation with the Secretary of State, may:

(i) prohibit the opening of, or prohibit or impose strict conditions on the maintenance of, correspondent accounts or payable-through accounts in the United States; or

(ii) block all property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person of

such foreign financial institution, and provide that such property and interests in property may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

(c) The prohibitions in subsection (b) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted before the date of this order.

(d) I hereby determine that the making of donations of the types of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to subsection (b)(ii) of this section would seriously impair my ability to deal with the national emergency declared in this order, and I hereby prohibit such donations as provided by subsection (b)(ii) of this section.

(e) The prohibitions in subsection (b)(ii) of this section include:

(i) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to subsection (b)(ii) of this section; and

(ii) the receipt of any contribution or provision of funds, goods, or services from any such person.

(f) For purposes of this section, the term “foreign financial institution” means any foreign entity that is engaged in the business of accepting deposits; making, granting, transferring, holding, or brokering loans or credits; purchasing or selling foreign exchange, securities, futures or options; or procuring purchasers and sellers thereof, as principal or agent. It includes depository institutions; banks; savings banks; money services businesses; operators of credit card systems; trust companies; insurance companies; securities brokers and dealers; futures and options brokers and dealers; forward contract and foreign exchange merchants; securities and commodities exchanges; clearing corporations; investment companies; employee benefit plans; dealers in precious metals, stones, or jewels; and holding companies, affiliates, or subsidiaries of any of the foregoing. The term does not include the international financial institutions identified in 22 U.S.C. 262r(c)(2), the International Fund for Agricultural Development, the North American Development Bank, or any other international financial institution so notified by the Office of Foreign Assets Control.”.

Sec. 2. *Additional Amendments to Executive Order 14024.* Executive Order 14024 is hereby amended by striking section 7 and inserting, in lieu thereof, the following:

“**Sec. 7.** For those persons whose property and interests in property are blocked pursuant to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render those measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to section 1 or section 11 of this order.”.

Sec. 3. *Amendments to Executive Order 14068.* Executive Order 14068 is hereby amended as follows:

(a) in section 1, by striking subsection (a)(i) and inserting, in lieu thereof, the following:

(i) the importation and entry into the United States, including importation for admission into a foreign trade zone located in the United States, of:

(A) the following products of Russian Federation origin: fish, seafood, and preparations thereof; alcoholic beverages; non-industrial diamonds;

and any other products of Russian Federation origin, as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Commerce;

(B) categories of any of the following products as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Secretary of Commerce, and the Secretary of Homeland Security, that were mined, extracted, produced, or manufactured wholly or in part in the Russian Federation, or harvested in waters under the jurisdiction of the Russian Federation or by Russia-flagged vessels, notwithstanding whether such products have been incorporated or substantially transformed into other products outside of the Russian Federation: fish, seafood, and preparations thereof; diamonds; and any other such products as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Secretary of Commerce, and the Secretary of Homeland Security;

(C) products containing any of the products subject to the prohibitions of subsections (a)(i)(A)–(B) of this section, as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Secretary of Commerce, and the Secretary of Homeland Security; and

(D) products subject to the prohibitions of subsections (a)(i)(A)–(C) of this section that transited through or were exported from or by the Russian Federation, as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Secretary of Commerce, and the Secretary of Homeland Security;”;

(b) in section 1, by adding new subsections (c)–(f) to read as follows:

“(c) The prohibitions in subsection (a)(i) of this section apply with respect to:

(i) products subject to the prohibitions of subsection (a)(i)(A) of this section imported on or after the date of this order or the date specified in any determinations made pursuant to that subsection, unless otherwise specified or authorized; and

(ii) products subject to the prohibitions of subsections (a)(i)(B)–(D) of this section imported on or after the date specified in any determinations made pursuant to those subsections, unless otherwise specified or authorized.

(d) The Secretary of Homeland Security, with the concurrence of the Secretary of the Treasury, shall prescribe rules and regulations to collect, including through an authorized electronic data interchange system as appropriate, any documentation or information as may be necessary to enforce subsections (a)(i)(B)–(D) and (c) of this section as expeditiously as possible.”;

(c) in section 4, by striking “and” at the end of subsection 4(c), by striking the period at the end of subsection (d) and replacing it with “; and”, and by inserting the following new subsection after subsection (d):

“(e) the term “diamond” includes any diamonds classifiable under subheadings 7102.10, 7102.31, and 7102.39 of the Harmonized Tariff Schedule of the United States and under any other subheadings of the Harmonized Tariff Schedule of the United States specified in determinations made pursuant to section (1)(a)(i) of this order.”; and

(d) by striking section 5 and inserting, in lieu thereof, the following:

“**Sec. 5.** The Secretary of the Treasury, the Secretary of Commerce, and the Secretary of Homeland Security, in consultation with the Secretary of State, are hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA, as may be necessary to carry out the purposes of this order. The Secretary of the Treasury, the Secretary of Commerce, and the Secretary of Homeland Security may, consistent with applicable law, redelegate any of these functions within the Department of the Treasury, the Department of Commerce, and the Department of Homeland Security, respectively. All

executive departments and agencies of the United States shall take all appropriate measures within their authority to implement this order.”.

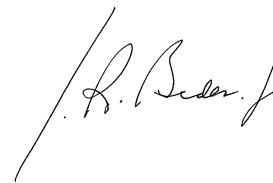
Sec. 4. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other persons.



THE WHITE HOUSE,
December 22, 2023.

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H.J. Res. 62/P.L. 118–28

Providing for the reappointment of Michael Govan as a citizen regent of the Board of Regents of the Smithsonian Institution. (Dec. 21, 2023; 137 Stat. 133)

H.J. Res. 63/P.L. 118–29

Providing for the appointment of Antoinette Bush as a citizen regent of the Board of Regents of the Smithsonian

Institution. (Dec. 21, 2023; 137 Stat. 134)

H.J. Res. 64/P.L. 118–30

Providing for the reappointment of Roger W. Ferguson as a citizen regent of the Board of Regents of the Smithsonian Institution. (Dec. 21, 2023; 137 Stat. 135)
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