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# Contents

**Federal Register**

Vol. 88, No. 247

Wednesday, December 27, 2023

## Agency for Healthcare Research and Quality

### NOTICES

Hearings, Meetings, Proceedings, etc., 89453

## Agricultural Marketing Service

### RULES

Oranges, Grapefruit, Tangerines, and Pummelos Grown in Florida:

Marketing Order, 89276–89280

### PROPOSED RULES

Domestic Dates Produced or Packed in Riverside County, CA:

Decreased Assessment Rate, 89327–89330

## Agriculture Department

*See* Agricultural Marketing Service

*See* Animal and Plant Health Inspection Service

*See* The U.S. Codex Office

### RULES

Debt Management:

Administrative Updates, 89275–89276

## Animal and Plant Health Inspection Service

### NOTICES

Exemption:

Movement of Organisms Modified or Produced through Genetic Engineering, 89362

## Centers for Medicare & Medicaid Services

### PROPOSED RULES

Medicare Program:

Appeal Rights for Certain Changes in Patient Status, 89506–89538

## Civil Rights Commission

### NOTICES

Hearings, Meetings, Proceedings, etc.:

District of Columbia Advisory Committee, 89366–89367

Hawai'i Advisory Committee, 89365–89366

Nebraska Advisory Committee, 89365

New Mexico Advisory Committee, 89363–89364

Puerto Rico Advisory Committee, 89364–89365

Texas Advisory Committee, 89366

## Commerce Department

*See* International Trade Administration

*See* National Institute of Standards and Technology

*See* National Oceanic and Atmospheric Administration

*See* National Telecommunications and Information Administration

### RULES

Civil Monetary Penalty Inflation Adjustment, 89300–89303

## Commodity Futures Trading Commission

### NOTICES

Guidance:

Listing of Voluntary Carbon Credit Derivative Contracts, 89410–89428

## Comptroller of the Currency

### NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 89489–89495

## Defense Acquisition Regulations System

### PROPOSED RULES

Defense Federal Acquisition Regulation Supplement:

Inapplicability of Additional Defense-Unique Laws and Certain Non-statutory Defense Federal Acquisition Regulation Supplement Clauses to Commercial Item Contracts, 89357

Modular Open Systems Approaches, 89357–89358

Rights in Technical Data, 89358

## Defense Department

*See* Defense Acquisition Regulations System

## Education Department

### RULES

Final Waiver and Extension of the Project Period with Funding for Innovative Rehabilitation Training Grants, 89305–89306

Final Waiver and Extension of the Project Period with Funding for Rehabilitation Long-Term Training Grants, 89306–89307

## Energy Department

*See* Federal Energy Regulatory Commission

*See* National Nuclear Security Administration

### PROPOSED RULES

Energy Conservation Program:

Standards for Consumer Water Heaters, 89330–89339

### NOTICES

Application:

Renewal of Authorization to Export Electric Energy; Boston Energy Trading and Marketing LLC, 89428–89429

Charter Amendments, Establishments, Renewals and Terminations:

Isotope Research and Development and Production Advisory Committee, 89429

Hearings, Meetings, Proceedings, etc.:

President's Council of Advisors on Science and Technology, 89431–89432

Importation or Exportation of Liquefied Natural Gas or

Electric Energy; Applications, Authorizations, etc.:

Boston Energy Trading and Marketing LLC, 89434–89435

Emera Energy Services Subsidiary No. 6 LLC, 89433–89434

Emera Energy Services Subsidiary No. 7 LLC, 89435–89436

Emera Energy Services Subsidiary No. 8 LLC, 89429–89430

Emera Energy Services, Inc., 89432–89433

Sempra Gas and Power Marketing, LLC, 89430–89431

TransCanada Energy Sales Ltd., 89433

## Environmental Protection Agency

### RULES

Civil Monetary Penalty Inflation Adjustment, 89309–89313

### PROPOSED RULES

Air Quality State Implementation Plans; Approvals and Promulgations:

Arizona; Maricopa County Air Quality Department, 89355–89357

California; Yolo-Solano Air Quality Management District, 89351–89355

**NOTICES**

Cancellation Order for Certain Pesticide Registrations and Amendments to Terminate Uses, 89447–89449  
 Product Cancellation Order for Certain Pesticide Registrations, 89446–89447

**Farm Credit Administration****RULES**

Loan Policies and Operations, 89280–89286

**Federal Aviation Administration****RULES**

Airspace Designations and Reporting Points:  
   Statesboro, GA, 89292–89293  
   Thomasville, GA, 89293–89294  
 Airworthiness Directives:  
   Embraer S.A. (Type Certificate Previously Held by Yabara Industria Aeronautica S.A.; Embraer S.A.) Airplanes, 89286–89290  
   Rolls-Royce Deutschland Ltd and Co KG Engines, 89290–89292  
 Extension of the Prohibition Against Certain Flights in the Damascus Flight Information Region, 89294–89300

**PROPOSED RULES**

Airspace Designations and Reporting Points:  
   Ottumwa, IA, 89344–89346  
   Youngstown, OH, 89342–89344  
 Airworthiness Directives:  
   BAE Systems (Operations) Limited Airplanes, 89339–89342

**Federal Communications Commission****NOTICES**

Hearings, Meetings, Proceedings, etc.:  
   Disability Advisory Committee, 89449–89450

**Federal Deposit Insurance Corporation****NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 89489–89495  
 Hearings, Meetings, Proceedings, etc., 89450

**Federal Energy Regulatory Commission****PROPOSED RULES**

Federal Power Act Section 203 Blanket Authorizations for Investment Companies, 89346–89351

**NOTICES**

Application:  
   Cube Yadkin Generation, LLC, 89443–89444  
   Jeffersonville Hydroelectric Co., 89444–89446  
   KC Brighton LLC, 89441–89442  
   Up Property 2, LLC, 89440–89441  
 Combined Filings, 89440, 89442–89443  
 Designation of Commission Staff as Non-Decisional:  
   Commonwealth Edison Co., 89441

**Federal Labor Relations Authority****NOTICES**

Privacy Act; Systems of Records, 89450–89452

**Federal Mediation and Conciliation Service****NOTICES**

Convening Policy, 89452

**Federal Reserve System****NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 89489–89495

Formations of, Acquisitions by, and Mergers of Bank Holding Companies, 89452

**Fish and Wildlife Service****NOTICES**

Permits; Applications, Issuances, etc.:  
   Foreign Endangered Species, 89464–89465

**Food and Drug Administration****RULES**

Guidance:  
   Direct-to-Consumer Prescription Drug Advertisements: Presentation of the Major Statement in a Clear, Conspicuous, and Neutral Manner in Advertisements in Television and Radio Format Final Rule: Questions and Answers, 89303–89305

**NOTICES**

Filing of Food Additive Petition:  
   Kemin Industries, Inc.; Correction, 89460  
 Patent Extension Regulatory Review Period:  
   Cytalux, 89458–89460  
   Ponvory, 89455–89456  
   Scemblix, 89456–89458  
   Zokinvy, 89453–89455

**Foreign Assets Control Office****NOTICES**

Sanctions Action, 89495–89496

**General Services Administration****NOTICES**

Calendar Year 2024 Privately Owned Vehicle Mileage Reimbursement Rates; Calendar Year 2024 Standard Mileage Rate for Moving Purposes, 89452–89453

**Health and Human Services Department**

*See* Agency for Healthcare Research and Quality  
*See* Centers for Medicare & Medicaid Services  
*See* Food and Drug Administration  
*See* National Institutes of Health

**Interior Department**

*See* Fish and Wildlife Service

**International Trade Administration****NOTICES**

Antidumping or Countervailing Duty Investigations, Orders, or Reviews:  
   Certain Oil Country Tubular Goods from the Republic of Korea, 89370–89371  
   Sugar from Mexico, 89367–89370

**International Trade Commission****NOTICES**

Investigations; Determinations, Modifications, and Rulings, etc.:  
   Certain Electronic Eyewear Products and Components Thereof, 89465–89466  
   Certain Marine Air Conditioning Systems, Components Thereof, and Products Containing the Same, 89466–89467

**Labor Department****NOTICES**

Final Tribal Consultation Policy, 89467–89478

**National Archives and Records Administration****NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 89478

**National Institute of Standards and Technology****NOTICES**

Environmental Assessments; Availability, etc.:

Modernization and Internal Expansion of Existing Semiconductor Fabrication Facilities under the CHIPS Incentives Program, 89372–89373

Hearings, Meetings, Proceedings, etc.:

National Conference on Weights and Measures 2024, 89373–89374

Visiting Committee on Advanced Technology, 89371

**National Institutes of Health****NOTICES**

Government Owned Inventions, 89461–89462

Hearings, Meetings, Proceedings etc.:

National Advisory Child Health and Human Development Council Stillbirth Working Group, 89463

Hearings, Meetings, Proceedings, etc.:

Center For Scientific Review, 89461

National Center for Advancing Translational Sciences, 89463–89464

National Institute of Nursing Research, 89460

National Institute on Deafness and Other Communication Disorders, 89460–89461

National Institute on Drug Abuse, 89463

Licenses; Exemptions, Applications, Amendments, etc.:

Government-Owned Inventions, 89462–89463

**National Nuclear Security Administration****NOTICES**

Secretarial Determination:

No Adverse Material Impact on the Domestic Uranium Mining, Conversion, and Enrichment Industries to Support Molybdenum-99 Production, 89436–89439

**National Oceanic and Atmospheric Administration****RULES**

Fisheries of the Exclusive Economic Zone off Alaska: Reallocation of Pacific Cod in the Central Regulatory Area of the Gulf of Alaska, 89319–89320

Fisheries off West Coast States:

Pacific Coast Groundfish Fishery; Pacific Coast Groundfish Fishery Management Plan; 2024 Specifications and Management Measures Corrections, 89313–89319

**PROPOSED RULES**

Fisheries off West Coast States:

Coastal Pelagic Species Fisheries; Harvest Specifications for the Central Subpopulation of Northern Anchovy, 89358–89361

**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Financial Assistance Performance Progress Reports, 89383–89385

Resident Perceptions of Offshore Wind Energy Development off the Oregon Coast and Along the Gulf of Mexico, 89407–89408

Draft Revised Management Plan:

Apalachicola National Estuarine Research Reserve, 89406–89407

Environmental Assessments; Availability, etc.:

Effects of Permitting Translocation of Sturgeon for Scientific Research and Enhancement under the Endangered Species Act, 89385

Fisheries of the Exclusive Economic Zone Off Alaska:

North Pacific Observer Program Standard Ex-Vessel Prices, 89375–89383

Hearings, Meetings, Proceedings, etc.:

New England Fishery Management Council, 89375

North Pacific Fishery Management Council, 89374–89375

Taking or Importing of Marine Mammals:

Parallel Thimble Shoal Tunnel Project, Virginia Beach, VA, 89385–89406

**National Science Foundation****NOTICES**

Civil Monetary Penalty Inflation Adjustment, 89479

Hearings, Meetings, Proceedings, etc.:

Astronomy and Astrophysics Advisory Committee, 89478–89479

**National Telecommunications and Information Administration****NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Public Wireless Supply Chain Innovation Fund Grant Program Forms, 89408

Hearings, Meetings, Proceedings, etc.:

2024 Spectrum Policy Symposium, 89409–89410

Request for Membership Application:

Spectrum Management Advisory Committee, 89408–89409

**Personnel Management Office****PROPOSED RULES**

Time-Limited Promotions, 89321–89327

**NOTICES**

Agency Information Collection Activities; Proposals, Submissions, and Approvals:

Report of Medical Examination of Person Electing Survivor Benefits, 89479–89480

**Postal Regulatory Commission****NOTICES**

New Postal Products, 89480

**Postal Service****NOTICES**

International Product Change:

Priority Mail Express International, Priority Mail International and First-Class Package International Service Agreement, 89480

**Railroad Retirement Board****NOTICES**

Civil Monetary Penalty Inflation Adjustment, 89480–89481

**Securities and Exchange Commission****NOTICES**

Self-Regulatory Organizations; Proposed Rule Changes:

MEMX LLC, 89481–89484

Miami International Securities Exchange, LLC, 89484–89485

MIAX Emerald, LLC, 89485

National Securities Clearing Corp., 89485–89488

**State Department****NOTICES**

Hearings, Meetings, Proceedings, etc.:  
International Information and Communications Policy  
Division Stakeholder Briefing, 89488

**Surface Transportation Board****NOTICES**

Release of Waybill Data, 89488

**Tennessee Valley Authority****NOTICES**

Hearings, Meetings, Proceedings, etc.:  
Regional Resource Stewardship Council and the Regional  
Energy Resource Council, 89488–89489

**The U.S. Codex Office****NOTICES**

Hearings, Meetings, Proceedings, etc.:  
Codex Committee on Food Hygiene, 89362–89363

**Transportation Department**

*See* Federal Aviation Administration

**Treasury Department**

*See* Comptroller of the Currency  
*See* Foreign Assets Control Office

**NOTICES**

Agency Information Collection Activities; Proposals,  
Submissions, and Approvals:  
Employer's Quarterly Federal Tax Return, 89500–89501  
Multiple Alcohol and Tobacco Tax and Trade Bureau  
Information Collection Requests, 89499–89500  
Multiple Internal Revenue Service Information Collection  
Requests, 89496–89499

**Veterans Affairs Department****RULES**

Exceptions to Applying the Bilateral Factor in Disability  
Calculations, 89307–89309

**NOTICES**

Agency Information Collection Activities; Proposals,  
Submissions, and Approvals:  
Application for Approval of an Institution of Higher  
Learning Facility; Institution of Higher Learning—  
Program Submission List; Application for Approval  
of Organizations Other Than Institutions of Higher  
Learning; etc., 89502–89503  
Hearings, Meetings, Proceedings, etc.:  
Veterans and Community Oversight and Engagement  
Board, 89501–89502

---

**Separate Parts In This Issue****Part II**

Health and Human Services Department, Centers for  
Medicare & Medicaid Services, 89506–89538

---

**Reader Aids**

Consult the Reader Aids section at the end of this issue for  
phone numbers, online resources, finding aids, and notice  
of recently enacted public laws.

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**CFR PARTS AFFECTED IN THIS ISSUE**

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

**5 CFR****Proposed Rules:**

335 .....89321

**7 CFR**

3 .....89275

905 .....89276

**Proposed Rules:**

987 .....89327

**10 CFR****Proposed Rules:**

430 .....89330

**12 CFR**

614 .....89280

620 .....89280

**14 CFR**

39 (2 documents) .....89286,

89290

71 (2 documents) .....89292,

89293

91 .....89294

**Proposed Rules:**

39 .....89339

71 (2 documents) .....89342,

89344

**15 CFR**

6 .....89300

**18 CFR****Proposed Rules:**

33 .....89346

**21 CFR**

202 .....89303

**34 CFR**

Ch. III (2

documents) .....89305, 89306

**38 CFR**

4 .....89307

**40 CFR**

19 .....89309

**Proposed Rules:**

52 (2 documents) .....89351,

89355

**42 CFR****Proposed Rules:**

405 .....89506

476 .....89506

489 .....89506

**48 CFR****Proposed Rules:**

203 .....89357

204 .....89357

207 .....89357

212 .....89357

215 (2 documents) .....89357

227 (2 documents) .....89357,

89358

252 (2 documents) .....89357,

89358

**50 CFR**

660 .....89313

679 .....89319

**Proposed Rules:**

660 .....89358

# Rules and Regulations

Federal Register

Vol. 88, No. 247

Wednesday, December 27, 2023

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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## DEPARTMENT OF AGRICULTURE

### Office of the Secretary

#### 7 CFR Part 3

[Docket No. USDA–2023–0016]

#### Debt Management; Administrative Updates

**AGENCY:** Office of the Secretary, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the U.S. Department of Agriculture's debt management regulations by making two minor clarifying changes pertaining to entities or programs to which some or all of the regulations do not apply.

**DATES:** Effective December 27, 2023.

**FOR FURTHER INFORMATION CONTACT:** Mr. Elvis Tull, Branch Chief, Office of the Chief Financial Officer, USDA; 202–205–5369.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The regulations in 7 CFR part 3, “Debt Management,” prescribe standards and procedures for use by U.S. Department of Agriculture (USDA) agencies in the collection, compromise, suspension, or termination of debts owed to the United States. This rule clarifies the scope of debt collection activity as it applies to public international organizations and the availability of administrative review under 7 CFR part 3 for certain debt collection activities involving the Commodity Credit Corporation (CCC).

First, § 3.1, “Purpose and scope,” includes categories of debt collection actions to which 7 CFR part 3 does not apply. One of those categories, found in paragraph (c)(3), is the “[c]ollection of debts owed by foreign governments and, sovereign institutions of foreign governments.”

This amendment clarifies that, in addition to debts owed by foreign governments and sovereign institutions of foreign governments, debts owed by

public international organizations are outside the scope of USDA's debt collection regulations. A public international organization is an organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (22 U.S.C. 288–288f). Examples include the Organization for Economic Cooperation and Development (OECD) and the United Nations. This amendment aligns USDA's debt collection regulations with those of other U.S. Government agencies, such as the Department of State and the United States Agency for International Development, that work with public international organizations. Consistent with the treatment of public international organizations under U.S. law, these agencies group the collection of debts owed by public international organizations along with the collection of debts owed by foreign governments and sovereign institutions of foreign governments in the list of debt collection actions to which their debt management regulations do not apply. Therefore, USDA amends § 3.1(c)(3) to include public international organizations.

Second, 7 CFR part 3, subpart F, establishes consolidated administrative review procedures for debts subject to administrative offset, administrative wage garnishment, and disclosure to credit reporting agencies under subparts D and E of part 3. However, there is a list in § 3.60(b) of certain debt collection proceedings initiated by USDA agencies that are subject to the separate administrative review procedures in 7 CFR part 11, National Appeals Division, rather than the procedures in 7 CFR part 3, subpart F. Among the debt collection proceedings listed in § 3.60(b) are those initiated by CCC.

The statutory authority for the National Appeals Division only specifically requires coverage for the CCC “with respect to domestic programs” (7 U.S.C. 6991(2)(B)). This draws a statutory distinction between domestic CCC programs and CCC programs administered outside the United States by USDA's Foreign Agricultural Service. To clarify that non-domestic CCC programs are addressed under the administrative review procedures of 7 CFR part 3, subpart F, and not subject to the

procedures provided in 7 CFR part 11, USDA amends 7 CFR 3.60(b) by adding the qualifier “(with respect to domestic programs)” to the mention of CCC-initiated debt collection proceedings.

##### II. Notice and Comment Not Required

This rule is ministerial in nature and makes only clarifying, technical adjustments to align USDA's debt management regulations. Accordingly, pursuant to the administrative procedure provisions in 5 U.S.C. 553, USDA finds, for good cause, that prior notice and other public procedure with respect to this action are not necessary and this rule may be made effective less than 30 days after publication in the **Federal Register**. Therefore, this rule will be effective upon publication in the **Federal Register**.

##### III. Procedural Requirements

###### *Executive Orders 12866 and 14094*

The Office of Management and Budget (OMB) has determined that this regulatory action does not meet the criteria for significant regulatory action pursuant to Executive Order 12866, Regulatory Planning and Review, as amended by Executive Order 14094, Modernizing Regulatory Review.

As noted, this rule is ministerial in nature and makes only clarifying, technical adjustments to align USDA's debt management regulations. Accordingly, there are no economic impacts associated with this action.

###### *Regulatory Flexibility Act*

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this final rule because USDA was not required to publish notice of proposed rulemaking under 5 U.S.C. 553 or any other law. Accordingly, a regulatory flexibility analysis is not required.

###### *Paperwork Reduction Act*

This final rule imposes no new reporting or recordkeeping requirements necessitating clearance by OMB.

##### List of Subjects in 7 CFR Part 3

Administrative practice and procedure, Claims, Government employees, Income taxes, Loan programs—agriculture, Penalties, Reporting and recordkeeping requirements, Wages.

Accordingly, USDA amends 7 CFR part 3 as follows:

### PART 3—DEBT MANAGEMENT

■ 1. The authority citation for part 3 continues to read as follows:

**Authority:** 5 U.S.C. 301; 7 U.S.C. 1506, 1981, 1981a, 1981d, and 2008h; 15 U.S.C. 714b; 31 U.S.C. 3701, 3711, 3716–18, and 3720B; and 31 CFR parts 285 and 901–904.

■ 2. In § 3.1, revise paragraph (c)(3) to read as follows:

#### § 3.1 Purpose and scope.

\* \* \* \* \*

(c) \* \* \*

(3) Collection of debts owed by foreign governments, sovereign institutions of foreign governments, or public international organizations.

\* \* \* \* \*

#### § 3.60 [Amended]

■ 3. In § 3.60, in paragraph (b), add the words “(with respect to domestic programs)” after the acronym “CCC”.

**Ethel Butler,**

*Fiscal Policy Division Director, Office of the Chief Financial Officer, U.S. Department of Agriculture.*

[FR Doc. 2023–28408 Filed 12–26–23; 8:45 am]

BILLING CODE 3410–90–P

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 905

[Doc. No. AMS–SC–21–0054]

#### Marketing Order for Oranges, Grapefruit, Tangerines, and Pummelos Grown in Florida

**AGENCY:** Agricultural Marketing Service, (USDA).

**ACTION:** Final rule.

**SUMMARY:** This rulemaking amends Marketing Order 905, which regulates the handling of oranges, grapefruit, tangerines, and pummelos grown in Florida. The amendments reduce the size of the Citrus Administrative Committee (Committee), lower the quorum requirements, revise the nomination and selection processes, and remove the requirement to allocate committee seats based on volume from each district. A new section will provide the Committee authority to receive voluntary contributions for promotion and research projects. Also, conforming changes were made to help align the marketing order with the amendments.

**DATES:** This rule is effective January 26, 2024.

#### FOR FURTHER INFORMATION CONTACT:

Geronimo Quinones, Marketing Specialist, or Matthew Pavone, Chief, Rulemaking Services Branch, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–8085, or Email: [Geronimo.Quinones@usda.gov](mailto:Geronimo.Quinones@usda.gov) or [Matthew.Pavone@usda.gov](mailto:Matthew.Pavone@usda.gov).

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–8085, or Email: [Richard.Lower@usda.gov](mailto:Richard.Lower@usda.gov).

**SUPPLEMENTARY INFORMATION:** This action, pursuant to 5 U.S.C. 553, finalizes amendments to regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Order No. 905, as amended (7 CFR part 905), regulating the handling of oranges, grapefruit, tangerines, and pummelos grown in Florida. Part 905, referred to as the “Order,” is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the “Act.” The Committee locally administers the Order and is composed of citrus producers and shippers operating within the area of production, and a non-industry member.

The Agricultural Marketing Service (AMS) is issuing this rule in conformance with Executive Orders 12866, 13563, and 14094. Executive Orders 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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 reaffirms, supplements, and updates Executive Order 12866 and further directs agencies to solicit and consider input from a wide range of affected and interested parties through a variety of means. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

In addition, this rule has been reviewed under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have Tribal implications. AMS has determined this rule is unlikely to have substantial direct effects on one or more Indian Tribes, 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.

This rule has also been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule shall not be deemed to preclude, preempt, or supersede any State program covering oranges, grapefruit, tangerines, and pummelos grown in Florida.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 8c(15)(A) of the Act (7 U.S.C. 608c(15)(A)), any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA’s ruling on the petition, provided an action is filed no later than 20 days after the date of entry of the ruling.

Section 8c(17) of the Act and the supplemental rules of practice authorize the use of informal rulemaking (5 U.S.C. 553) to amend Federal fruit, vegetable, and nut marketing agreements and orders. In determining whether informal rulemaking is appropriate, AMS is required to consider the nature and complexity of the proposed amendments, the potential regulatory and economic impacts on affected entities, and any other relevant matters.

AMS has considered these factors and has determined that the amendments in this final rule are not unduly complex. The amendments are primarily administrative in nature and adapt the Committee’s rules of practice to better reflect the current state of the Florida citrus industry. In addition, as discussed in the Final Regulatory Flexibility Analysis section below, the amendments are not expected to impose any costs on affected entities.

The Committee unanimously recommended the amendments following deliberations at a public meeting held on November 19, 2020. This rule will amend the Order by reducing the size of the Committee and lowering quorum requirements, revising the nomination and selection processes, eliminating the requirement to allocate Committee seats based on volume from each district, and adding a new section to provide the Committee authority to receive voluntary contributions for promotion/research projects. Finally, outdated language in the Order was revised and other conforming changes were made to align the Order with the amendments.

A proposed rule soliciting comments on the amendments was published in the **Federal Register** on June 30, 2022 (87 FR 39003). Seven comments were received in response to the proposed rule, all of which were in support of the proposal. After reviewing the comments, AMS republished the proposed rule without change along with the referendum order in the **Federal Register** on January 18, 2023 (88 FR 2862). That document directed that a referendum among Florida citrus producers be conducted from April 3, 2023, through May 1, 2023, to determine whether they favor the proposals. To become effective, the amendments had to be approved by either two-thirds of the producers voting in the referendum or by those representing at least two-thirds of the volume of citrus grown by those voting in the referendum.

The results of the referendum show that all four amendments were favored by over 97 percent of the eligible producers who voted and over 99 percent of the volume voted favored all the amendments.

#### Final Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS has considered the economic impact of this final rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be unduly or disproportionately burdened.

There are approximately 14 handlers of Florida citrus who are subject to regulation under the Order and approximately 500 citrus producers in the regulated area. At the time the initial regulatory flexibility analysis was prepared (88 FR 2862), small agricultural service firms were defined by the Small Business Administration

(SBA) as those having annual receipts of no more than \$30,000,000, small agricultural producers of orange groves were defined as those having annual receipts of no more than \$3,500,000, and small agricultural producers of citrus (except orange) groves were defined as those having annual receipts of no more than \$3,750,000 (13 CFR 121.201). The SBA subsequently updated these standards and, at the time this final regulatory flexibility analysis was prepared, the SBA defined small businesses as those having annual receipts of no more than \$4,000,000 for orange producers, \$4,250,000 for other citrus producers, and \$34,000,000 for handlers (13 CFR 121.201). Thus, AMS changed the thresholds to reflect the new SBA thresholds in this final rule. The changes do not impact AMS's ultimate determination regarding the impact of the rule on small entities.

According to data from the National Agricultural Statistics Service (NASS), the weighted average packing house door equivalent price for fresh Florida oranges for the 2022–23 season was approximately \$21.07 per box with total shipments of around 1,612,000 boxes. Based on this information, the majority of orange handlers have average annual receipts of significantly less than \$34,000,000 (\$21.07 multiplied by 1,612,000 boxes equals \$33,964,840, divided by 14 handlers equals \$2,426,060 per handler). The weighted average packing house door price for other Florida citrus for the 2022–23 season was \$38.24 per box with total shipments of 1,402,000 boxes. Based on this information, the majority of other citrus handlers have average annual receipts of significantly less than \$34,000,000 (\$38.24 multiplied by 1,402,000 boxes equals \$53,612,000, divided by 14 handlers equals \$3,829,428.57 per handler).

In addition, based on the NASS data, the weighted average orange grower price for the 2022–23 season was estimated at \$18.90 per box of fresh oranges. Based on grower price, shipment data, and the total number of Florida orange growers, the average annual grower revenue for oranges is well below \$4,000,000 (\$18.90 multiplied by 1,612,000 boxes equals \$30,465,823.03, divided by 500 growers equals \$60,931.65 per grower). The weighted average other citrus grower price for the 2022–23 season was estimated at \$29.08 per box of fresh citrus. Based on grower price, shipment data, and the total number of Florida citrus growers, the average annual grower revenue for other citrus is well below \$4,250,000 (\$29.08 multiplied by 1,402,000 boxes equals \$40,775,768,

divided by 500 growers equals \$81,551.54 per grower). Thus, the majority of Florida citrus handlers and growers may be classified as small entities.

AMS has determined that the amendments, as effectuated by this final rule, will not have a significant impact on a substantial number of small businesses. Rather, large and small entities alike would be expected to benefit from the Committee's improved ability to address important issues of interest to all on a timely basis. No small businesses are unduly or disproportionately burdened.

The amendments to the Order are necessary because the Florida citrus industry has undergone consolidation and crop reduction. Decreasing the Committee's size makes it more reflective of today's industry and easier to fulfill the quorum requirement. Handlers routinely source fruit from across the state, therefore the differentiation of districts no longer serves a practical purpose. Adding an authority to accept voluntary contributions from domestic sources allows the Committee to collaborate with other organizations for research/promotional activities. No economic impact is expected from these amendments because they will not establish any new regulatory requirements on handlers, nor will they have any assessment or funding implications. There will be no change in financial costs, reporting, or recordkeeping requirements because of these amendments.

Alternatives to this action were considered by the Committee. However, due to changes in the industry, AMS believes the amendments are justified and necessary to ensure the Committee's ability to locally administer the program.

#### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0189, Fruit Crops. No changes in those requirements are necessary because of this action. Should any changes become necessary, they would be submitted to OMB for approval.

This final rule does not impose additional reporting or recordkeeping requirements on either small or large Florida citrus handlers or producers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and

duplication by industry and public-sector agencies. AMS has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

AMS is committed to complying with the E-Government Act to promote the use of the internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Like all Committee meetings, the November 19, 2020, Committee meeting was widely publicized throughout the production area. Meetings are held virtually or in a hybrid style.

Participants both large and small have a choice whether to attend in person or virtually and can participate in the Committee's deliberations on all issues.

A proposed rule concerning this action was published in the **Federal Register** on June 30, 2022 (87 FR 39003). A copy of the rule was sent via email to the Committee Manager for disposal to all Committee members and the Florida citrus industry. The proposed rule was made available by USDA through the internet and the Office of the Federal Register. A 60-day comment period ending August 29, 2022, was provided to allow interested persons to respond to the proposals. Seven comments were received during the comment period, all of which were in support of the proposed amendments. Based on all the information available to AMS at this time, including the comments received in response to the proposed rule, no substantive changes will be made to the amendments as proposed.

A proposed rule and referendum order was then published on January 18, 2023 (88 FR 2862). That document directed that a referendum among Florida citrus producers be conducted during the period of April 3, 2023, through May 1, 2023, to determine whether they favored the proposed amendments to the Order. To become effective, the amendments had to be approved by two-thirds of the producers voting in the referendum or by those representing at least two-thirds of the volume of citrus grown by those voting in the referendum. The results show that over 97 percent of the eligible producers who voted and over 99 percent of the volume voted favored all four amendments. All of the amendments were passed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <https://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions

about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

### **Order Amending the Order Regulating the Handling of Oranges, Grapefruit, Tangerines, and Pummelos Grown in Florida**

#### **Findings and Determinations<sup>1</sup>**

##### *(a) Findings and Determinations Upon the Basis of the Rulemaking Record*

The findings hereinafter set forth are supplementary to the findings and determinations which were previously made in connection with the issuance of Marketing Order 905; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1. Marketing Order 905, as amended, and as hereby further amended, and all the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

2. Marketing Order 905, as amended, and as hereby further amended, regulates the handling of oranges, grapefruit, tangerines, and pummelos grown in Florida and is applicable only to persons in the respective classes of commercial and industrial activity specified in the Order;

3. Marketing Order 905, as amended, and as hereby further amended, is limited in application to the smallest regional production area, which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several marketing orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

4. Marketing Order 905, as amended, and as hereby further amended, prescribes, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of citrus produced or packed in the production area; and

5. All handling of citrus produced or packed in the production area, as defined in Marketing Order 905, is in the current of interstate or foreign commerce, or directly burdens, obstructs, or affects such commerce.

<sup>1</sup> This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

##### *(b) Determinations*

It is hereby determined that:

1. The issuance of this amendatory Order, amending the aforesaid Order, is favored or approved by producers representing at least two-thirds of the volume of citrus produced by those voting in a referendum on the question of approval and who, during the period of August 1, 2021, through July 31, 2022, were engaged within the production area in the production of such citrus.

2. The issuance of this amendatory Order advances the interests of producers of citrus in the production area pursuant to the declared policy of the Act.

#### **Order Relative to Handling**

It is therefore ordered, that on and after the effective date hereof, all handling of oranges, grapefruit, tangerines, and pummelos grown in Florida shall be in conformity to, and in compliance with, the terms and conditions of the said Order as hereby to be amended as follows:

The provisions amending the Order contained in the proposed rule and referendum order, published in the **Federal Register** (88 FR 2862) on January 18, 2023, will be and are the terms and provisions of this order amending the Order and are set forth in full herein.

#### **List of Subjects in 7 CFR Part 905**

Grapefruit, Marketing agreements, Oranges, Pummelos, Reporting and recordkeeping requirements, Tangerines.

For the reasons set forth in the preamble, the Agricultural Marketing Service amends 7 CFR part 905 as follows:

### **PART 905—ORANGES, GRAPEFRUIT, TANGERINES, AND PUMMELOS GROWN IN FLORIDA**

■ 1. The authority citation for part 905 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. In § 905.14, revise paragraph (a) introductory text to read as follows:

#### **§ 905.14 Redistricting.**

(a) The Committee may, with the approval of the Secretary, redefine the districts into which the production area is divided or reapportion or otherwise change the grower membership of districts, or both: *Provided*, That the membership shall consist of 10 grower members, and any such change shall be based, insofar as practicable, upon the

respective averages for the immediately preceding three fiscal periods of:

\* \* \* \* \*

■ 3. In § 905.19, revise paragraph (a) to read as follows:

**§ 905.19 Establishment and membership.**

(a) There is hereby established a Citrus Administrative Committee consisting of 10 grower members. Grower members shall be producers who produce within the district for which they are nominated and selected to represent. Grower members may be persons who, in addition to being producers, are shippers or employees of shippers: Provided, that the committee, with the approval of the Secretary, may establish alternative qualifications for such grower members. The committee may be increased by one non-industry member nominated by the committee and selected by the Secretary. The committee, with approval of the Secretary, shall prescribe qualifications, term of office, and the procedure for nominating the non-industry member.

\* \* \* \* \*

■ 4. Revise § 905.22 to read as follows:

**§ 905.22 Nominations.**

(a)(1) The Committee shall give public notice of a meeting of producers in each district, to be held not later than April 10th of even-numbered years, for the purpose of making nominations for grower members and alternate grower members. The Committee, with the approval of the Secretary, shall prescribe uniform rules to govern such meetings and the balloting thereat. The chairman of each meeting shall publicly announce at such meeting the names of the persons nominated, and the chairman and secretary of each such meeting shall transmit to the Secretary their certification as to the number of votes so cast, the names of the persons nominated, and such other information as the Secretary may request. All nominations shall be submitted to the Secretary on or before the 20th day of April.

(2) Each nominee shall be a producer in the district from which he or she is nominated. In voting for nominees, each producer shall be entitled to cast one vote for each nominee in each of the districts in which he or she is a producer. At least one of the nominees and their alternates so nominated shall be affiliated with a bona fide cooperative marketing organization.

(b) Notwithstanding the provisions of paragraph (a) of this section, nomination and election of members and alternate members to the Committee may be conducted by mail, electronic mail, or

other means according to rules and regulations recommended by the Committee and approved by the Secretary.

■ 5. Revise § 905.23 to read as follows:

**§ 905.23 Selection.**

From the nominations made pursuant to § 905.22(a) or from other qualified persons, the Secretary shall select 10 members and 10 alternates. At least one such member and their alternate shall be affiliated with a bona fide cooperative marketing organization.

■ 6. In § 905.29, revise paragraph (b) to read as follows:

**§ 905.29 Inability of members to serve.**

\* \* \* \* \*

(b) If both a member and his or her respective alternate are unable to attend a committee meeting, such member may designate another alternate to act in his or her place in order to obtain a quorum. If the member is unable to designate such an alternate, the committee members present may designate such alternate.

\* \* \* \* \*

■ 7. In § 905.34, revise paragraphs (a), (b), and (c) to read as follows:

**§ 905.34 Procedure of committees.**

(a) Seven members of the committee shall constitute a quorum.

(b) For any decision or recommendation of the Committee to be valid, six concurring votes shall be necessary: *Provided*, That the Committee may recommend a regulation restricting the shipment of grapefruit grown in Regulation Area I or Regulation Area II which meets the requirements of the Improved No. 2 grade or the Improved No. 2 Bright grade only upon the affirmative vote of a majority of its members present from the regulation area in which such restriction would apply; and whenever a meeting to consider a recommendation for release of such grade is requested by a majority of the members from the affected area, the committee shall hold a meeting within a reasonable length of time for the purpose of considering such a recommendation. If after such consideration the requesting area majority present continues to favor such release for their area, the request shall be considered a valid recommendation and transmitted to the Secretary. The votes of each member cast for or against any recommendation made pursuant to this subpart shall be duly recorded. Whenever an assembled meeting is held each member must vote in person.

(c) The committee may provide for meeting by telephone, or other means of

communication, and any vote cast at such a meeting shall be promptly confirmed in writing: Provided, that if any assembled meeting is held, all votes shall be cast in person.

\* \* \* \* \*

■ 8. Add § 905.43 before the undesignated center heading "Regulations" to read as follows:

**§ 905.43 Contributions.**

The Committee may accept voluntary contributions. Such contributions shall be free from any encumbrances by the donor and the Committee shall retain complete control of their use.

■ 9. Revise § 905.80 to read as follows:

**§ 905.80 Fruit not subject to regulation.**

(a) Except as otherwise provided in this section, any person may, without regard to the provisions of §§ 905.52 and 905.53 and the regulations issued thereunder, ship any variety for the following purposes:

(1) To a charitable institution for consumption by such institution;

(2) To a relief agency for distribution by such agency;

(3) To a commercial processor for conversion by such processor into canned or frozen products or into a beverage base;

(4) By U.S. Mail or private courier; or

(5) In such minimum quantities, types of shipments, or for such purposes as the committee with the approval of the Secretary may specify.

(b) No assessment shall be levied on fruit so shipped. The committee shall, with the approval of the Secretary, prescribe such rules, regulations, or safeguards as it may deem necessary to prevent varieties handled under the provisions of this section from entering channels of trade for other than the purposes authorized by this section. Such rules, regulations, and safeguards may include the requirements that handlers shall file applications with the committee for authorization to handle a variety pursuant to this section, and that such applications be accompanied by a certification by the intended purchaser or receiver that the variety will not be used for any purpose not authorized by this section.

■ 10. Revise § 905.114 to read as follows:

**§ 905.114 Redistricting of citrus districts and reapportionment of grower members.**

Pursuant to § 905.14, the citrus districts and membership allotted each district shall be as follows:

(a) Citrus District One shall include that portion of the State of Florida, which is bounded by the Suwannee River, the Georgia border, the Atlantic

Ocean, and the Gulf of Mexico. This district shall have 10 members and 10 alternates.

(b) [Reserved]

■ 11. In § 905.120, revise paragraphs (d) and (e) and remove paragraphs (f) and (g).

The revisions read as follows:

**§ 905.120 Nomination procedure.**

\* \* \* \* \*

(d) At each meeting each eligible person may cast one vote for each of the persons to be nominated to represent the district or group, as the case may be.

(e) Voting may be by written ballot. If written ballots are used, all ballots shall be delivered by the chairman or the secretary of the meeting to the agent of the Secretary. If written ballots are not used, the committee's representative shall deliver to the Secretary's agent a listing of each person nominated and a count of the number of votes cast for each nominee for grower member and alternate. Said representative shall also provide the agent the register of eligible voters present at each meeting, a listing of each person nominated, and the number of votes cast.

■ 12. In § 905.150, revise paragraph (d) to read as follows:

**§ 905.150 Eligibility requirements for public member and alternate member.**

\* \* \* \* \*

(d) The public member should be nominated by the Citrus Administrative Committee and should serve a 2-year term which coincides with the term of office of grower members of the Committee.

**Erin Morris,**

*Associate Administrator, Agricultural Marketing Service.*

[FR Doc. 2023-28315 Filed 12-26-23; 8:45 am]

**BILLING CODE P**

## FARM CREDIT ADMINISTRATION

### 12 CFR Parts 614 and 620

**RIN 3052-AD54**

#### Loan Policies and Operations

**AGENCY:** Farm Credit Administration.

**ACTION:** Final rule.

**SUMMARY:** The Farm Credit Administration (FCA, we, or our) is amending regulations governing young, beginning, and small farmers and ranchers (YBS). The final rule clarifies the responsibilities of funding banks in the review and approval of direct lender association YBS programs, strengthens funding bank internal controls, and bolsters YBS business planning.

**DATES:** This regulation will be effective the later of February 1, 2024, or at least 30 days after publication in the **Federal Register** during which either or both Houses of Congress have been in session. We will publish a notice of the effective date in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:**

*Technical information:* Jessica Tomlinson-Potter, Senior Policy Analyst, Office of Regulatory Policy, (703) 819-4667, TTY (703) 883-4056, [potterj@fca.gov](mailto:potterj@fca.gov) or *Legal information:* Hazem Isawi, Senior Attorney, Office of General Counsel, (703) 883-4022, TTY (703) 883-4056, [isawih@fca.gov](mailto:isawih@fca.gov).

**SUPPLEMENTARY INFORMATION:**

#### I. Objectives of the Final Rule

The objectives of this final rule are to:

- Increase direct lender associations' YBS activity to a diverse population of borrowers;
- Reinforce the supervisory responsibilities of the funding banks, authorized by section 4.19 of the Farm Credit Act; and
- Require each direct lender association to enhance the strategic plan for their YBS program.

When developing YBS programs, direct lender associations should consider marketing to all populations of YBS farmers and ranchers. Underserved communities and groups can be overlooked or excluded from marketing efforts and education outreach, leaving out a potential borrowing base.

Underserved groups include those who have been subjected to racial, ethnic, or gender prejudice because of their identity as members of the group without regard to their individual qualities. Examples of underserved communities include, but are not limited to, Black or African American, American Indian and Alaskan Native, Hispanic, Asian and Pacific Islander, LGBTQIA+, women, veterans, and persons with disabilities. These are examples of communities with a high potential for individuals who may fall into the Y, B, and/or S categories of borrowers, and direct lender associations should target such communities specifically to reach the entire universe of potential borrowers. Underserved communities can often be reached in schools and universities, professional and social organizations, at community gatherings, and local events.

Every effort should be made to reach the entire universe of potential Y, B, and S borrowers. Direct lender associations should also work with their local Farm Service Agency representatives to assist the Farm Credit System with its directive to serve all creditworthy Y, B,

and S borrowers by breaking down bureaucratic barriers to entry.

#### II. Background

The Farm Credit Act of 1971, as amended (Act),<sup>1</sup> establishes the Farm Credit Administration as the safety and soundness regulator of the Farm Credit System (FCS or System). As stated in the FCA Strategic Plan for FYs 2018–2023, our mission is to ensure that System institutions are safe, sound, and dependable sources of credit and related services for all creditworthy and eligible persons in agriculture and rural America. The System has a unique mission to serve YBS farmers and ranchers. Section 4.19 of the Act<sup>2</sup> requires each direct lender association to establish a program to furnish sound and constructive credit and related services to YBS farmers and ranchers.

We continue to believe the System's YBS mission is important to enable small and start-up farmers and ranchers to make successful entries into agricultural production. Also, we believe it is important to ensure marketing and outreach efforts include all eligible and creditworthy persons, with specific outreach to achieve diversity and inclusion. The System's YBS mission is also critical to facilitate the transfer of agricultural operations from one generation to the next. We remain committed to ensuring the System fulfills its important mission to YBS farmers and ranchers.

We published a proposed rule on June 16, 2022 (NPRM), recommending updates to FCA's YBS regulations, which were last updated almost 20 years ago. This final rule largely adopts the proposal with certain changes made in response to comments, with a particular focus on reducing an increased administrative burden. Comment letters, along with our responses are discussed below.

#### III. Comments and Our Responses

The comment period ended August 15, 2022. We received 67 comment letters. Most comments came from System institutions or persons affiliated with the System, with one letter from the Farm Credit Council (Council) acting on behalf of its membership. We also received three letters from trade groups representing commercial banking.

Most commenters requested we withdraw the proposed rule and keep the existing regulations in place. Some commenters offered solutions to bolster practices such as continued

<sup>1</sup> Public Law 92–181, 85 Stat. 583.

<sup>2</sup> 12 U.S.C. 2207.

collaboration with FCA and System workgroups without changes to the existing regulation. Commenters stated that the rule was administratively burdensome, human capital intensive, difficult for smaller direct lenders to implement, and did not achieve the shared goal of increasing YBS activity.

We also received comments in support of the proposed rule that agreed with the framework and accountability the rule requires, stating the rule changes should be done with more than incremental progress in mind. Another comment supported the idea of increased reporting.

#### *Specific Issues*

##### *A. YBS Program Uniformity*

System commenters expressed concern that the prospect of a YBS rating system and the proposed requirements relating to funding bank oversight may encourage all YBS programs to “look alike” or to fit into a “cookie cutter” mold. While one of the proposed rule’s stated objectives was to provide elements that will be evaluated as part of a rating system to measure year-over-year YBS progress, we did not propose to create any such rating system itself through the rulemaking. For clarity, however, this final rule omits rating system matters in its statement of objectives.

Next, we disagree that the proposed changes to bank oversight responsibilities will lead to “cookie cutter” YBS programs. We have long encouraged direct lender associations to tailor YBS programs to serve the specific needs of borrowers in the different lending territories. Existing FCA regulation § 614.4165(c), which is redesignated paragraph (d) in this final rule, states that each direct lender association “must establish a program to provide sound and constructive credit and services to YBS farmers and ranchers in its territory.” The reference to “its territory” illustrates that each YBS program should reflect the credit and service needs of YBS borrowers within that lending territory. While this rulemaking enhances and strengthens bank oversight responsibilities and direct lender association YBS program standards, it does not prescribe or encourage uniformity of content among YBS programs. We continue to expect varying approaches among the direct lender associations, appropriate to the needs of borrowers in each lending territory.

##### *B. Definitions [§ 614.4165(a)]*

The proposed rule had no substantive changes to the definitions in current

paragraph (a). We proposed grammatical changes, including removing the word “and” between farmers and ranchers, and adjusting punctuation. We received one comment on the definition of a “beginning” farmer; however, that term is not defined in regulatory text. The definitions in paragraph (a) will be finalized as proposed.

##### *C. Farm Credit Banks Oversight [Proposed § 614.4165(b)]*

Commenters frequently raised concerns on the topic of bank oversight. Two non-System commenters supported the concept of increased bank oversight, stating they would like to see reform in reporting and tracking, and that they believe bank review and approval will help with this. System commenters opposed increased bank oversight for a variety of reasons, which will be discussed as they relate to each section of the rule text. The proposed preamble stated that we believed funding banks were in a unique position to know the YBS activities of their affiliated direct lender associations and see how those associations respond to the needs of their respective borrowers. Commenters strongly disagreed, stating funding banks do not have “boots on the ground” and are not familiar with local YBS markets and needs. We considered this feedback as we drafted the final rule, which removes certain elements of the proposed bank oversight requirements.

Proposed paragraph (b)(1) required each bank, among other things, to adopt written policies directing direct lender associations to establish YBS programs, ensure direct lender association coordination with others, and report to FCA. A bank trade group commented that the proposed rule lacked a requirement for direct involvement or representation of YBS farmers and ranchers in the process of creating and reviewing YBS programs. To address this, the commenter recommended that each bank be directed to adopt a written policy requiring the bank and any affiliated direct lender association to form a committee comprised of local YBS farmers and ranchers. The commenter further recommended that these committees be vested with authority over YBS programs, independent of the board of directors of each institution. We decline to adopt this recommendation because it is outside the scope of the proposal. Moreover, because Farm Credit is a cooperative system run by member-borrowers who elect their respective System institutions’ boards of directors, YBS farmers and ranchers are structurally situated to be heard and

represented at the board level. We also note that as a matter of practice, many direct lender associations have various YBS committees and advisory groups that provide input and are involved in program development. We do not believe this additional involvement and representation from YBS farmers and ranchers is necessary at the bank level given the current involvement of member borrowers in System governance at their direct lender associations.

Proposed paragraph (b)(1)(i) required each funding bank to adopt written policies that direct their affiliated direct lender associations to establish an annual strategic YBS plan. While we did not receive comments on this specific paragraph, we received many comments on the YBS strategic plan itself, which are addressed in section *D. Direct lender association YBS strategic plan*. Because the proposal for an independent YBS strategic plan is not being adopted in this final rule, the requirement for bank policy direction on such plan has been removed.

The proposed rule redesignated paragraph (b)(2) of the current regulation as paragraph (b)(1)(ii). The text of this coordination requirement remained unchanged, but nonetheless we received three comments from the System stating it is unclear how much coordination between organizations is acceptable and how coordination can be objectively evaluated. Although these comments are outside the scope of the proposal’s substantive changes, coordination efforts are generally sufficient if they accomplish the objective that YBS programs “shall assure that such credit and services are available in coordination with other institutions of the Farm Credit System serving the territory and with other governmental and private sources of credit.” Act § 4.19(a). We expect that specific coordination efforts will be devised on an institution-by-institution basis. Paragraph (b)(1)(ii) will be finalized as proposed.

Proposed paragraph (b)(1)(iii) required each bank to establish a policy to direct each affiliated direct lender association to submit a YBS strategic plan and any other information regarding its YBS program deemed necessary by the bank. We received two System comments and one comment from the Council on this requirement. In summary, the comments stated that “any other information deemed necessary by the bank” was vague, arbitrary, and therefore burdensome. There was concern over inconsistency of requirements between the banks and the stifling of creativity for the direct

lender. Further, there was commenter concern on the relationship with the direct lender and bank being damaged, with various reasons listed. We received many comments on the strategic YBS plan itself, which are addressed in that section. Because we are not adopting the proposal's requirement for an independent YBS strategic plan, we are removing proposed paragraph (b)(1)(iii) from this final rule.

Proposed paragraph (b)(1)(iv) is redesignated as paragraph (b)(1)(iii) and finalized as proposed. Although we only proposed a redesignation from the current paragraph (b)(4) and a replacement of "agency" for "FCA," we still received four comments. Commenters agreed that no changes were needed to the data reporting requirement of "complete and accurate" in the rule text, but they did mention concerns surrounding subjectivity of criteria, which has not been a material issue in the past. Commenters did not provide reasons this would be a concern going forward.

A trade group for commercial banks commented that "achievements" may be interpreted as denoting completion and success. The commenter stated that since success should not be presumed, we should add "shortfalls" as an element for the bank to report on in addition to "operations" and "achievements." We decline to adopt this specific change because paragraph (c)(2)(ii) as finalized requires the operational and strategic business plan to discuss variances and reasons for the results. We expect that both positive and negative variances will be discussed in the plan. Reporting of negative variances thus addresses the commenter's suggestion.

We received 46 comments on proposed paragraph (b)(2). Two commenters supported funding bank oversight and approval while the rest opposed this requirement. Those in favor wanted to see reform in reporting and tracking and believed that bank oversight would help in that area. They stated that oversight and accountability are necessary, and this rule is a step in the right direction for critical accountability.

Those opposed to the proposed changes relating to funding bank oversight raised the following issues:

- cost and administrative burden;
- negative impacts on cooperative structure and local control;
- no appeal or resolution process;
- expansion of current funding bank duties;
- lack of funding bank personnel expertise regarding individual YBS markets;

- biased, preferential, or inconsistent evaluation among the four funding banks;

- lack of guidance on goal standards or what is considered acceptable/successful;

- no value added to YBS programs;
- homogenization of YBS programs resulting from a "uniform" bank approval process; and

- exam findings and communication to the System not warranting increased bank oversight.

To address these comments, we made changes to the rule by:

- removing the requirement for an independent YBS strategic plan and associated funding bank approval and review,

- providing that funding bank review and approval shall solely be to determine whether the YBS program contains all required components,

- updating the reference from paragraph (c) in the current regulation to paragraph (d) in the final rule, and

- stating that funding bank communication of an incomplete plan must be in writing and sent to FCA within 30 days.

The statute provides that association YBS programs are "[u]nder the policies of the Farm Credit Bank board," and that "[e]ach program shall be subject to review and approval by the supervising bank." The System's comments and representations about funding bank lack of expertise, staff knowledge and capability with respect to YBS programs suggest there is room for the banks to improve their capabilities in this area.

As in the existing regulation, banks will still be required to review and approve each direct lender association's YBS program. This rule clarifies that such review and approval must be performed annually. We find this requirement complements—and is logically connected to—the bank's responsibility for creating and submitting the operations and achievements report to FCA. Specifically, annual review and approval of direct lender association YBS programs will give each bank a better understanding of the programs in their territories and ultimately result in more accurate reporting to FCA.

To address concerns about the scope of bank review, however, we are revising the regulatory text so that review and approval shall solely be to determine whether the YBS program contains the components of finalized paragraph (d). As a result, the finalized text more closely tracks the scope of review specified in the current regulation. Notwithstanding the revision, we encourage open dialogue

between the bank and direct lender to continually improve program content.

With slight changes from the proposal, this final rule provides that where a bank concludes a YBS program is incomplete, it must communicate that fact in writing to both the direct lender association and FCA within 30 days.

Proposed paragraph (b)(3) required internal controls. Since banks are the main YBS reporting entity to FCA, having a strong internal control environment is critical to safety and soundness. We received four comments from the System, the Council, and a commercial bank trade group. The commercial bank trade group stated that, in the past, internal controls over YBS data reporting processes have been weak. They stated this resulted in inaccurate reporting to FCA. They went on to state weak reporting is a concern they'd like to see addressed. The System and Council stated that establishing new internal controls will create redundancy and inefficiencies. As discussed in sections above and below, direct lenders are not required to have an independent YBS strategic plan in the finalized rule. Therefore, bank internal control requirements in the proposed rule for direct lender YBS plans have been removed. The Council commented that banks should be able to rely on the internal controls of the direct lender. The bank's responsibilities for review and approval of YBS programs and data compilation and reporting to FCA are independent of direct lenders. For this reason, it is necessary that each bank has internal controls over the processes they perform, just as direct lenders do. Each organization in the System should have internal controls over their respective YBS responsibilities.

#### *D. Direct Lender Association YBS Strategic Plan [Proposed § 614.4165(c)]*

Proposed paragraph (c)(1) required each direct lender association to adopt an independent 3-year YBS strategic plan to guide the direct lender's required YBS program. We received 31 comments on this requirement from the System and a commercial bank trade group, all of whom were opposed for a variety of reasons.

Many stated that YBS borrowers are critical to the System's sustainability, are an integral part of direct lender's operations, and are a key component of the overall business plan. As such, YBS components are woven into almost every aspect of a direct lender's annual business plan. Commenters went on to say that YBS borrowers should be considered in the context of the whole business and included as part of the overall business plan rather than

separated out. The FCS commenters stated that creating an independent plan outside of the business plan would create disconnected, redundant, and unnecessary administrative burdens. The FCS commenters noted that staff's time could better be used serving YBS borrowers directly rather than duplicating the business plans.

We considered this input and will not finalize the requirement for an independent YBS strategic plan. We agree that YBS is an integral part of direct lenders' operations and should be incorporated as part of overall business planning. The intent of our proposal was that an independent planning document would put increased emphasis on YBS. However, the same goal can be achieved without creating a separate document. It is our intent that direct lenders give thoughtful consideration into their strategic lending to YBS borrowers, in both current and potential markets.

While we are not changing the existing requirement for a 3-year planning period in the operational and strategic business plan, we still received comments on this area. Some commenters stated that a 3-year plan is not reasonable given volatility and uncertainty, making future years a guess. We believe it is important to be forward looking and innovative in strategic business planning. Three years has been established as a minimum planning period. We continue to believe that three years is appropriate for planning. Some commenters stated the requirement to adopt a 3-year plan within 30 days after the commencement of the year is not enough time to analyze the past year's data and conflicts with other business planning activity. While we understand that the period around the new calendar year may be particularly busy, the timeframe for adoption of the plan is specified in the existing regulation, and we have not proposed a change in this regard. We believe the new calendar year continues to be an appropriate time to conclude activity and begin reporting processes.

Paragraph (c)(2) of the proposed rule required that the strategic plan must detail the operations of the YBS program including all components in paragraph (d). We received no comments specific to this section. This requirement has been combined into the finalized (c)(1).

In proposed paragraph (c)(3)(i), direct lenders were required to analyze performance from the previous year in achieving components of their YBS program listed in proposed paragraph (d). We received a comment from a banking trade group that analyzing only

performance and effectiveness but not identifying areas to improve upon is not a balanced approach. While we understand the commenter's point, it is our expectation that direct lenders take a balanced approach when analyzing performance. If a goal is not achieved, it must still be reported on.

Proposed paragraph (c)(3)(ii) received no comments. We redesignated and finalized it as paragraph (c)(2)(ii). Proposed paragraph (c)(3)(iii) received no comments, and we redesignated and finalized it as paragraph (c)(2)(iii). We replaced the word, "efforts," with "qualitative factors and quantitative goals." We added the words, "expand access to," which derived from proposed paragraph (c)(3)(iv).

We received seven comments from the FCS opposing proposed paragraph (c)(3)(iv). The requirement proposed that direct lenders assess the effectiveness in providing efforts resulting in credit provided to new and expanding YBS operations. Commenters discussed the high subjectivity of such data and stated they are unclear how effectiveness is measured. Examples were given of a person attending a seminar and several years later becoming a borrower. How would direct lenders track and record such activity? Commenters stated databases are not currently in place to collect such data and it is cost prohibitive with little value added to create a database. Commenters also believed that tracking this data provided no value to YBS borrowers. After assessing comments, we added the words "and expand access to" which derived from proposed paragraph (c)(3)(iv) to finalized paragraph (c)(3)(iii) and removed the other requirements of proposed paragraph (c)(3)(iv). We believe that tracking such data and identifying how direct lender association YBS programs are assisting and expanding access to credit and education for YBS farmers and ranchers does provide value to YBS farmers and ranchers by strengthening and improving lender's YBS programs. To comply with this provision, direct lenders must assess how their YBS program components assist and expand access to credit and education for YBS farmers and ranchers.

#### *E. Direct Lender Association YBS Program [Proposed § 614.4165(d)]*

We received one comment on proposed paragraph (d) from a commercial banking trade group in support of the requirement. There were no opposing comments. The comment stated that the components have been long awaited and both qualitative and quantitative factors play important roles

in YBS lending. Paragraph (d) is finalized as proposed.

We received one comment from a commercial banking trade group regarding the mission statement requirement in proposed paragraph (d)(1)(i)(A). The commenter stated that the mission statement should explicitly recognize the importance of YBS and ensure support at the direct lender level. We believe the requirement is satisfactory as drafted in accomplishing this purpose, and finalized it as proposed.

Proposed paragraph (d)(1)(i)(B) is finalized as proposed. We received two comments on the direct lender internal controls requirement in proposed paragraph (d)(1)(i)(B). One System commenter stated that adding internal controls adds additional time, energy, and costs to reporting. Internal controls are an existing requirement that direct lenders should already have in place. Another commenter asked that internal controls clarify the extent to which staff must take stakeholder input into account. While encouraged, the rule does not require stakeholder input, nor is it necessarily a component of an internal controls system.

There was one comment from a commercial banking trade group, supporting the use of credit enhancement tools. Proposed paragraph (d)(1)(ii)(A) is finalized as proposed.

Proposed paragraph (d)(1)(ii)(B) is finalized as proposed. It requires credit and related services coordination with System institutions, governmental and private sources. This is a continuation of requirements in existing paragraph (c)(3)(ii). We received nine comments on this requirement. One comment from a commercial banking trade group supported third-party coordination on credit and related services. Eight commenters, all from the System, opposed this existing requirement. Commenters stated that where direct lender associations are over-chartered within the same market, coordination efforts will entice competition rather than healthy collaboration. Another System commenter stated that the prospect of interterritorial competition was untenable and would potentially damage their association and members. Some commenters stated that collaboration is already occurring, and a regulatory requirement is not needed. System commenters were worried that this requirement may be interpreted by funding banks to force best practices for one lender onto another lender, even if the practices may not apply or work, to achieve bank approval. Commenters stated that statutory borrower rights requirements were not in the

commercial banks' interest and, as such, posed a barrier to coordination. Another commenter mentioned that agencies such as FSA or other national YBS organizations already experience time constraints. When multiple direct lender associations request collaboration at the same time, particularly in over-chartered areas or small towns, these resource issues will be compounded. Lastly a commenter stated that the System does not have an adequate portal to capture and highlight the depth of the collaboration efforts that occur. As an existing requirement, we have seen the importance and benefit of third-party coordination. The requirement leaves the option open to direct lenders in choosing with which parties they coordinate. We understand that some relationships work better than others. Nonetheless, we encourage direct lenders to continue outreach and third-party coordination, for the betterment of YBS farmers and ranchers.

Proposed paragraph (d)(1)(iii) is finalized as proposed. It requires implementation of outreach programs, which may include marketing and education. This is a continuation of requirements in existing paragraph (c)(3)(iii). We received seven comments on this requirement. One comment from a commercial banking trade group supported minimum requirements for marketing, outreach, and education. Six commenters, all from the System, opposed this existing requirement. Commenters stated that the rule is silent on criteria to determine effectiveness and that measuring effectiveness is subjective. One commenter stated that it would frustrate and confuse potential customers and business partners when a direct lender comes to an event with predetermined measurers for effectiveness. Another commenter asked if the board, management, or banks would be determining the effectiveness of activities, going on to say that this requirement is redundant and burdensome. In the existing requirement, the agency has not identified material weaknesses with direct lenders implementing effective outreach, marketing, and educational programs.

We are unclear as to why carrying this requirement forward into the finalized rule would be burdensome. Results have shown for a direct lender YBS program to be successful, it is critical to have more components than merely the extension of credit. Some of these components include marketing to underserved segments, providing new borrower education, and listening to feedback from YBS farmers and ranchers.

Proposed paragraph (d)(2)(i) strikes the word "reasonably" and is finalized as proposed. It requires using reliable demographic data in developing quantitative goals, along with identifying the sources of the data. We received seven comments on this requirement. One comment from a commercial banking trade group stated that quantitative goals must be bolstered with additional requirements and that more than one goal should be used. This commenter did not like basing the understanding of goals on reasonably reliable demographic data and stated that sources should be recognized and not arbitrary. The six opposing commenters were all from the System. Commenters who opposed this requirement shared concerns on the term "reasonably reliable," saying it provides uncertainty and results in highly subjective interpretations, asking who is to have final determination if the data is reasonably reliable or not. Validation of such data and timeliness were also raised as concerns. Opposing commenters stated validating data would raise significant time and resource concerns. They also stated that USDA census data is several years old before release, not making it the most up-to-date and reliable. Commenters questioned whether direct lenders would be expected to contract with third parties while awaiting USDA data availability to meet this requirement.

Opposing commenters also raised concerns that requiring additional quantitative goals will increase the potential for compromises to be made to existing programs that are effective as a means to meet new goals, adding that there is no incentive for direct lenders to set aggressive goals which may not be met and then result in a lower FCA rating. We believe that striking the word "reasonably" addresses these comments. Reliable data is a key component in developing effective goals. It is our expectation that the direct lender associations obtain the best data available to them when developing goals.

Proposed paragraphs (d)(2)(i)(A), (d)(2)(i)(B), (d)(2)(i)(C), and (d)(2)(i)(D) are finalized as proposed. They identify the minimum quantitative goals that a direct lender must establish annually. These requirements carry over unchanged from existing paragraphs (c)(2)(i) through (iv). We received one comment from a commercial banking trade group on proposed paragraphs (d)(2)(i)(A) through (C), stating the goals are arbitrary and unmoored and should be bolstered with additional requirements. We did strengthen this existing requirement by requiring direct

lenders to use at least one of the goal categories listed as opposed to the existing requirement that states that such targets may include one of the goal categories listed. Historically, direct lenders rarely used categories other than those listed in the regulation. Keeping the same categories ensures that data can be compared consistently over a range of time periods. Further, databases are already in place in the System to track these categories, which helps minimize regulatory burden and costs. We note these are only minimums and some direct lenders can and do use a combination of these goals or other categories.

Proposed paragraph (d)(2)(i)(D), pertaining to goals for capital committed to loans made to YBS borrowers, is finalized as proposed. It is an unchanged requirement compared with existing paragraph (c)(2)(iv), however, we did receive two opposing comments from a commercial bank trade group and the System. Both commenters had similar observations that the requirement was arbitrary and unmoored. One commenter went on to say there is a lack of criteria to determine how much capital a direct lender should allocate to YBS. There was concern that both FCA and the funding bank will have difficulty determining where a program is deficient in the capitalization goal. The final rule does not require direct lenders to have a capital goal. Paragraph (d)(2) only requires each direct lender to have one of the listed goals, not all. Nonetheless, we believe a capital commitment is a best practice and is one method of allowing direct lenders to serve YBS borrowers who may have a higher risk profile, while at the same time mitigating the lender's overall risk in the credit relationship.

#### *F. Annual Report Information Concerning YBS [Proposed § 620.5(k)(2)]*

We received no comments on the renumbering changes in proposed § 620.5(k)(2). It will be finalized as proposed.

#### *G. Other Matters*

One system commenter concluded that because the NPRM states that "YBS components will no longer be required as part of § 618.8440," FCA is impermissibly trying to modify § 618.8440 through the proposed rule. No part of this rulemaking revises § 618.8440 or changes its requirements. Our statement in the NPRM merely observed the effect of the proposed deletion of paragraph (e) of § 614.4165, which requires each direct lender

association's YBS program targets and goals to be included in its operational and strategic business plan (as separately required under § 618.8440). In any case, since the final rule does not adopt the proposed rule's wholesale deletion of paragraph (e) of § 614.4165, and instead moves it with minor changes to paragraph (c)(1), the substantive requirement to include YBS program components in the operational and strategic business plan will remain intact. As a result, the commenter's concern is addressed.

#### IV. Regulatory Flexibility Act and Congressional Review Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), FCA hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Each of the banks in the Farm Credit System, considered together with its affiliated direct lender associations, has assets and annual income in excess of the amounts that would qualify them as small entities. Therefore, Farm Credit System institutions are not "small entities" as defined in the Regulatory Flexibility Act.

Under the provisions of the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Management and Budget's Office of Information and Regulatory Affairs has determined that this final rule is not a "major rule," as the term is defined at 5 U.S.C. 804(2).

#### List of Subjects

##### 12 CFR Part 614

Agriculture, Banking, Banks, Flood insurance, Foreign trade, Reporting and recordkeeping requirements, Rural areas.

##### 12 CFR Part 620

Accounting, Agriculture, Banking, Banks, Reporting and recordkeeping requirements, Rural areas.

#### PART 614—LOAN POLICIES AND OPERATIONS

■ 1. The authority citation for part 614 continues to read as follows:

**Authority:** Secs. 1.3, 1.5, 1.6, 1.7, 1.9, 1.10, 1.11, 2.0, 2.2, 2.3, 2.4, 2.10, 2.12, 2.13, 2.15, 3.0, 3.1, 3.3, 3.7, 3.8, 3.10, 3.20, 3.28, 4.12, 4.12A, 4.13B, 4.14, 4.14A, 4.14D, 4.14E, 4.18, 4.18A, 4.19, 4.25, 4.26, 4.27, 4.28, 4.36, 4.37, 5.9, 5.10, 5.17, 7.0, 7.2, 7.6, 7.8, 7.12, 7.13, 8.0, 8.5 of the Farm Credit Act (12 U.S.C. 2011, 2013, 2014, 2015, 2017, 2018, 2019, 2071, 2073, 2074, 2075, 2091, 2093, 2094, 2097, 2121, 2122, 2124, 2128, 2129, 2131, 2141, 2149, 2183, 2184, 2201, 2202, 2202a, 2202d, 2202e, 2206, 2206a, 2207, 2211, 2212, 2213, 2214, 2219a, 2219b, 2243, 2244, 2252,

2279a, 2279a–2, 2279b, 2279c–1, 2279f, 2279f–1, 2279aa, 2279aa–5); 12 U.S.C. 2121 note; 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

■ 2. Section 614.4165 is revised to read as follows:

##### § 614.4165 Young, beginning, and small farmers and ranchers.

(a) Definitions.

(1) For purposes of this subpart, the term "credit" includes:

(i) Loans made to farmers, ranchers, and producers or harvesters of aquatic products under title I or II of the Act; and

(ii) Interests in participations made to farmers, ranchers, and producers or harvesters of aquatic products under title I or II of the Act.

(2) For purposes of this subpart, the term "services" includes:

(i) Leases made to farmers, ranchers, and producers or harvesters of aquatic products under title I or II of the Act; and

(ii) Related services to farmers, ranchers, and producers or harvesters of aquatic products under title I or II of the Act.

(b) Farm Credit banks oversight.

(1) Each Farm Credit Bank and Agricultural Credit Bank must adopt written policies that direct:

(i) The board of each affiliated direct lender association to establish a program to provide sound and constructive credit and related services to young, beginning, and small farmers, ranchers, and producers or harvesters of aquatic products (YBS farmers and ranchers or YBS);

(ii) Each affiliated direct lender association to include in its YBS program provisions ensuring coordination with other System institutions in the territory and other governmental and private sources of credit; and

(iii) The bank to provide the FCA a complete and accurate annual report summarizing the YBS program operations and achievements of its affiliated direct lender associations.

(2) Annually, the YBS program of each direct lender association must be reviewed and approved by its funding bank, provided review and approval shall solely be to determine whether the YBS program contains all required components as set forth in paragraph (d) of this section. Any conclusion by the bank that a YBS program is incomplete must be communicated in writing to the direct lender association and to the FCA within 30 days.

(3) Each Farm Credit Bank and Agricultural Credit Bank must implement internal controls for

requirements in paragraphs (b)(1)(iii) and (b)(2) of this section.

(c) Direct lender association YBS plan.

(1) YBS program components outlined in paragraph (d) of this section must be included in each direct lender association's operational and strategic business plan for at least the succeeding 3 years (as set forth in § 618.8440 of this chapter).

(2) The YBS portion of the operational and strategic business plan must:

(i) Analyze the direct lender association's performance in the previous year toward achieving the components in paragraph (d) of this section;

(ii) Discuss variances and reasons for the results; and

(iii) Identify how the qualitative factors and quantitative goals in paragraph (d) of this section assist and expand access to credit and education for YBS farmers and ranchers.

(d) Direct lender association YBS programs. The board of directors of each direct lender association must establish a program to provide sound and constructive credit and services to YBS farmers and ranchers in its territory. Each YBS program must operate in a safe and sound manner and within the direct lender association's risk-bearing capacity, while meeting the unique needs of YBS farmers and ranchers. Such a program must include the following minimum components:

(1) Qualitative factors—

(i) Corporate governance.

(A) A mission statement describing program objectives and specific means for achieving such objectives.

(B) Internal controls that establish clear lines of responsibility for YBS strategic plan development and the corresponding YBS program implementation, tracking YBS program performance, and YBS quarterly reporting to the direct lender association's board of directors.

(ii) Credit and related services.

(A) Efforts to offer credit and related services, either directly or in coordination with others, that are responsive to the needs of the YBS farmers and ranchers in the territory. Examples include customized loan underwriting standards, loan guarantee programs, fee waivers, or other credit enhancements commensurate with the credit risk approved by the board of directors.

(B) Coordination with other System institutions in the territory and other governmental and private sources who offer credit and services to YBS farmers and ranchers.

(iii) Marketing, outreach, and education. Implementation of effective outreach programs to attract and retain YBS farmers and ranchers, which may include the use of advertising campaigns, educational programs, and advisory committees comprised of YBS farmers and ranchers and/or a YBS mentoring program to better serve and understand the needs of this lending segment.

(2) Quantitative goals—

(i) Annual quantitative goals. Annual quantitative goals for credit to YBS farmers and ranchers based on an understanding of reliable demographic data for the lending territory. Direct lender associations must identify the sources of data used to establish the goals. Such goals must include at least one of the following:

(A) Loan volume and loan number goals for YBS farmers and ranchers in the territory;

(B) Percentage goals representative of the demographics for YBS farmers and ranchers in the territory;

(C) Percentage goals for loans made to new borrowers qualifying as YBS farmers and ranchers in the territory; or

(D) Goals for capital committed to loans made YBS farmers and ranchers in the territory.

(ii) Board of directors approval and review. Goals must be approved by the direct lender association's board of directors and reviewed quarterly with adjustments made as needed.

## PART 620—DISCLOSURE TO SHAREHOLDERS

■ 3. The authority citation for part 620 continues to read as follows:

**Authority:** Secs. 4.3, 4.3A, 4.19, 5.9, 5.17, 5.19 of the Farm Credit Act (12 U.S.C. 2154, 2154a, 2207, 2243, 2252, 2254); sec. 424, Pub. L. 100–233, 101 Stat. 1568, 1656 (12 U.S.C. 2252 note); sec. 514, Pub. L. 102–552, 106 Stat. 4102, 4134.

■ 4. Revise § 620.5 (k)(2) to read as follows:

### § 620.5 Contents of the annual report to shareholders.

\* \* \* \* \*

(k) \* \* \*

(2) Each direct lender association must provide a description of its YBS program, including a status report on each program component as set forth in § 614.4165 (d) of this chapter and the definitions of “young,” “beginning,” and “small” farmers and ranchers. The discussion must provide such other information necessary for a comprehensive understanding of the direct lender association's YBS program and its results.

\* \* \* \* \*

Dated: December 14, 2023.

**Ashley Waldron,**

*Secretary, Farm Credit Administration.*

[FR Doc. 2023–27929 Filed 12–26–23; 8:45 am]

**BILLING CODE 6705–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

**[Docket No. FAA–2023–2153; Project Identifier MCAI–2023–00688–T; Amendment 39–22611; AD 2023–23–09]**

**RIN 2120–AA64**

### **Airworthiness Directives; Embraer S.A. (Type Certificate Previously Held by Yaborã Indústria Aeronáutica S.A.; Embraer S.A.) Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for all Embraer S.A. Model ERJ 190–400 airplanes. This AD was prompted by a report of unexpected wear on the wing hinge bearing assembly of the aileron surfaces found during the functional test of the aileron control system backlash. This AD requires repetitive inspections of the press-fitted bushings of the wing ailerons for migration and broken sealant, measurements of the distance between the aileron surfaces and hinge fittings, functional checks of the backlash of the wing aileron control system, and all applicable related investigative and corrective actions, as specified in an Agência Nacional de Aviação Civil (ANAC) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective January 11, 2024.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 11, 2024.

The FAA must receive comments on this AD by February 12, 2024.

**ADDRESSES:** You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to [regulations.gov](https://www.regulations.gov). Follow the instructions for submitting comments.

- *Fax:* 202–493–2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room

W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**AD Docket:** You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2023–2153; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

**Material Incorporated by Reference:**

- For material incorporated by reference in this AD, contact National Civil Aviation Agency (ANAC), Aeronautical Products Certification Branch (GGCP), Rua Dr. Orlando Feirabend Filho, 230—Centro Empresarial Aquarius—Torre B—Andares 14 a 18, Parque Residencial Aquarius, CEP 12.246–190—São José dos Campos—SP, Brazil; phone 55 (12) 3203–6600; email [pac@anac.gov.br](mailto:pac@anac.gov.br); website [anac.gov.br/en/](https://anac.gov.br/en/). You may find this material on the ANAC website at [sistemas.anac.gov.br/certificacao/DA/DAE.asp](https://sistemas.anac.gov.br/certificacao/DA/DAE.asp).

- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2023–2153.

### **FOR FURTHER INFORMATION CONTACT:**

Joshua Bragg, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 817–222–5366; email [joshua.k.bragg@faa.gov](mailto:joshua.k.bragg@faa.gov).

### **SUPPLEMENTARY INFORMATION:**

#### **Comments Invited**

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include “Docket No. FAA–2023–2153; Project Identifier MCAI–2023–00688–T” at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other

information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to [regulations.gov](https://www.regulations.gov), including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this final rule.

### Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as "PROPIN." The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Joshua Bragg, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 817-222-5366; email [joshua.k.bragg@faa.gov](mailto:joshua.k.bragg@faa.gov). Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

### Background

ANAC, which is the aviation authority for Brazil, has issued ANAC AD 2023-05-02, effective May 18, 2023 (ANAC AD 2023-05-02) (also referred to as the MCAI), to correct an unsafe condition for all Embraer S.A. Model ERJ 190-400 airplanes. The MCAI states unexpected wear, which was beyond the certification limits of the airplane, was found on the wing hinge bearing assembly of the aileron surfaces during the functional test of the aileron control system backlash. Excessive backlash may result in a limit cycle oscillation phenomenon exposing the surrounding structure and systems to unacceptable vibration levels and reducing the airplane controllability.

ANAC has informed the FAA of corrections to ANAC AD 2023-05-02 that were issued in ANAC AD 2023-05-02, Errata, dated May 18, 2023. The FAA has included these corrections in paragraphs (h)(3) and (10) of this AD and has also addressed typographical errors in paragraphs (h)(4) and (5) of this AD.

The FAA is issuing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2023-2153.

### Related Service Information Under 1 CFR Part 51

ANAC AD 2023-05-02 specifies procedures for repetitive general visual inspections of the press-fitted bushings of the left-hand (LH) and right-hand (RH) wing ailerons for migration and broken sealant; repetitive detailed inspections to measure the distance between the LH and RH wing aileron surfaces and hinge fittings; repetitive functional checks of the backlash of the LH and RH wing aileron control system; and applicable related investigative and corrective actions. The related investigative actions include a detailed inspection of the torque values of the attachments parts on the LH and RH wing aileron surfaces; a general visual inspection of the press-fitted bushings on the LH and RH aileron surfaces, as applicable, for damage (*i.e.*, elongation, scratches, nicks) and rotation or migration (*i.e.*, gap between the bushing flange and lug, or broken sealant around the bushing); a general visual inspection of the sliding bushings of the LH and RH aileron surfaces, as applicable, for damage (*i.e.*, scratches, steps, and dents) and migration of the press-fitted bushing pair; a detailed inspection to measure the outer diameter of the sliding bushings; a detailed inspection to check the inner diameter of the press-fitted bushings of certain aileron fittings; measurement of the outer diameters of the mating sliding bushing and bolt shank; and an operational check of the aileron control system, or a rigging procedure and deflection check, as applicable. The corrective actions include retorquing the nuts and installing cotterpins on the bolts and nuts of the attachment parts on the LH and RH wing aileron surfaces; and replacing the bearings and press-fitted and sliding bushings.

This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in ADDRESSES section.

### FAA's Determination

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA is issuing this AD after determining that the unsafe condition described previously is likely to exist or develop

on other products of the same type design.

### Requirements of This AD

This AD requires accomplishing the actions specified in ANAC AD 2023-05-02 described previously, except for any differences identified as exceptions in the regulatory text of this AD.

### Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, ANAC AD 2023-05-02 is incorporated by reference in this AD. This AD requires compliance with ANAC AD 2023-05-02 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Service information required by ANAC AD 2023-05-02 for compliance will be available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2023-2153 after this AD is published.

### FAA's Justification and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for "good cause," finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

There are currently no domestic operators of these products. Accordingly, notice and opportunity for prior public comment are unnecessary, pursuant to 5 U.S.C. 553(b)(3)(B). In addition, for the forgoing reason(s), the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days.

### Regulatory Flexibility Act (RFA)

The requirements of the RFA do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because the FAA has determined that it

has good cause to adopt this rule without notice and comment, RFA analysis is not required.

**Costs of Compliance**  
Currently, there are no affected U.S.-registered airplanes. If an affected

airplane is imported and placed on the U.S. Register in the future, the FAA provides the following cost estimates to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

| Labor cost                                       | Parts cost | Cost per product |
|--------------------------------------------------|------------|------------------|
| Up to 8 work-hours × \$85 per hour = \$680 ..... | \$0        | Up to \$680.     |

The FAA estimates the following costs to do any necessary on-condition actions that would be required based on

the results of any required actions. The FAA has no way of determining the

number of aircraft that might need these on-condition actions:

ESTIMATED COSTS OF ON-CONDITION ACTIONS

| Labor cost                                          | Parts cost | Cost per product |
|-----------------------------------------------------|------------|------------------|
| Up to 22 work-hours × \$85 per hour = \$1,870 ..... | \$500      | \$2,370          |

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA’s authority to issue rules on aviation safety. 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.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

This AD will not have federalism implications under Executive Order 13132. This AD will 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.

For the reasons discussed above, I certify that this AD:

(1) Is not a “significant regulatory action” under Executive Order 12866, and

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

**The Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

**PART 39—AIRWORTHINESS DIRECTIVES**

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

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

**2023–23–09 Embraer S.A. (Type Certificate Previously Held by Yaborã Indústria Aeronáutica S.A.; Embraer S.A.):** Amendment 39–22611; Docket No. FAA–2023–2153; Project Identifier MCAI–2023–00688–T.

**(a) Effective Date**

This airworthiness directive (AD) is effective January 11, 2024.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to all Embraer S.A. (Type Certificate previously held by Yaborã Indústria Aeronáutica S.A.; Embraer S.A.) Model ERJ 190–400 airplanes, certificated in any category.

**(d) Subject**

Air Transport Association (ATA) of America Code 27, Flight controls.

(e) Unsafe Condition

This AD was prompted by a report of unexpected wear on the wing hinge bearing assembly of the aileron surfaces found during the functional test of the aileron control system backlash. The FAA is issuing this AD to address wear on the wing hinge bearing assembly of the aileron surfaces that could lead to excessive backlash. The unsafe condition, if not addressed, could result in a limit cycle oscillation phenomenon exposing the surrounding structure and systems to unacceptable vibration levels and reducing the airplane controllability.

**(f) Compliance**

Comply with this AD within the compliance times specified, unless already done.

**(g) Requirements**

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, Agência Nacional de Aviação Civil (ANAC) AD 2023–05–02, effective May 18, 2023 (ANAC AD 2023–05–02).

**(h) Exceptions to ANAC AD 2023–05–02**

(1) Where ANAC AD 2023–05–02 refers to its effective date, this AD requires using the effective date of this AD.

(2) This AD requires replacing Table 01 of ANAC AD 2023–05–02 with Figure 1 to paragraph (h)(2) of this AD; and where paragraph (b)(1) of ANAC AD 2023–05–02 specifies “Within the applicable intervals and limitations established in the ‘Table 01—Compliance intervals and limitations’ of this AD,” this AD requires replacing those words with “Within the applicable compliance time specified in ‘Table 01—Compliance Times for Initial Inspections’ of this AD.”

**Figure 1 to Paragraph (h)(2)**

**Table 01 – Compliance Times for Initial Inspections**

| <b>Airplanes that have accumulated, as of the effective date of this AD, the following flight hours since new (FHSN)</b> | <b>Applicable compliance time, whichever occurs first</b>     |                                       |
|--------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------|---------------------------------------|
| 6,000 FHSN or more                                                                                                       | Within 750 flight hours after the effective date of this AD   | Not applicable                        |
| 5,000 FHSN or more, but less than 6,000 FHSN                                                                             | Within 1,000 flight hours after the effective date of this AD | Before the accumulation of 6,750 FHSN |
| 3,000 FHSN or more, but less than 5,000 FHSN                                                                             | Within 2,000 flight hours after the effective date of this AD | Before the accumulation of 6,000 FHSN |
| Less than 3,000 FHSN                                                                                                     | Within 3,000 flight hours after the effective date of this AD | Before the accumulation of 5,000 FHSN |

(3) Where paragraphs (b)(2) and (b)(2)(i) of ANAC AD 2023–05–02 specify “press-fitting bushings” this AD requires replacing those words with “press-fitted bushings.”

(4) Where paragraphs (b)(2)(i) and (b)(3)(i) of ANAC AD 2023–05–02 specify “before the next flight, accomplish the paragraph (c) of this AD after to accomplish the paragraph (b)(4) of this AD” as corrective actions for certain conditions, this AD requires replacing those words with “before the next flight, accomplish paragraph (c) of this AD after accomplishing paragraph (b)(4) of this AD.”

(5) Where paragraph (b)(3) of ANAC AD 2023–05–02 specifies to “measure de distances,” this AD requires replacing those words with “measure the distances.”

(6) All applicable related investigative and corrective actions specified in paragraphs (b)(4)(iii) and (b)(4)(iii)(a) of ANAC AD 2023–05–02 must be done before the next flight after the functional check of the left-hand (LH) and right-hand (RH) wing aileron control system.

(7) All applicable related investigative actions specified in paragraph (c)(4)(ii) of ANAC AD 2023–05–02 must be done before the next flight after the detailed inspection on the LH and RH removed aileron surface, as applicable.

(8) Where paragraph (d) of ANAC AD 2023–05–02 specifies to repeat the inspections “at each 3,000 FH,” this AD requires replacing those words with “at intervals not to exceed 3,000 FH”; and where paragraph (d) of ANAC AD 2023–05–02 specifies performing subsequent inspections “after 3000 FH,” this AD requires replacing those words with “within 3,000 FH.”

(9) Where paragraph (d) of ANAC AD 2023–05–02 specifies to “Repeat the inspections and the actions required by the

paragraphs (b) and (c) of this AD,” this AD requires replacing those words with “Repeat the inspections required by paragraph (b) of this AD.”

(10) Where paragraph (e) of ANAC AD 2023–05–02 specifies “the paragraphs (b) and (c) of this AD have been complied with” this AD requires replacing those words with “paragraphs (b) and (c) of this AD, as applicable, have been complied with.”

(11) This AD does not adopt paragraph (f) of ANAC AD 2023–05–02.

(12) Although the service information specified in ANAC AD 2023–05–02 specifies returning certain parts the manufacturer, this AD does not include that requirement.

#### **(i) No Reporting Requirement**

Although the service information in ANAC AD 2023–05–02 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

#### **(j) Additional AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs)*: The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the International Validation Branch, mail it to the address identified in paragraph (k) of this AD. Information may be emailed to: 9-AVS-AIR-730-AMOC@faa.gov. Before using any approved AMOC, notify your appropriate principal inspector, or

lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer*: For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or ANAC; or ANAC's authorized Designee. If approved by the ANAC Designee, the approval must include the Designee's authorized signature.

#### **(k) Additional Information**

For more information about this AD, contact Joshua Bragg, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 817–222–5366; email [joshua.k.bragg@faa.gov](mailto:joshua.k.bragg@faa.gov).

#### **(l) Material Incorporated by Reference**

(1) The Director of the Federal Register approved the incorporation by reference of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) Agência Nacional de Aviação Civil (ANAC) AD 2023–05–02, effective May 18, 2023.

(ii) [Reserved]

(3) For ANAC AD 2023–05–02, contact ANAC, Aeronautical Products Certification Branch (GGCP), Rua Dr. Orlando Feirabend Filho, 230—Centro Empresarial Aquarius—Torre B—Andares 14 a 18, Parque Residencial Aquarius, CEP 12.246–190—São José dos Campos—SP, Brazil; phone 55 (12) 3203–6600; email [pac@anac.gov.br](mailto:pac@anac.gov.br); website [anac.gov.br/en/](http://anac.gov.br/en/). You may find this ANAC AD on the ANAC website at

[sistemas.anac.gov.br/certificacao/DAE.asp](https://www.sistemas.anac.gov.br/certificacao/DAE.asp).

(4) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195.

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit [www.archives.gov/federal-register/cfr/ibr-locations](https://www.archives.gov/federal-register/cfr/ibr-locations) or email [fr.inspection@nara.gov](mailto:fr.inspection@nara.gov).

Issued on December 14, 2023.

**Victor Wicklund,**

*Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.*

[FR Doc. 2023-28335 Filed 12-26-23; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2023-1889; Project Identifier MCAI-2023-00738-E; Amendment 39-22623; AD 2023-24-06]

**RIN 2120-AA64**

#### Airworthiness Directives; Rolls-Royce Deutschland Ltd & Co KG Engines

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The FAA is superseding Airworthiness Directive (AD) 2021-25-04 for certain Rolls-Royce Deutschland Ltd & Co KG (RRD) Model Trent 1000 engines. AD 2021-25-04 required operators to revise the airworthiness limitations section (ALS) of their existing approved continuous airworthiness maintenance program by incorporating the revised tasks of the applicable time limits manual (TLM) for each affected model turbofan engine. Since the FAA issued AD 2021-05-04, the manufacturer revised the TLM to introduce new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts, which prompted this AD. This AD requires revising the ALS of the operator's existing approved engine maintenance or inspection program, as applicable, to incorporate new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective January 31, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 31, 2024.

#### ADDRESSES:

**AD Docket:** You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2023-1889; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

#### Material Incorporated by Reference:

- For service information identified in this final rule, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: [ADS@easa.europa.eu](mailto:ADS@easa.europa.eu); website: [easa.europa.eu](https://easa.europa.eu). You may find this material on the EASA website at [ad.easa.europa.eu](https://ad.easa.europa.eu).

- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222-5110. It is also available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2023-1889.

#### FOR FURTHER INFORMATION CONTACT:

Sungmo Cho, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238-7241; email: [sungmo.d.cho@faa.gov](mailto:sungmo.d.cho@faa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2021-25-04, Amendment 39-21847 (86 FR 71129, December 15, 2021) (AD 2021-25-04). AD 2021-25-04 applied to RRD Model Trent 1000-AE3, Trent 1000-CE3, Trent 1000-D3, Trent 1000-G3, Trent 1000-H3, Trent 1000-J3, Trent 1000-K3, Trent 1000-L3, Trent 1000-M3, Trent 1000-N3, Trent 1000-P3, Trent 1000-Q3, and Trent 1000-R3 engines. AD 2021-25-04, which was prompted by EASA AD 2020-0243, dated November 5, 2020 (EASA AD 2020-0243), required revising the ALS of the operator's existing approved engine maintenance or inspection program, as applicable, to incorporate new or more restrictive tasks and limitations and associated

thresholds and intervals for life-limited parts. The FAA issued AD 2021-25-04 to prevent the failure of critical rotating parts, which could result in failure of one or more engines, loss of thrust control, and loss of the airplane.

Since the FAA issued AD 2021-25-04, EASA superseded EASA AD 2020-0243 with EASA AD 2022-0247, dated December 14, 2022 (EASA AD 2022-0247) and then superseded EASA AD 2022-0247 with EASA AD 2023-0115, dated June 7, 2023 (EASA AD 2023-0115).

The NPRM published in the **Federal Register** on September 18, 2023 (88 FR 63885); corrected on September 27, 2023 (88 FR 66316). The NPRM was prompted by EASA AD 2023-0115 (also referred to as the MCAI), issued by EASA, which is the Technical Agent for the Member States of the European Union. The MCAI states that the manufacturer published a revised engine TLM to introduce new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts.

You may examine the MCAI in the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA-2023-1889.

In the NPRM, the FAA proposed to require revising the ALS of the operator's existing approved engine maintenance or inspection program, as applicable, to incorporate new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts.

#### Discussion of Final Airworthiness Directive

##### Comments

The FAA received a comment from The Boeing Company (Boeing). Boeing supported the NPRM without change.

##### Conclusion

These products have been approved by the aviation authority of another country and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA reviewed the relevant data, considered the comment received, and determined that air safety requires adopting the AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, this AD is adopted as proposed in the NPRM.

**Related Service Information Under 1 CFR Part 51**

The FAA reviewed EASA AD 2023–0115, which specifies procedures for operators to revise the ALS of the existing approved engine maintenance or inspection program, as applicable, to incorporate new or more restrictive tasks and limitations and associated thresholds and intervals for life-limited parts.

This service information is reasonably available because the interested parties

have access to it through their normal course of business or by the means identified in **ADDRESSES**.

**Differences Between This AD and the MCAI**

Where paragraph (3) of EASA AD 2023–0115 specifies revising the approved Aircraft Maintenance Programme within 12 months after the effective date of EASA AD 2023–0115, this AD requires revising the ALS of the existing approved engine maintenance

or inspection program, as applicable, within 90 days after the effective date of this AD.

This AD does not require compliance with paragraphs (1), (2), (4), and (5) of EASA AD 2023–0115.

**Costs of Compliance**

The FAA estimates that this AD affects 2 engines installed on airplanes of U.S. registry.

The FAA estimates the following costs to comply with this AD:

**ESTIMATED COSTS**

| Action               | Labor cost                                | Parts cost | Cost per product | Cost on U.S. operators |
|----------------------|-------------------------------------------|------------|------------------|------------------------|
| Revise the ALS ..... | 1 work-hours × \$85 per hour = \$85 ..... | \$0        | \$85             | \$170                  |

**Authority for This Rulemaking**

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. 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.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

The FAA has determined that this AD will not have federalism implications under Executive Order 13132. This AD will 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.

For the reasons discussed above, I certify that this AD:

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

**The Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

**PART 39—AIRWORTHINESS DIRECTIVES**

- 1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

- 2. The FAA amends § 39.13 by:

- a. Removing Airworthiness Directive 2021–25–04, Amendment 39–21847 (86 FR 71129, December 15, 2021); and
- b. Adding the following new airworthiness directive:

**2023–24–06 Rolls-Royce Deutschland Ltd & Co KG:** Amendment 39–22623; Docket No. FAA–2023–1889; Project Identifier MCAI–2023–00738–E.

**(a) Effective Date**

This airworthiness directive (AD) is effective January 31, 2024.

**(b) Affected ADs**

This AD replaces AD 2021–25–04, Amendment 39–21847 (86 FR 71129, December 15, 2021).

**(c) Applicability**

This AD applies to Rolls-Royce Deutschland Ltd & Co KG Model Trent 1000–AE3, Trent 1000–CE3, Trent 1000–D3, Trent 1000–G3, Trent 1000–H3, Trent 1000–J3, Trent 1000–K3, Trent 1000–L3, Trent 1000–M3, Trent 1000–N3, Trent 1000–P3, Trent 1000–Q3, and Trent 1000–R3 engines.

**(d) Subject**

Joint Aircraft System Component (JASC) Code 7200, Engine (Turbine/Turboprop).

**(e) Unsafe Condition**

This AD was prompted by the manufacturer revising the engine time limits manual (TLM) life limits of certain critical rotating parts and direct accumulation counting data files. The FAA is issuing this AD to prevent the failure of critical rotating parts. The unsafe condition, if not addressed, could result in failure of one or more engines, loss of thrust control, and loss of the airplane.

**(f) Compliance**

Comply with this AD within the compliance times specified, unless already done.

**(g) Required Actions**

Except as specified in paragraph (h) of this AD: Perform all required actions within the compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2023–0115, dated June 7, 2023 (EASA AD 2023–0115).

**(h) Exceptions to EASA AD 2023–0115**

(1) Where EASA AD 2023–0115 defines the AMP as the approved Aircraft Maintenance Programme containing the tasks on the basis of which the scheduled maintenance is conducted to ensure the continuing airworthiness of each operated engine, this AD defines the AMP as the aircraft maintenance program containing the tasks on the basis of which the scheduled maintenance is conducted to ensure the continuing airworthiness of each operated airplane.

(2) Where EASA AD 2023–0115 refers to its effective date, this AD requires using the effective date of this AD.

(3) This AD does not require compliance with paragraphs (1), (2), (4), and (5) of EASA AD 2023–0115.

(4) Where paragraph (3) of EASA AD 2023–0115 specifies revising the approved AMP within 12 months after the effective date of EASA AD 2023–0115, this AD requires

revising the airworthiness limitations section of the existing approved engine maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

(5) This AD does not adopt the Remarks paragraph of EASA AD 2023–0115.

#### (i) Provisions for Alternative Actions and Intervals

After performing the actions required by paragraph (g) of this AD, no alternative actions and associated thresholds and intervals, including life limits, are allowed unless they are approved as specified in the provisions of the “Ref. Publications” section of EASA AD 2023–0115.

#### (j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520 Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the AIR–520 Continued Operational Safety Branch, send it to the attention of the person identified in paragraph (k) of this AD and email to: [ANE-AD-AMOC@faa.gov](mailto:ANE-AD-AMOC@faa.gov).

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

#### (k) Additional Information

For more information about this AD, contact Sungmo Cho, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7241; email: [sungmo.d.cho@faa.gov](mailto:sungmo.d.cho@faa.gov).

#### (l) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) European Union Aviation Safety Agency (EASA) AD 2023–0115, dated June 7, 2023.

(ii) [Reserved]

(3) For service information identified in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: [ADs@easa.europa.eu](mailto:ADs@easa.europa.eu); website: [easa.europa.eu](http://easa.europa.eu). You may find this EASA AD on the EASA website at [ad.easa.europa.eu](http://ad.easa.europa.eu).

(4) You may view this service information at FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit [www.archives.gov/federal-register/cfr/ibr-locations](http://www.archives.gov/federal-register/cfr/ibr-locations) or email [fr.inspection@nara.gov](mailto:fr.inspection@nara.gov).

Issued on November 29, 2023.

**Victor Wicklund,**

*Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.*

[FR Doc. 2023–28549 Filed 12–26–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

**[Docket No. FAA–2023–2051; Airspace Docket No. 23–ASO–38]**

**RIN 2120–AA66**

#### Amendment of Class E Airspace; Statesboro, GA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action amends Class E airspace extending upward from 700 feet above the surface for Statesboro-Bulloch County Airport, Statesboro, GA, to support the revised area navigation (RNAV) instrument approach procedure. This action increases the radius of the Class E airspace extending upward from 700 feet above the surface, and updates the airport’s name and geographic coordinates.

**DATES:** Effective 0901 UTC, March 21, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

**ADDRESSES:** A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at [www.regulations.gov](http://www.regulations.gov) using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours a day, 365 days a year.

FAA Order JO 7400.11H Airspace Designations and Reporting Points and subsequent amendments can be viewed online at [www.faa.gov/air\\_traffic/publications/](http://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:** John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; Telephone: (404) 305–6364.

**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 amends Class E airspace in Statesboro, GA.

#### History

The FAA published a notice of proposed rulemaking for Docket No. FAA 2023–2051 in the **Federal Register** on November 2, 2023 (88 FR 75242), proposing to amend Class E airspace extending upward from 700 feet above the surface for Statesboro-Bulloch County Airport, Statesboro, GA. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

#### Incorporation by Reference

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

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

#### The Rule

This action amends 14 CFR part 71 by amending Class E airspace extending upward from 700 feet above the surface for Statesboro-Bulloch County Airport, Statesboro, GA, by increasing the Class E airspace extending upward from 700 feet above the surface to 7.2-miles (previously 6.5-miles), to support a revised RNAV approach procedure. In addition, this action updates the airport name (formerly Statesboro Municipal Airport) and the geographic coordinates to coincide with the FAA’s database. Controlled airspace is necessary for the

area's safety and management of instrument flight rules (IFR) operations.

### Regulatory Notices and Analyses

The FAA has determined that this 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 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 minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

### Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures," paragraph 5–6.5a.

This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances warrant the preparation of an environmental assessment.

### Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

### The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 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 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.*

\* \* \* \* \*

#### ASO GA E5 Statesboro, GA [Amended]

Statesboro-Bulloch County Airport, GA (Lat. 32°28'58" N, long. 81°44'13" W)

That airspace extending upward from 700 feet above the surface within a 7.2-mile radius of the Heart of Statesboro-Bulloch County Airport.

\* \* \* \* \*

Issued in College Park, Georgia, on December 19, 2023.

**Andree C. Davis,**

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

[FR Doc. 2023–28312 Filed 12–26–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA–2023–2052; Airspace Docket No. 23–ASO–39]

RIN 2120–AA66

#### Amendment of Class E Airspace; Thomasville, GA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action amends Class E airspace extending upward from 700 feet above the surface for Thomasville Regional Airport, Thomasville, GA. This action increases the existing radius, adds an extension to the northeast, and updates the airport's name.

**DATES:** Effective 0901 UTC, March 21, 2024. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

**ADDRESSES:** A copy of the Notice of Proposed Rulemaking (NPRM), all comments received, this final rule, and all background material may be viewed online at [www.regulations.gov](http://www.regulations.gov) using the FAA Docket number. Electronic retrieval help and guidelines are available on the website. It is available 24 hours a day, 365 days a year.

FAA Order JO 7400.11H Airspace Designations and Reporting Points and subsequent amendments can be viewed online at [www.faa.gov/air\\_traffic/publications/](http://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:** John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; Telephone: (404) 305–6364.

### 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 amends Class E airspace in Thomasville, GA.

#### History

The FAA published a notice of proposed rulemaking for Docket No. FAA 2023–2052 in the **Federal Register** on October 18, 2023 (88 FR 71786), proposing to amend Class E airspace extending upward from 700 feet above the surface for Thomasville Regional Airport, Thomasville, GA. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

#### Incorporation by Reference

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

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

#### The Rule

This action amends 14 CFR part 71 by amending Class E airspace extending upward from 700 feet above the surface

for Thomasville Regional Airport, Thomasville, GA, by updating the airport name (formerly Thomasville Municipal Airport). Also, the radius is increased to 7 miles (previously 6.5 miles), and an extension to the northeast is added. Controlled airspace is necessary for the area's safety and management of instrument flight rules (IFR) operations.

### Regulatory Notices and Analyses

The FAA has determined that this 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 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 minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

### Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures," paragraph 5–6.5a.

This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances warrant the preparation of an environmental assessment.

### Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

### The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 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 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.*

\* \* \* \* \*

### ASO GA E5 Thomasville, GA [Amended]

Thomasville Regional Airport, GA  
(Lat. 30°54'05" N, long. 83°52'53" W)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Thomasville Regional Airport and within 3.5 miles on each side of the 040° bearing of the airport, extending from the 7-mile radius to 9.7 miles northeast of the airport.

\* \* \* \* \*

Issued in College Park, Georgia, on December 20, 2023.

**Andree C. Davis,**

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

[FR Doc. 2023–28406 Filed 12–26–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 91

[Docket No.: FAA–2017–0768; Amdt. No. 91–348D]

RIN 2120–AL91

### Extension of the Prohibition Against Certain Flights in the Damascus Flight Information Region (FIR) (OSTT)

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** This action extends the prohibition against certain flight operations in the Damascus Flight Information Region (FIR) (OSTT) by all: U.S. air carriers; U.S. commercial operators; persons exercising the privileges of an airman certificate issued by the FAA, except when such persons are operating U.S.-registered aircraft for a foreign air carrier; and operators of U.S.-registered civil aircraft, except when the operator of such aircraft is a foreign air carrier, for an additional five years, from December 30, 2023, until December 30, 2028. The FAA finds this action necessary to address significant safety-of-flight risks to U.S. civil aviation associated with the enduring complex conflict in Syria. The FAA also

republishes the approval process and exemption information for this Special Federal Aviation Regulation (SFAR), consistent with other recently published flight prohibition SFARs.

**DATES:** This final rule is effective on December 27, 2023.

**FOR FURTHER INFORMATION CONTACT:** Bill Petrak, Flight Standards Service, through the Washington Operations Center, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267–3203; email [9-FAA-OverseasFlightProhibitions@faa.gov](mailto:9-FAA-OverseasFlightProhibitions@faa.gov).

### SUPPLEMENTARY INFORMATION:

#### I. Executive Summary

This action extends the expiration date of SFAR No. 114, § 91.1609 of title 14, Code of Federal Regulations (CFR), from December 30, 2023, to December 30, 2028. SFAR No. 114, § 91.1609, prohibits certain flight operations in the Damascus FIR (OSTT) by all: U.S. air carriers; U.S. commercial operators; persons exercising the privileges of an airman certificate issued by the FAA, except when such persons are operating U.S.-registered aircraft for a foreign air carrier; and operators of U.S.-registered civil aircraft, except when the operator of such aircraft is a foreign air carrier. The FAA finds this action necessary to address significant safety-of-flight risks to U.S. civil aviation in the Damascus FIR (OSTT) associated with the enduring complex conflict in Syria. The FAA also republishes the approval process and exemption information for this flight prohibition SFAR, consistent with other recently published flight prohibition SFARs.

#### II. Authority and Good Cause

##### A. Authority

The FAA is responsible for the safety of flight in the U.S. and for the safety of U.S. civil operators, U.S.-registered civil aircraft, and U.S.-certificated airmen throughout the world. Sections 106(f) and (g) of title 49, U.S. Code (U.S.C.), subtitle I, establish the FAA Administrator's authority to issue rules on aviation safety. Subtitle VII of title 49, Aviation Programs, describes in more detail the scope of the Agency's authority. Section 40101(d)(1) provides that the Administrator shall consider in the public interest, among other matters, assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce. Section 40105(b)(1)(A) requires the Administrator to exercise this authority consistently with the obligations of the U.S. Government under international agreements.

The FAA is promulgating this rule under the authority described in 49 U.S.C. 44701, General requirements. Under that section, the FAA is charged broadly with promoting safe flight of civil aircraft in air commerce by prescribing, among other things, regulations and minimum standards for practices, methods, and procedures that the Administrator finds necessary for safety in air commerce and national security.

This regulation is within the scope of the FAA's authority because it continues to prohibit the persons described in paragraph (a) of SFAR No. 114, § 91.1609, from conducting flight operations in the Damascus FIR (OSTT) due to the significant safety-of-flight risks to U.S. civil flight operations in that airspace, as described in the preamble to this final rule.

#### *B. Good Cause for Immediate Adoption*

Section 553(b)(B) of title 5, U.S. Code, authorizes agencies to dispense with notice and comment procedures for rules when the agency for "good cause" finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Also, section 553(d) permits agencies, upon a finding of good cause, to issue rules with an effective date less than 30 days from the date of publication. In this instance, the FAA finds good cause to forgo notice and comment and the delayed effective date because they would be impracticable and contrary to the public interest.

Providing notice and the opportunity for the public to comment here would be impracticable. The FAA's flight prohibitions, and any amendments thereto, need to include appropriate boundaries that reflect the agency's current understanding of the risk environment for U.S. civil aviation. This allows the FAA to protect the safety of U.S. operators' aircraft and the lives of their passengers and crews without over-restricting or under-restricting U.S. operators' routing options. However, the risk environment for U.S. civil aviation in airspace managed by other countries with respect to safety of flight is fluid in circumstances involving fighting, violent extremist and militant activity, or periods of heightened tensions, particularly where weapons capable of targeting or otherwise negatively affecting U.S. civil aviation are or may be present. This fluidity, and the potential for rapid changes in the risks to U.S. civil aviation, significantly limits how far in advance of a new or amended flight prohibition the FAA can usefully assess the risk environment. The delay that would be occasioned by providing

an opportunity to comment on this action would significantly increase the risk that the resulting final action would not accurately reflect the current risks to U.S. civil aviation associated with the situation and thus would not establish boundaries for the flight prohibition commensurate with those risks.

While the FAA sought and responded to public comments, the boundaries of the area in which unacceptable risks to the safety of U.S. civil aviation existed might change due to: evolving military or political circumstances; violent extremist and militant group activity; the introduction, removal, or repositioning of more advanced anti-aircraft weapon systems; or other factors. As a result, if the situation improved while the FAA sought and responded to public comments, the rule the FAA finalized might be over-restrictive, unnecessarily limiting U.S. operators' routing options and potentially causing them to incur unnecessary additional fuel and operations-related costs, as well as potentially causing passengers to incur unnecessarily some costs attributed to their time. Conversely, if the situation deteriorated while the FAA sought and responded to public comments, the rule the FAA finalized might be under-restrictive, allowing U.S. civil aviation to continue operating in areas where unacceptable risks to their safety had developed. Such an outcome would endanger the safety of these aircraft, as well as their passengers and crews, exposing them to unacceptable risks of death, injury, and property damage that could occur if a U.S. operator's aircraft were shot down (or otherwise damaged) while operating in the Damascus FIR (OSTT).

Alternatively, if the FAA made changes to the area in which U.S. civil aviation operations would be prohibited between a notice of proposed rulemaking and a final rule due to changed conditions, the version of the rule the public commented on would no longer reflect the FAA's current assessment of the risk environment for U.S. civil aviation.

In addition, seeking comment would be contrary to the public interest because some of the rational basis for the rulemaking is based upon classified information and controlled unclassified information not authorized for public release. In order to meaningfully provide comment on a proposal, the public would need access to the basis for the agency's decision-making, which the FAA cannot provide. Disclosing classified or controlled unclassified information in order to seek meaningful comment on the proposal would harm

the public interest. Accordingly, the FAA meaningfully seeking comment on the proposal is contrary to the public interest.

Therefore, providing notice and the opportunity for comment would be impracticable as it would hinder the FAA's ability to maintain appropriate flight prohibitions based on up-to-date risk assessments of the risks to the safety of U.S. civil aviation operations in airspace managed by other countries, and contrary to the public interest, as the FAA cannot protect classified and controlled unclassified information and meaningfully seek public comment.

For the same reasons discussed above, the potential safety impacts and the need for prompt action on up-to-date information that is not public would make delaying the effective date impracticable and contrary to the public interest.

Accordingly, the FAA finds good cause exists to forgo notice and comment and any delay in the effective date for this rule.

### **III. Background**

On December 30, 2020, the FAA amended SFAR No. 114, § 91.1609, to extend the expiration date of the flight prohibition for U.S. operators and airmen in the Damascus FIR (OSTT) from December 30, 2020, to December 30, 2023.<sup>1</sup> In issuing the 2020 final rule, the FAA determined the situation in the Damascus FIR (OSTT) remained hazardous for U.S. civil aviation due to a variety of aviation safety risks associated with the ongoing conflict in Syria.<sup>2</sup>

In 2020, the FAA determined the presence of third parties conducting independent military operations in Syria against pro-Assad regime forces, opposition groups, and violent extremist elements presented an unacceptable level of risk to U.S. civil aviation operations. Third-party airstrikes in Syria often resulted in Syrian military air defense responses. Syrian authorities did not adequately de-conflict these air defense activities, which included indiscriminate surface-to-air missile (SAM) fire, with civil aviation operations in the Damascus FIR (OSTT), including, but not limited to, civil flight operations in close proximity to international airports in Syria. In late February 2020, Syrian air defense activities forced a commercial Cham Wings Airbus 320 passenger flight on final approach to Damascus

<sup>1</sup> Extension of the Prohibition Against Certain Flights in the Damascus Flight Information Region (FIR) (OSTT) final rule, 85 FR 75840, (Nov. 27, 2020).

<sup>2</sup> Id. at 75841.

International Airport (ICAO code: OSDI) to divert to an alternate airfield in Syria.

The lack of de-confliction of Syrian air defense activity with civil air traffic was just one of the risks to U.S. civil aviation operations in the Damascus FIR (OSTT) emanating from third-party involvement in Syria. Russia, Iran, and the Lebanese terrorist organization, Hizballah, all of which are Syrian regime allies, continued to conduct military operations in Syria and had deployed significant air defense and electronic warfare capabilities, including Global Positioning System (GPS) jammers, which presented a risk to U.S. civil aviation operations in the Damascus FIR (OSTT). In March 2020, Russian, Turkish, and Syrian forces clashed in Idlib Province. During these clashes, fighter aircraft and possible SAMs shot down several manned and unmanned aircraft.

In addition to the hazards associated with third-party involvement in the Syrian conflict, violent extremist threats to civil aviation safety existed in Syria. Terrorist groups, including the Islamic State of Iraq and ash-Sham (ISIS) and al-Qaida-aligned entities, possessed or had access to a wide array of anti-aircraft weapons that posed a risk to civil aviation operations in the Damascus FIR (OSTT). Anti-regime forces, violent extremists, and militants had successfully shot down multiple military aircraft using man-portable air defense systems (MANPADS) during the Syrian conflict. Additionally, various elements had successfully targeted military aircraft using advanced anti-tank guided missiles (ATGMs). ATGMs primarily pose a risk to civil aircraft operating near, or parked at, an airport. Finally, various groups had employed unmanned aircraft systems (UAS) to surveil and attack Syrian and Syrian-allied fielded forces and airfields.

#### IV. Discussion of the Final Rule

The FAA has determined the enduring complex conflict in Syria continues to present an unacceptable level of risk for U.S. civil aviation safety in the entirety of the Damascus FIR (OSTT) at all altitudes. Various third parties, including but not limited to Russia, Iran, Turkey, and Israel, continue to conduct uncoordinated military operations in Syria, resulting in various risks to U.S. civil aviation operations in the Damascus FIR (OSTT). Such military operations include tactical crewed aircraft and UAS intelligence collection and strike operations, electronic warfare operations, indirect fire attacks, missiles, and potential anti-aircraft weapons use that may not be de-

conflicted adequately with civil aviation operations in the Damascus FIR (OSTT).

Recent third-party military operations have resulted in damage and operational disruptions at Damascus International Airport (ICAO code: OSDI) and Aleppo International Airport (ICAO code: OSAP). In mid October 2023, third party attacks resulted in cratering of the runways at both Damascus International Airport (OSDI) and at Aleppo International Airport (OSAP) resulting in operational disruptions and at least one civil aircraft changing its routing out of Syrian airspace. Previous attacks on Syrian airports had occurred in early January 2023, third-party attacks in Damascus caused damage and operational disruptions at Damascus International Airport (OSDI). Third-party airstrikes also had targeted Damascus International Airport (OSDI) in June and September 2022. In March 2023 and in early May 2023, third-party airstrikes on Aleppo International Airport (OSAP) occurred. The early May 2023 airstrikes against military targets at the airport resulted in a temporary shutdown of airport operations. Past Syrian air defense responses to third-party missile attacks and airstrikes in Syria have included indiscriminate surface-to-air missile (SAM) fire not adequately de-conflicted with civil aviation operations in the Damascus FIR (OSTT). Additionally, Russia, Iran, and the Lebanese terrorist organization Hizballah, have deployed significant air defense and electronic warfare capabilities in Syria, including GPS jammers, which also may not be de-conflicted adequately with civil aviation operations, further contributing to the inadvertent risks to the safety of U.S. civil aviation operations in the Damascus FIR (OSTT). The FAA remains concerned about the potential for inadvertent damage to or destruction of civil aircraft operating in the Damascus FIR (OSTT) and while on the ground at or near targeted locations in Syria.

In addition to the continued hazards associated with third-party involvement in the Syrian conflict, violent extremist threats to civil aviation safety continue to exist in the Damascus FIR (OSTT). Anti-regime forces, violent extremists, and militants have successfully shot down multiple crewed military aircraft using man-portable air defense systems (MANPADS) during the Syrian conflict, as well as multiple UAS. In addition, in early 2023, Iranian-aligned militia groups (IAMGs) increased their targeting of U.S. forces in Syria with rockets and weaponized UAS, as demonstrated by a January 2023 UAS attack on U.S. interests at Al-Tanf and a March 2023

UAS attack on U.S. forces located in northeastern Syria. UAS attack operations present increased safety-of-flight risks to civil aircraft operating at low altitudes in the Damascus FIR (OSTT) and at targeted locations in Syria.

Open-source reporting also indicates that Iran has discussed deploying advanced air defense capabilities to Syria, and potentially proliferating these capabilities to IAMGs, to counter third-party airstrikes in Syria. If confirmed, the proliferation of advanced air defense capabilities to IAMGs would likely increase risk concerns for U.S. civil aviation in the Damascus FIR (OSTT) due to the potential for uncoordinated SAM launches by operators who would likely lack adequate training and a complete airspace picture.

As a result of the significant, continuing, unacceptable risks to the safety of U.S. civil aviation operations in the Damascus FIR (OSTT), the FAA extends the expiration date of SFAR No. 114, § 91.1609, from December 30, 2023, until December 30, 2028.

Further amendments to SFAR No. 114, § 91.1609, might be appropriate if the risk to U.S. civil aviation safety and security changes. In this regard, the FAA will continue to monitor the situation and evaluate the extent to which persons described in paragraph (a) of this rule might be able to operate safely in the Damascus FIR (OSTT).

The FAA also republishes the details concerning the approval and exemption processes in Sections V and VI of this preamble, consistent with other recently published flight prohibition SFARs, to enable interested persons to refer to this final rule for comprehensive information about requesting relief from the FAA from the provisions of SFAR No. 114, § 91.1609.

#### V. Approval Process Based on a Request From a Department, Agency, or Instrumentality of the United States Government

##### A. Approval Process Based on an Authorization Request From a Department, Agency, or Instrumentality of the United States Government

In some instances, U.S. government departments, agencies, or instrumentalities may need to engage U.S. civil aviation to support their activities in the Damascus FIR (OSTT). If a department, agency, or instrumentality of the U.S. Government determines that it has a critical need to engage any person described in SFAR No. 114, § 91.1609, including a U.S. air carrier or commercial operator, to transport civilian or military passengers

or cargo or conduct other operations in the Damascus FIR (OSTT), that department, agency, or instrumentality may request the FAA to approve persons described in paragraph (a) of SFAR No. 114, § 91.1609, to conduct such operations.

The requesting department, agency, or instrumentality of the U.S. Government must submit the request for approval to the FAA's Associate Administrator for Aviation Safety in a letter signed by an appropriate senior official of the requesting department, agency, or instrumentality.<sup>3</sup> The FAA will not accept or consider requests for approval from anyone other than the requesting department, agency, or instrumentality. In addition, the senior official signing the letter requesting FAA approval on behalf of the requesting department, agency, or instrumentality must be sufficiently positioned within the organization to demonstrate that the senior leadership of the requesting department, agency, or instrumentality supports the request for approval and is committed to taking all necessary steps to minimize aviation safety and security risks to the proposed flights. The senior official must also be in a position to: (1) attest to the accuracy of all representations made to the FAA in the request for approval, and (2) ensure that any support from the requesting U.S. Government department, agency, or instrumentality described in the request for approval is in fact brought to bear and is maintained over time. Unless justified by exigent circumstances, requests for approval must be submitted to the FAA no less than 30 calendar days before the date on which the requesting department, agency, or instrumentality wishes the proposed operation(s) to commence.

The requestor must send the request to the Associate Administrator for Aviation Safety, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591. Electronic submissions are acceptable, and the requesting entity may request that the FAA notify it electronically as to whether the FAA grants the approval request. If a requestor wishes to make an electronic submission to the FAA, the requestor should contact the Washington Operations Center by

telephone at (202) 267-3203 or by email at [9-FAA-OverseasFlightProhibitions@faa.gov](mailto:9-FAA-OverseasFlightProhibitions@faa.gov) for submission instructions. The requestor must not submit its letter requesting FAA approval or related supporting documentation to the Washington Operations Center. Rather, the Washington Operation Center will refer the requestor to an appropriate staff member of the Air Transportation Division, Flight Standards Service, for further assistance.

A single letter may request approval from the FAA for multiple persons described in SFAR No. 114, § 91.1609, or for multiple flight operations. To the extent known, the letter must identify the person(s) the requester expects the SFAR to cover on whose behalf the U.S. Government department, agency, or instrumentality seeks FAA approval, and it must describe—

The proposed operation(s), including the nature of the mission being supported;

The service that the person(s) covered by the SFAR will provide;

To the extent known, the specific locations in the Damascus FIR (OSTT) where the proposed operation(s) will occur, including, but not limited to, the flight path and altitude of the aircraft while it is operating in the Damascus FIR (OSTT) and the airports, airfields, or landing zones at which the aircraft will take off and land; and

The method by which the department, agency, or instrumentality will provide, or how the operator will otherwise obtain, current threat information and an explanation of how the operator will integrate this information into all phases of the proposed operations (*i.e.*, the pre-mission planning and briefing, in-flight, and post-flight phases).

The request for approval must also include a list of operators with whom the U.S. Government department, agency, or instrumentality requesting FAA approval has a current contract(s), grant(s), or cooperative agreement(s) (or its prime contractor has a subcontract(s)) for specific flight operations in the Damascus FIR (OSTT). The requestor may identify additional operators to the FAA at any time after the FAA issues its approval. Neither the operators listed in the original request, nor any operators the requestor subsequently seeks to add to the approval, may commence operations under the approval until the FAA issues them an Operations Specification (OpSpec) or Letter of Authorization (LOA), as appropriate, for operations in the Damascus FIR (OSTT). The approval conditions discussed below apply to all operators, whether included in the original list or subsequently added to

the approval. Requestors should contact the Washington Operations Center by telephone at (202) 267-3203 or by email at [9-FAA-OverseasFlightProhibitions@faa.gov](mailto:9-FAA-OverseasFlightProhibitions@faa.gov) for instructions on how to submit the names of additional operators it wishes to add to an existing approval to the FAA. The requestor must not submit the names of additional operators it wishes to add to an existing approval to the Washington Operations Center. Rather, the Washington Operation Center will refer the requestor to an appropriate staff member of the Air Transportation Division, Flight Standards Service, for further assistance.

If an approval request includes classified information or controlled unclassified information not authorized for public release, requestors may contact the Washington Operations Center for instructions on submitting it to the FAA. The Washington Operations Center's contact information appears in the **FOR FURTHER INFORMATION CONTACT** section of this final rule.

FAA approval of an operation under SFAR No. 114, § 91.1609, does not relieve persons subject to this SFAR of the responsibility to comply with all other applicable FAA rules and regulations. Operators of civil aircraft must comply with the conditions of their certificates, OpSpecs, and LOAs, as applicable. Operators must also comply with all rules and regulations of other U.S. Government departments or agencies that may apply to the proposed operation(s), including, but not limited to, regulations issued by the Transportation Security Administration.

#### B. Approval Conditions

If the FAA approves the request, the FAA's Aviation Safety organization will send an approval letter to the requesting department, agency, or instrumentality informing it that the FAA's approval is subject to all of the following conditions:

(1) The approval will stipulate those procedures and conditions that limit, to the greatest degree possible, the risk to the operator, while still allowing the operator to achieve its operational objectives.

(2) Before any approval takes effect, the operator must submit to the FAA:

(a) A written release of the U.S. Government from all damages, claims, and liabilities, including without limitation legal fees and expenses, relating to any event arising out of or related to the approved operations in the Damascus FIR (OSTT); and

(b) The operator's written agreement to indemnify the U.S. Government with respect to any and all third-party

<sup>3</sup> This approval procedure applies to U.S. Government departments, agencies, or instrumentalities; it does not apply to the public. The FAA describes this procedure in the interest of providing transparency with respect to the FAA's process for interacting with U.S. Government departments, agencies, or instrumentalities that seek to engage U.S. civil aviation to operate within the area in which this SFAR would prohibit their operations in the absence of specific FAA authorization.

damages, claims, and liabilities, including without limitation legal fees and expenses, relating to any event arising from or related to the approved operations in the Damascus FIR (OSTT).

(3) Other conditions the FAA may specify, including those the FAA might impose in OpSpecs or LOAs, as applicable.

The release and agreement to indemnify do not preclude an operator from raising a claim under an applicable non-premium war risk insurance policy the FAA issues under chapter 443 of title 49, U.S. Code.

If the FAA approves the proposed operation(s), the FAA will issue an OpSpec or LOA, as applicable, to the operator(s) identified in the original request, and any operators the requestor subsequently adds to the approval, authorizing them to conduct the approved operation(s). In addition, as stated in paragraph (3) of this section V.B., the FAA notes that it may include additional conditions beyond those contained in the approval letter in any OpSpec or LOA associated with a particular operator operating under this approval, as necessary in the interests of aviation safety. U.S. Government departments, agencies, and instrumentalities requesting FAA approval on behalf of entities with which they have a contract or subcontract, grant, or cooperative agreement should request a copy of the relevant OpSpec or LOA directly from the entity with which they have any of the foregoing types of arrangements, if desired.

## VI. Information Regarding Petitions for Exemption

Any operations not conducted under an approval the FAA issues through the approval process set forth previously may only occur in accordance with an exemption from SFAR No. 114, § 91.1609. A petition for exemption must comply with 14 CFR part 11. The FAA will consider whether exceptional circumstances exist beyond those the approval process described in the previous section contemplates. To determine whether a petition for exemption from the prohibition this SFAR establishes fulfills the standard of 14 CFR 11.81, the FAA consistently finds necessary the following information:

The proposed operation(s), including the nature of the operation(s);

The service the person(s) covered by the SFAR will provide;

The specific locations in the Damascus FIR (OSTT) where the proposed operation(s) will occur, including, but not limited to, the flight

path and altitude of the aircraft while it is operating in the Damascus FIR (OSTT) and the airports, airfields, or landing zones at which the aircraft will take off and land;

The method by which the operator will obtain current threat information and an explanation of how the operator will integrate this information into all phases of its proposed operations (*i.e.*, the pre-mission planning and briefing, in-flight, and post-flight phases); and

The plans and procedures the operator will use to minimize the risks, identified in this preamble, to the proposed operations, to establish that granting the exemption would not adversely affect safety or would provide a level of safety at least equal to that provided by this SFAR. The FAA has found comprehensive, organized plans and procedures of this nature to be helpful in facilitating the agency's safety evaluation of petitions for exemption from flight prohibition SFARs.

The FAA includes, as a condition of each such exemption it issues, a release and agreement to indemnify, as described previously.

The FAA recognizes that, with the support of the U.S. Government, the governments of other countries could plan operations that may be affected by SFAR No. 114, § 91.1609. While the FAA will not permit these operations through the approval process, the FAA will consider exemption requests for such operations on an expedited basis and in accordance with the order of preference set forth in paragraph (c) of SFAR No. 114, § 91.1609.

If a petition for exemption includes information that is sensitive for security reasons or proprietary information, requestors may contact the Washington Operations Center for instructions on submitting it to the FAA. The Washington Operations Center's contact information appears in the **FOR FURTHER INFORMATION CONTACT** section of this final rule. Requestors must not submit their petitions for exemption or related supporting documentation to the Washington Operations Center. Rather, the Washington Operation Center will refer the requestor to the appropriate staff member of the Air Transportation Division, Flight Standards Service, or the Office of Rulemaking for further assistance.

## VII. Severability

Congress authorized the FAA by statute to promote safe flight of civil aircraft in air commerce by prescribing, among other things, regulations and minimum standards for practices, methods, and procedures the Administrator finds necessary for safety

in air commerce and national security. 49 U.S.C. 44701. Consistent with that mandate, the FAA is prohibiting certain persons from conducting flight operations in the Damascus FIR (OSTT) due to the continuing hazards to the safety of U.S. civil flight operations. The purpose of this rule is to operate holistically in addressing a range of hazards and needs in the Damascus FIR (OSTT). However, the FAA recognizes that certain provisions focus on unique factors. Therefore, the FAA finds that the various provisions of this final rule are severable and able to operate functionally if severed from each other. In the event a court were to invalidate one or more of this final rule's unique provisions, the remaining provisions should stand, thus allowing the FAA to continue to fulfill its Congressionally authorized role of promoting safe flight of civil aircraft in air commerce.

## VIII. Regulatory Notices and Analyses

Federal agencies consider impacts of regulatory actions under a variety of executive orders and other requirements. First, Executive Order 12866 and Executive Order 13563, as amended by Executive Order 14094 ("Modernizing Regulatory Review"), direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify the costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act of 1979 (Pub. L. 96-39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or Tribal Governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted annually for inflation) in any one year. The current threshold after adjustment for inflation is \$177 million using the most current (2022) Implicit Price Deflator for the Gross Domestic Product. This portion of the preamble summarizes the FAA's analysis of the economic impacts of this final rule.

In conducting these analyses, the FAA has determined this final rule has benefits that justify its costs. This rule is a significant regulatory action, as defined in section 3(f) of Executive Order 12866 as amended by Executive

Order 14094. As 5 U.S.C. 553 does not require notice and comment for this final rule, 5 U.S.C. 603 and 604 do not require regulatory flexibility analyses regarding impacts on small entities. This rule will not create unnecessary obstacles to the foreign commerce of the United States. This rule will not impose an unfunded mandate on State, local, or Tribal governments, or on the private sector, by exceeding the threshold identified previously.

#### *A. Regulatory Evaluation*

This action extends the expiration date of the SFAR prohibiting certain flight operations in the Damascus FIR (OSTT) for an additional five years due to the significant, continuing risks to U.S. civil aviation detailed in the preamble of this final rule. The FAA acknowledges this flight prohibition might result in additional costs to some U.S. operators, such as increased fuel costs and other operational-related costs. However, the FAA expects the benefits of this action to exceed the costs because it will result in the avoidance of risks of fatalities, injuries, and property damage that could occur if a U.S. operator's aircraft were shot down (or otherwise damaged) while operating in the Damascus FIR (OSTT).

#### *B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA), in 5 U.S.C. 603, requires an agency to prepare an initial regulatory flexibility analysis describing impacts on small entities whenever 5 U.S.C. 553 or any other law requires an agency to publish a general notice of proposed rulemaking for any proposed rule. Similarly, 5 U.S.C. 604 requires an agency to prepare a final regulatory flexibility analysis when an agency issues a final rule under 5 U.S.C. 553, after that section or any other law requires publication of a general notice of proposed rulemaking. The FAA concludes good cause exists to forgo notice and comment and to not delay the effective date for this rule. As 5 U.S.C. 553 does not require notice and comment in this situation, 5 U.S.C. 603 and 604 similarly do not require regulatory flexibility analyses.

#### *C. International Trade Impact Assessment*

The Trade Agreements Act of 1979 (Pub. L. 96–39) prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to this Act, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long

as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

The FAA has assessed the potential effect of this final rule and determined that its purpose is to protect the safety of U.S. civil aviation from risks to their operations in the Damascus FIR (OSTT), a location outside the U.S. Therefore, the rule complies with the Trade Agreements Act of 1979.

#### *D. Unfunded Mandates Assessment*

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (in 1995 dollars) in any one year by State, local, and Tribal Governments, in the aggregate, or by the private sector; such a mandate is deemed to be a “significant regulatory action.” The FAA currently uses an inflation-adjusted value of \$177 million in lieu of \$100 million.

This final rule does not contain such a mandate. Therefore, the requirements of Title II of the Act do not apply.

#### *E. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires the FAA to consider the impact of paperwork and other information collection burdens it imposes on the public. The FAA has determined no new requirement for information collection is associated with this final rule.

#### *F. International Compatibility and Cooperation*

In keeping with U.S. obligations under the Convention on International Civil Aviation, the FAA's policy is to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined no ICAO Standards and Recommended Practices correspond to this regulation. The FAA finds this action is fully consistent with the obligations under 49 U.S.C. 40105(b)(1)(A) to ensure the FAA exercises its duties consistently with the obligations of the United States under international agreements.

While the FAA's flight prohibition does not apply to foreign air carriers, DOT codeshare authorizations prohibit foreign air carriers from carrying a U.S.

codeshare partner's code on a flight segment that operates in airspace for which the FAA has issued a flight prohibition for U.S. civil aviation. In addition, foreign air carriers and other foreign operators may choose to avoid, or be advised or directed by their civil aviation authorities to avoid, airspace for which the FAA has issued a flight prohibition for U.S. civil aviation.

#### *G. Environmental Analysis*

The FAA has analyzed this action under Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, and DOT Order 5610.1C, Paragraph 16. Executive Order 12114 requires the FAA to be informed of environmental considerations and take those considerations into account when making decisions on major Federal actions that could have environmental impacts anywhere beyond the borders of the United States. The FAA has determined this action is exempt pursuant to Section 2–5(a)(i) of Executive Order 12114 because it does not have the potential for a significant effect on the environment outside the United States.

In accordance with FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, paragraph 8–6(c), FAA has prepared a memorandum for the record stating the reason(s) for this determination and has placed it in the docket for this rulemaking.

### **IX. Executive Order Determinations**

#### *A. Executive Order 13132, Federalism*

The FAA has analyzed this rule under the principles and criteria of Executive Order 13132, Federalism. The Agency has determined this action would not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, this rule will not have federalism implications.

#### *B. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use*

The FAA analyzed this rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. The Agency has determined it is not a “significant energy action” under the Executive order and will not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

*C. Executive Order 13609, Promoting International Regulatory Cooperation*

Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609 and has determined that this action will have no effect on international regulatory cooperation.

**X. Additional Information**

*A. Electronic Access*

Except for classified and controlled unclassified material not authorized for public release, all documents the FAA considered in developing this rule, including economic analyses and technical reports, may be accessed from the internet through the docket for this rulemaking.

Those documents may be viewed online at <https://www.regulations.gov> using the docket number listed above. A copy of this rule will be placed in the docket. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at <https://www.federalregister.gov> and the Government Publishing Office's website at <https://www.govinfo.gov>. A copy may also be found at the FAA's Regulations and Policies website at [https://www.faa.gov/regulations\\_policies](https://www.faa.gov/regulations_policies).

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267-9677.

*B. Small Business Regulatory Enforcement Fairness Act*

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (Pub. L. 104-121) (set forth as a note to 5 U.S.C. 601) requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document may contact its local FAA official or the persons listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the internet,

visit [http://www.faa.gov/regulations\\_policies/rulemaking/sbre\\_act/](http://www.faa.gov/regulations_policies/rulemaking/sbre_act/).

**List of Subjects in 14 CFR Part 91**

Air traffic control, Aircraft, Airmen, Airports, Aviation safety, Freight, Syria.

**The Amendment**

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations, as follows:

**PART 91—GENERAL OPERATING AND FLIGHT RULES**

■ 1. The authority citation for part 91 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g), 40101, 40103, 40105, 40113, 40120, 44101, 44111, 44701, 44704, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506-46507, 47122, 47508, 47528-47531, 47534, Pub. L. 114-190, 130 Stat. 615 (49 U.S.C. 44703 note); articles 12 and 29 of the Convention on International Civil Aviation (61 Stat. 1180), (126 Stat. 11).

■ 2. Amend § 91.1609 by revising paragraph (e) to read as follows:

**§ 91.1609 Special Federal Aviation Regulation No. 114—Prohibition Against Certain Flights in the Damascus Flight Information Region (FIR) (OSTT).**

\* \* \* \* \*

(e) Expiration. This SFAR will remain in effect until December 30, 2028. The FAA may amend, rescind, or extend this SFAR, as necessary.

Issued in Washington, DC, under the authority of 49 U.S.C. 106(f) and (g), 40101(d)(1), 40105(b)(1)(A), and 44701(a)(5).

**Michael Gordon Whitaker,**  
*Administrator.*

[FR Doc. 2023-28502 Filed 12-26-23; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF COMMERCE**

**Office of the Secretary**

**15 CFR Part 6**

**[Docket No. 231129-0280]**

**RIN 0605-AA66**

**Civil Monetary Penalty Adjustments for Inflation**

**AGENCY:** Office of the Chief Financial Officer and Assistant Secretary for Administration, Department of Commerce.

**ACTION:** Final rule.

**SUMMARY:** This final rule is being issued to adjust for inflation each civil monetary penalty (CMP) provided by law within the jurisdiction of the United

States Department of Commerce (Department of Commerce). The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, required the head of each agency to adjust for inflation its CMP levels in effect as of November 2, 2015, under a revised methodology that was effective for 2016 which provided for initial catch up adjustments for inflation in 2016, and requires adjustments for inflation to CMPs under a revised methodology for each year thereafter. The Department of Commerce's 2024 adjustments for inflation to CMPs apply only to CMPs with a dollar amount, and will not apply to CMPs written as functions of violations. The Department of Commerce's 2024 adjustments for inflation to CMPs apply only to those CMPs, including those whose associated violation predated such adjustment, which are assessed by the Department of Commerce after the effective date of the new CMP level.

**DATES:** This rule is effective January 15, 2024.

**FOR FURTHER INFORMATION CONTACT:**

Stephen M. Kunze, Deputy Chief Financial Officer and Director for Financial Management, Office of Financial Management, at (202) 482-1207, Department of Commerce, 1401 Constitution Avenue NW, Room D200, Washington, DC 20230. The Department of Commerce's Civil Monetary Penalty Adjustments for Inflation are available for downloading from the Department of Commerce, Office of Financial Management's website at the following address: [http://www.osec.doc.gov/ofm/OFM\\_Publications.html](http://www.osec.doc.gov/ofm/OFM_Publications.html).

**SUPPLEMENTARY INFORMATION:**

**Background**

The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101-410; 28 U.S.C. 2461), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104-134), provided for agencies' adjustments for inflation to CMPs to ensure that CMPs continue to maintain their deterrent value and that CMPs due to the Federal Government were properly accounted for and collected.

A CMP is defined as any penalty, fine, or other sanction that:

1. Is for a specific monetary amount as provided by Federal law, or has a maximum amount provided for by Federal law; and,

2. Is assessed or enforced by an agency pursuant to Federal law; and,

3. Is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701 of Pub. L. 114–74) further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 to improve the effectiveness of CMPs and to maintain their deterrent effect. This amendment (1) required agencies to adjust the CMP levels in effect as of November 2, 2015, with initial catch up adjustments for inflation through a final rulemaking to take effect no later than August 1, 2016; and (2) requires agencies to make subsequent annual adjustments for inflation to CMPs that shall take effect not later than January 15. The Department of Commerce's 2023 adjustments for inflation to CMPs were published in the **Federal Register** on January 3, 2023, and the new CMP levels became effective January 15, 2023.

The Department of Commerce's 2024 adjustments for inflation to CMPs apply only to CMPs with a dollar amount, and will not apply to CMPs written as functions of violations. These 2024 adjustments for inflation apply only to those CMPs, including those whose associated violation predated such adjustment, which are assessed by the Department of Commerce after the effective date of the new CMP level.

This regulation adjusts for inflation CMPs that are provided by law within the jurisdiction of the Department of Commerce. The actual CMP assessed for a particular violation is dependent upon a variety of factors. For example, the National Oceanic and Atmospheric Administration's (NOAA) Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions (Penalty Policy), a compilation of NOAA internal guidelines that are used when assessing CMPs for violations for most of the statutes NOAA enforces, will be interpreted in a manner consistent with this regulation to maintain the deterrent effect of the CMPs. The CMP ranges in the Penalty Policy are intended to aid enforcement attorneys in determining the appropriate CMP to assess for a particular violation. NOAA's Penalty Policy is maintained and made available to the public on NOAA's Office of the General Counsel, Enforcement Section website at: <https://www.noaa.gov/general-counsel/gc-enforcement-section>.

The Department of Commerce's 2024 adjustments for inflation to CMPs set forth in this regulation were determined pursuant to the methodology prescribed by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of

2015, which requires the maximum CMP, or the minimum and maximum CMP, as applicable, to be increased by the cost-of-living adjustment. The term "cost-of-living adjustment" is defined by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. For the 2024 adjustments for inflation to CMPs, the cost-of-living adjustment is the percentage for each CMP by which the Consumer Price Index for the month of October 2023 exceeds the Consumer Price Index for the month of October 2022.

#### Classification

Pursuant to 5 U.S.C. 553(b)(3)(B), there is good cause to issue this rule without prior public notice or opportunity for public comment because it would be unnecessary. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701(b)) requires agencies to make annual adjustments for inflation to CMPs notwithstanding section 553 of title 5, United States Code. Additionally, the methodology used for adjusting CMPs for inflation is given by statute, with no discretion provided to agencies regarding the substance of the adjustments for inflation to CMPs. The Department of Commerce is charged only with performing ministerial computations to determine the dollar amounts of adjustments for inflation to CMPs. Accordingly, prior public notice and an opportunity for public comment are not required for this rule. For the same reasons, there is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date.

#### Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. Chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this rule because there are no new or revised recordkeeping or reporting requirements.

#### Regulatory Analysis

##### *E.O. 12866, Regulatory Review*

This rule is not a significant regulatory action as that term is defined in Executive Order 12866.

##### *Regulatory Flexibility Act*

Because notice of proposed rulemaking and opportunity for comment are not required pursuant to 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

#### List of Subjects in 15 CFR Part 6

Civil monetary penalties, Law enforcement.

Dated: December 20, 2023.

**Stephen M. Kunze,**

*Deputy Chief Financial Officer and Director for Financial Management, Department of Commerce.*

■ For the reasons stated in the preamble, the Department of Commerce revises 15 CFR part 6 to read as follows:

#### PART 6—CIVIL MONETARY PENALTY ADJUSTMENTS FOR INFLATION

Sec.

- 6.1 Definitions.
- 6.2 Purpose and scope.
- 6.3 Adjustments for inflation to civil monetary penalties.
- 6.4 Effective date of adjustments for inflation to civil monetary penalties.
- 6.5 Subsequent annual adjustments for inflation to civil monetary penalties.

**Authority:** Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 104–134, 110 Stat. 1321 (31 U.S.C. 3701 note); Sec. 701 of Pub. L. 114–74, 129 Stat. 599 (28 U.S.C. 1 note; 28 U.S.C. 2461 note).

##### **§ 6.1 Definitions.**

(a) The *Department of Commerce* means the United States Department of Commerce.

(b) *Civil Monetary Penalty* means any penalty, fine, or other sanction that:

- (1) Is for a specific monetary amount as provided by Federal law, or has a maximum amount provided for by Federal law; and
- (2) Is assessed or enforced by an agency pursuant to Federal law; and
- (3) Is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

##### **§ 6.2 Purpose and scope.**

The purpose of this part is to make adjustments for inflation to civil monetary penalties, as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410; 28 U.S.C. 2461), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701 of Pub. L. 114–74), of each civil monetary penalty provided by law within the jurisdiction of the United States Department of Commerce (Department of Commerce).

##### **§ 6.3 Adjustments for inflation to civil monetary penalties.**

The civil monetary penalties provided by law within the jurisdiction of the Department of Commerce, as set forth in paragraphs (a) through (f) of this section, are hereby adjusted for inflation in

accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, from the amounts of such civil monetary penalties that were in effect as of January 15, 2023, to the amounts of such civil monetary penalties, as thus adjusted. The year stated in parenthesis represents the year that the civil monetary penalty was last set by law or adjusted by law (excluding adjustments for inflation).

(a) *United States Department of Commerce.* (1) 31 U.S.C. 3802(a)(1), Program Fraud Civil Remedies Act of 1986 (1986), violation, maximum from \$13,508 to \$13,946.

(2) 31 U.S.C. 3802(a)(2), Program Fraud Civil Remedies Act of 1986 (1986), violation, maximum from \$13,508 to \$13,946.

(3) 31 U.S.C. 3729(a)(1)(G), False Claims Act (1986); violation, minimum from \$13,508 to \$13,946; maximum from \$27,018 to \$27,894.

(b) *Bureau of Economic Analysis.* 22 U.S.C. 3105(a), International Investment and Trade in Services Act (1990); failure to furnish information, minimum from \$5,580 to \$5,761; maximum from \$55,808 to \$57,617.

(c) *Bureau of Industry and Security.* (1) 15 U.S.C. 5408(b)(1), Fastener Quality Act (1990), violation, maximum from \$55,808 to \$57,617.

(2) 22 U.S.C. 6761(a)(1)(A), Chemical Weapons Convention Implementation Act (1998), violation, maximum from \$45,429 to \$46,901.

(3) 22 U.S.C. 6761(a)(1)(B), Chemical Weapons Convention Implementation Act (1998), violation, maximum from \$9,086 to \$9,380.

(4) 50 U.S.C. 1705(b), International Emergency Economic Powers Act (2007), violation, maximum from \$356,579 to \$368,136.

(5) 22 U.S.C. 8142(a), United States Additional Protocol Implementation Act (2006), violation, maximum from \$36,919 to \$38,116.

(6) 50 U.S.C. 4819, Export Controls Act of 2018 (2018), violation, maximum from \$353,534 to \$364,992.

(d) *Census Bureau.* (1) 13 U.S.C. 304, Collection of Foreign Trade Statistics (2002), each day's delinquency of a violation; total of not to exceed maximum per violation, from \$1,643 to \$1,696; maximum per violation, from \$16,438 to \$16,971.

(2) 13 U.S.C. 305(b), Collection of Foreign Trade Statistics (2002), violation, maximum from \$16,438 to \$16,971.

(e) *International Trade Administration.* (1) 19 U.S.C. 81s, Foreign Trade Zone (1934), violation, maximum from \$3,446 to \$3,558.

(2) 19 U.S.C. 1677f(f)(4), U.S.-Canada Free Trade Agreement Protective Order (1988), violation, maximum from \$247,929 to \$255,964.

(f) *National Oceanic and Atmospheric Administration.* (1) 51 U.S.C. 60123(a), Land Remote Sensing Policy Act of 2010 (2010), violation, maximum from \$13,625 to \$14,067.

(2) 51 U.S.C. 60148(c), Land Remote Sensing Policy Act of 2010 (2010), violation, maximum from \$13,625 to \$14,067.

(3) 16 U.S.C. 773f(a), Northern Pacific Halibut Act of 1982 (2007), violation, maximum from \$285,265 to \$294,510.

(4) 16 U.S.C. 783, Sponge Act (1914), violation, maximum from \$2,037 to \$2,103.

(5) 16 U.S.C. 957(d), (e), and (f), Tuna Conventions Act of 1950 (1962):

(i) Violation of 16 U.S.C. 957(a), maximum from \$101,805 to \$105,105.

(ii) Subsequent violation of 16 U.S.C. 957(a), maximum from \$219,273 to \$226,380.

(iii) Violation of 16 U.S.C. 957(b), maximum from \$3,446 to \$3,558.

(iv) Subsequent violation of 16 U.S.C. 957(b), maximum from \$20,362 to \$21,022.

(v) Violation of 16 U.S.C. 957(c), maximum from \$438,548 to \$452,761.

(6) 16 U.S.C. 957(i), Tuna Conventions Act of 1950,<sup>1</sup> violation, maximum from \$223,229 to \$230,464.

(7) 16 U.S.C. 959, Tuna Conventions Act of 1950,<sup>2</sup> violation, maximum from \$223,229 to \$230,464.

(8) 16 U.S.C. 971f(a), Atlantic Tunas Convention Act of 1975,<sup>3</sup> violation, maximum from \$223,229 to \$230,464.

(9) 16 U.S.C. 973f(a), South Pacific Tuna Act of 1988 (1988), violation, maximum from \$619,820 to \$639,908.

(10) 16 U.S.C. 1174(b), Fur Seal Act Amendments of 1983 (1983), violation, maximum from \$29,505 to \$30,461.

(11) 16 U.S.C. 1375(a)(1), Marine Mammal Protection Act of 1972 (1972), violation, maximum from \$34,457 to \$35,574.

(12) 16 U.S.C. 1385(e), Dolphin Protection Consumer Information Act,<sup>4</sup> violation, maximum from \$223,229 to \$230,464.

(13) 16 U.S.C. 1437(d)(1), National Marine Sanctuaries Act (1992), violation, maximum from \$210,161 to \$216,972.

<sup>1</sup>This National Oceanic and Atmospheric Administration maximum civil monetary penalty, as prescribed by law, is the maximum civil monetary penalty per 16 U.S.C. 1858(a), Magnuson-Stevens Fishery Conservation and Management Act civil monetary penalty (paragraph (f)(15) of this section).

<sup>2</sup> See footnote 1.

<sup>3</sup> See footnote 1.

<sup>4</sup> See footnote 1.

(14) 16 U.S.C. 1540(a)(1), Endangered Species Act of 1973:

(i) Violation as specified (1988), maximum from \$61,982 to \$63,991.

(ii) Violation as specified (1988), maximum from \$29,751 to \$30,715.

(iii) Otherwise violation (1978), maximum from \$2,037 to \$2,103.

(15) 16 U.S.C. 1858(a), Magnuson-Stevens Fishery Conservation and Management Act (1990), violation, maximum from \$223,229 to \$230,464.

(16) 16 U.S.C. 2437(a), Antarctic Marine Living Resources Convention Act of 1984,<sup>5</sup> violation, maximum from \$223,229 to \$230,464.

(17) 16 U.S.C. 2465(a), Antarctic Protection Act of 1990,<sup>6</sup> violation, maximum from \$223,229 to \$230,464.

(18) 16 U.S.C. 3373(a), Lacey Act Amendments of 1981 (1981):

(i) 16 U.S.C. 3373(a)(1), violation, maximum from \$31,908 to \$32,942.

(ii) 16 U.S.C. 3373(a)(2), violation, maximum from \$797 to \$823.

(19) 16 U.S.C. 3606(b)(1), Atlantic Salmon Convention Act of 1982,<sup>7</sup> violation, maximum from \$223,229 to \$230,464.

(20) 16 U.S.C. 3637(b), Pacific Salmon Treaty Act of 1985,<sup>8</sup> violation, maximum from \$223,229 to \$230,464.

(21) 16 U.S.C. 4016(b)(1)(B), Fish and Seafood Promotion Act of 1986 (1986); violation, minimum from \$1,350 to \$1,394; maximum from \$13,508 to \$13,946.

(22) 16 U.S.C. 5010, North Pacific Anadromous Stocks Act of 1992,<sup>9</sup> violation, maximum from \$223,229 to \$230,464.

(23) 16 U.S.C. 5103(b)(2), Atlantic Coastal Fisheries Cooperative Management Act,<sup>10</sup> violation, maximum from \$223,229 to \$230,464.

(24) 16 U.S.C. 5154(c)(1), Atlantic Striped Bass Conservation Act,<sup>11</sup> violation, maximum from \$223,229 to \$230,464.

(25) 16 U.S.C. 5507(a), High Seas Fishing Compliance Act of 1995 (1995), violation, maximum from \$193,890 to \$200,174.

(26) 16 U.S.C. 5606(b), Northwest Atlantic Fisheries Convention Act of 1995,<sup>12</sup> violation, maximum from \$223,229 to \$230,464.

<sup>5</sup> See footnote 1.

<sup>6</sup> See footnote 1.

<sup>7</sup> This National Oceanic and Atmospheric Administration maximum civil monetary penalty, as prescribed by law, is the maximum civil monetary penalty per 16 U.S.C. 1858(a), Magnuson-Stevens Fishery Conservation and Management Act civil monetary penalty (paragraph (f)(15) of this section).

<sup>8</sup> See footnote 7.

<sup>9</sup> See footnote 7.

<sup>10</sup> See footnote 7.

<sup>11</sup> See footnote 7.

<sup>12</sup> See footnote 7.

(27) 16 U.S.C. 6905(c), Western and Central Pacific Fisheries Convention Implementation Act,<sup>13</sup> violation, maximum from \$223,229 to \$230,464.

(28) 16 U.S.C. 7009(c) and (d), Pacific Whiting Act of 2006,<sup>14</sup> violation, maximum from \$223,229 to \$230,464.

(29) 22 U.S.C. 1978(e), Fishermen's Protective Act of 1967 (1971):

(i) Violation, maximum from \$34,457 to \$35,574.

(ii) Subsequent violation, maximum from \$101,805 to \$105,105.

(30) 30 U.S.C. 1462(a), Deep Seabed Hard Mineral Resources Act (1980), violation, maximum, from \$87,855 to \$90,702.

(31) 42 U.S.C. 9152(c), Ocean Thermal Energy Conversion Act of 1980 (1980), violation, maximum from \$87,855 to \$90,702.

(32) 16 U.S.C. 1827a, Billfish Conservation Act of 2012,<sup>15</sup> violation, maximum from \$223,229 to \$230,464.

(33) 16 U.S.C. 7407(b), Port State Measures Agreement Act of 2015,<sup>16</sup> violation, maximum from \$223,229 to \$230,464.

(34) 16 U.S.C. 1826g(f), High Seas Driftnet Fishing Moratorium Protection Act,<sup>17</sup> violation, maximum from \$223,229 to \$230,464.

(35) 16 U.S.C. 7705, Ensuring Access to Pacific Fisheries Act,<sup>18</sup> violation, maximum from \$223,229 to \$230,464.

(36) 16 U.S.C. 7805, Ensuring Access to Pacific Fisheries Act,<sup>19</sup> violation, maximum from \$223,229 to \$230,464.

(37) 16 U.S.C. 1857 note, James M. Inhofe National Defense Authorization Act for Fiscal Year 2023,<sup>20</sup> (newly reported penalty), violation, maximum \$230,464.

(g) *National Technical Information Service*. 42 U.S.C. 1306c(c), Bipartisan Budget Act of 2013 (2013), violation, minimum from \$1,158 to \$1,196; maximum total penalty on any person for any calendar year, excluding willful or intentional violations, from \$289,504 to \$298,887.

(h) *Office of the Under Secretary for Economic Affairs*. 15 U.S.C. 113, Concrete Masonry Products Research, Education, and Promotion Act of 2018, violation, maximum from \$5,000 to \$5,162.

#### **§ 6.4 Effective date of adjustments for inflation to civil monetary penalties.**

The Department of Commerce's 2024 adjustments for inflation made by § 6.3,

of the civil monetary penalties there specified, are effective on January 15, 2024, and said civil monetary penalties, as thus adjusted by the adjustments for inflation made by § 6.3, apply only to those civil monetary penalties, including those whose associated violation predated such adjustment, which are assessed by the Department of Commerce after the effective date of the new civil monetary penalty level, and before the effective date of any future adjustments for inflation to civil monetary penalties thereto made subsequent to January 15, 2024 as provided in § 6.5.

#### **§ 6.5 Subsequent annual adjustments for inflation to civil monetary penalties.**

The Secretary of Commerce or his or her designee by regulation shall make subsequent adjustments for inflation to the Department of Commerce's civil monetary penalties annually, which shall take effect not later than January 15, notwithstanding section 553 of title 5, United States Code.

[FR Doc. 2023–28484 Filed 12–26–23; 8:45 am]

**BILLING CODE 3510–DP–P**

## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

### **Food and Drug Administration**

#### **21 CFR Part 202**

**Docket No. FDA–2009–N–0582]**

#### **Direct-to-Consumer Prescription Drug Advertisements: Presentation of the Major Statement in a Clear, Conspicuous, and Neutral Manner in Advertisements in Television and Radio Format Final Rule: Questions and Answers; Guidance for Industry; Small Entity Compliance Guide; Availability**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notification of availability.

**SUMMARY:** The Food and Drug Administration (FDA, the Agency, or we) is announcing the availability of a guidance for industry entitled “Direct-to-Consumer Prescription Drug Advertisements: Presentation of the Major Statement in a Clear, Conspicuous, and Neutral Manner in Advertisements in Television and Radio Format Final Rule: Questions and Answers.” We are issuing this small entity compliance guide (SECG) in accordance with the Small Business Regulatory Enforcement Fairness Act to help small businesses understand and comply with the “Direct-to-Consumer

Prescription Drug Advertisements: Presentation of the Major Statement in a Clear, Conspicuous, and Neutral Manner in Advertisements in Television and Radio Format Final Rule” (CCN Final Rule). The CCN Final Rule modifies FDA regulations to reflect the requirement in the Federal Food, Drug, and Cosmetic Act (FD&C Act) that human prescription drug advertisements presented directly to consumers (DTC) in television or radio format and stating the name of the drug and its conditions of use (DTC TV/radio ads) present the major statement relating to side effects and contraindications (major statement) in a clear, conspicuous, and neutral manner and establishes standards to help ensure this requirement is met. The term “drugs” in this guidance refers to prescription human drug and biological products.

**DATES:** The announcement of the guidance is published in the **Federal Register** on December 27, 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

<sup>13</sup> See footnote 7.

<sup>14</sup> See footnote 7.

<sup>15</sup> See footnote 7.

<sup>16</sup> See footnote 7.

<sup>17</sup> See footnote 7.

<sup>18</sup> See footnote 7.

<sup>19</sup> See footnote 7.

<sup>20</sup> See footnote 7.

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–2009–N–0582 for “Direct-to-Consumer Prescription Drug Advertisements: Presentation of the Major Statement in a Clear, Conspicuous, and Neutral Manner in Advertisements in Television and Radio Format Final Rule: Questions and Answers.” 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 the SECG 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 to 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 SECG.

#### **FOR FURTHER INFORMATION CONTACT:**

Suzanna Boyle, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 3214, Silver Spring, MD 20993–0002, 301–796–1200, [CDER-OPDP-RPM@fda.hhs.gov](mailto:CDER-OPDP-RPM@fda.hhs.gov); 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**

We are announcing the availability of a guidance for industry entitled “Direct-to-Consumer Prescription Drug Advertisements: Presentation of the Major Statement in a Clear, Conspicuous, and Neutral Manner in Advertisements in Television and Radio Format Final Rule: Questions and Answers.” FDA is issuing this SECG as a level 2 guidance, consistent with FDA’s good guidance practices (GGP) regulation (§ 10.115 (21 CFR 10.115)). Consistent with the GGP regulation, FDA is immediately implementing the level 2 guidance and inviting public comment (§ 10.115(g)(4)).

We are issuing this guidance in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act (Pub. L. 104–121, as amended by Pub. L. 110–28) to help small businesses understand and comply with the CCN Final Rule (88 FR 80958, November 21, 2023). The CCN Final Rule modifies 21 CFR 202.1(e)(1) to reflect the requirement in section 502(n) of the FD&C Act (21 U.S.C.

352(n)) that human prescription drug advertisements presented directly to consumers (DTC) in television or radio format and stating the name of the drug and its conditions of use (DTC TV/radio ads) present the major statement relating to side effects and contraindications in a clear, conspicuous, and neutral manner. The CCN Final Rule also establishes standards to help ensure that this requirement is met.

This guidance addresses the content and effect of the CCN Final Rule, including identifying which drugs and advertisements are covered by the rule. The term “drugs” in this guidance refers to prescription human drug and biological products. In addition, this guidance explains when firms are expected to comply with the CCN Final Rule and how they can do so. The term “firms” in this guidance refers to manufacturers, packers, and distributors of any human prescription drug that, in any State, is distributed or offered for sale and who advertise that drug, and to all persons who they cause to issue any advertisement with respect to their human prescription drug(s), including both individuals and corporate entities.

This level 2 guidance is being issued consistent with FDA’s good guidance practices regulation (§ 10.115). The SECG represents the current thinking of FDA on how small businesses can better understand and comply with the “Direct-to-Consumer Prescription Drug Advertisements: Presentation of the Major Statement in a Clear, Conspicuous, and Neutral Manner in Advertisements in Television or Radio Format Final Rule.” 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 collections of information in 21 CFR 202.1 have been approved under OMB control number 0910–0686. The collections of information in 21 CFR 314.81(b)(3)(i) relating to the submission of advertisements and promotional labeling have been approved under OMB control number 0910–0001.

### III. Electronic Access

Persons with access to the internet may obtain the SECG at <https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs>, <https://www.fda.gov/regulatory-information/search-fda-guidance-documents>, or <https://www.regulations.gov>. Use the FDA websites listed in the previous sentence to find the most current version of the guidance.

Dated: December 21, 2023.

**Lauren K. Roth,**

*Associate Commissioner for Policy.*

[FR Doc. 2023-28530 Filed 12-26-23; 8:45 am]

BILLING CODE 4164-01-P

## DEPARTMENT OF EDUCATION

### 34 CFR Chapter III

[ED-2023-OSERS-0177]

#### Final Waiver and Extension of the Project Period With Funding for Innovative Rehabilitation Training Grants

**AGENCY:** Office of Special Education and Rehabilitative Services (OSERS), Department of Education.

**ACTION:** Final waiver and extension of project period with funding.

**SUMMARY:** The Secretary waives the requirements in the Education Department General Administrative Regulations that generally prohibit project periods exceeding five years and project period extensions involving the obligation of additional Federal funds. The waiver and extension enable seven projects under Assistance Listing Number (ALN) 84.263C to receive funding for an additional period, not to exceed September 30, 2025.

**DATES:** The waiver and extension of the project periods are effective December 27, 2023.

**FOR FURTHER INFORMATION CONTACT:** Felipe Lulli, U.S. Department of Education, 400 Maryland Avenue SW, Room 4A110, Washington, DC 20202. Telephone: 202-987-0128. Email: [Felipe.Lulli@ed.gov](mailto:Felipe.Lulli@ed.gov).

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7-1-1.

#### SUPPLEMENTARY INFORMATION:

##### Background

On October 3, 2023, the Department published a notice in the **Federal Register** (84 FR 32135) proposing a waiver and extension of the project

period with funding in order to enable seven projects under Assistance Listing Number (ALN) 84.263C to receive continuation funding for an additional 12-month period, not to exceed September 30, 2025. The proposed waiver and extension of the project period with funding would allow the Department to align those dates with that of awards funded under ALNs 84.263E and 84.263F, which will each receive their final year of funding in FY 2024, and end on September 30, 2025. Due to the overlapping goals of these three programs, the Department does not believe that it would be in the public interest to run a competition for ALN 84.263C in FY 2024. Rather, aligning the projects' periods of performance end dates for ALNs 84.263C, 84.263E, and 84.263F would reduce financial and administrative burden by allowing the Department to conduct a single competition for all 84.263C, 84.263E, and 84.263F grants in FY 2025, with a five-year performance period that would run from October 1, 2025, through September 30, 2030.

There are no differences between the notice of proposed waiver and extension of the project period with funding and this notice of final waiver and extension of the project period with funding, as discussed in the *Analysis of Comments and Changes* section of this document.

##### Public Comment

In response to our invitation in the notice of proposed waiver and extension of the project period with funding, two parties submitted comments.

Generally, we do not address technical and other minor changes or suggested changes the law does not authorize us to make under the applicable statutory authority. In addition, we do not address general comments that raised concerns not directly related to the proposed waiver and extension with funding.

##### Analysis of Comments and Changes

An analysis of the comments and of any changes in the priority since publication of the notice of proposed waiver and extension of the project period with funding follows.

*Comment:* One commenter expressed strong support for the proposed waiver and extension of the project period with funding noting the vital importance of the Innovation Rehabilitation Training projects to the Vocational Rehabilitation field. The commenter described first-hand experience serving on an advisory board of one of the Innovative Rehabilitation Training grants and evaluating their products. The commenter noted the value of the

products to the vocational rehabilitation field in meeting the needs of individuals with disabilities.

*Discussion:* The Department appreciates support for the proposed waiver and extension of the project period with funding for the Innovative Rehabilitation Training grants.

*Change:* None.

*Comment:* One commenter analyzed whether the proposed waiver and extension of the project period with funding would lead to more efficient outcomes for the Innovative Rehabilitation Training program. The commenter presented one argument that extending the project period and providing additional funding would offer the Department streamlined decision-making and grantee flexibility to ensure the delivery of comprehensive, high-quality training that effectively meets the needs of their target populations. The commenter presented a counterargument that extending the project timeline might cause grantees to delay project milestones if they know extensions are readily available, leading to inefficiencies and prolonged timelines that do not guarantee improved outcomes. The commenter recommended the Department implement appropriate oversight procedures to alleviate possible risks and safeguard the effectiveness of the waiver and extension of the project period to alleviate financial and administrative burden.

*Discussion:* The Department appreciates the commenter's analysis of arguments for and against the proposed notice of waiver and extension of the project period with funding and carefully considered them in its decision making. The Department will monitor grantees in accordance with applicable regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99; (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485; and (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. Additionally, the Department will assess grant performance through annual reporting and tracking of expenditures to ensure that project milestones for both the current budget period and the additional budget period

are met in a timely and efficient manner, thus mitigating potential program and financial risk.

*Change:* None.

#### *Final Waiver and Extension of the Project Period With Funding*

The Department believes aligning the projects' period of performance for ALNs 84.263C, 84.263E, and 84.263F is in the best interest of the public, as the extension reduces the financial and administrative burden by allowing the Department to conduct a single competition for 84.263C, 84.263E, and 84.263F in FY 2025, with a five-year performance period that would run from October 1, 2025, through September 30, 2030.

Consequently, the Secretary waives the requirements in 34 CFR 75.250, which prohibit project periods exceeding five years, as well as the requirements in 34 CFR 75.261(a) and (c)(2), which allow the extension of a project period only if the extension does not involve the obligation of additional Federal funds. This waiver allows the Department to issue a one-year FY 2024 continuation award to each of the seven currently funded FY 2019 84.263C projects. Any activities carried out during the year of this continuation award must be consistent with the scope, goals, and objectives of the grantees' applications as approved in the FY 2019 competition. The requirements for continuation awards are set forth in 34 CFR 75.253.

#### *Regulatory Flexibility Act Certification*

The Secretary certifies that the final waiver and extension of the project period with funding would not have a significant economic impact on a substantial number of small entities. The only entities that would be affected by the final waiver and extension of the project period with funding are the seven grants that were awarded in FY 2019 under ALN 84.263C.

The Secretary certifies that the final waiver and extension would not have a significant economic impact on these entities, because the extension of an existing project period imposes minimal compliance costs, and the activities required to support the additional year of funding would not impose additional regulatory burdens or require unnecessary Federal supervision.

#### *Paperwork Reduction Act of 1995*

This notice of final waiver and extension of the project period with funding does not contain any information collection requirements.

#### *Intergovernmental Review*

These programs are subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides final notification of our specific plans and actions for this program.

**Accessible Format:** On request to the program contact person listed under **FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

**Electronic Access to This Document:** The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at [www.govinfo.gov](http://www.govinfo.gov). At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at [www.federalregister.gov](http://www.federalregister.gov). Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

**Danté Allen,**

*Commissioner, Rehabilitation Services Administration, Office of Special Education and Rehabilitative Services.*

[FR Doc. 2023-28375 Filed 12-26-23; 8:45 am]

**BILLING CODE 4000-01-P**

## DEPARTMENT OF EDUCATION

### 34 CFR Chapter III

[ED-2023-OSERS-0175]

#### **Final Waiver and Extension of the Project Period With Funding for Rehabilitation Long-Term Training Grants**

**AGENCY:** Office of Special Education and Rehabilitative Services (OSERS), Department of Education.

**ACTION:** Final waiver and extension of project period with funding.

**SUMMARY:** The Secretary waives the requirements in the Education Department General Administrative Regulations that generally prohibit project periods exceeding five years and project period extensions involving the obligation of additional Federal funds. The waiver and extension enables 51 projects under Assistance Listing Numbers (ALN) 84.129B, 84.129H, 84.129P, and 84.129Q to receive funding for an additional period, not to exceed September 30, 2025.

**DATES:** The waiver and extension of the project periods are effective December 27, 2023.

**FOR FURTHER INFORMATION CONTACT:** Karen Holliday Young, U.S. Department of Education, 400 Maryland Avenue SW, Room 4A10, Washington, DC 20202. Telephone: 202-245-7318. Email: [Karen.Holliday@ed.gov](mailto:Karen.Holliday@ed.gov).

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7-1-1.

**SUPPLEMENTARY INFORMATION:** On October 3, 2023, the Department published in the **Federal Register** (88 FR 67953) a proposal to waive and extend the project period with funding in order to enable 51 projects under Assistance Listing Numbers (ALN) 84.129B, 84.129H, 84.129P, and 84.129Q to receive continuation funding for an additional 12-month period, not to exceed September 30, 2025. The proposed waiver and extension of the project period with funding would allow the Department to align with the 33 ALN 84.129B grant projects funded in FY 2020 that will receive their final year of funding in FY 2024 with a September 30, 2025, performance period ending date. There are no differences between the proposed waiver and extension of the project period with funding and this final waiver and extension of the project period with funding.

## Public Comment

In response to our invitation in the proposed waiver and extension of the project period with funding, one party submitted comments. Although the commenter expressed strong support for the proposed waiver and the extension of the project period with funding, the discussion the commenter provided relates to the Innovation Rehabilitation Training grants, which fund projects that develop training products and programs in providing rehabilitation services to individuals with disabilities, rather than the Rehabilitation Long-Term Training grants, which are the subject of this notice, under which projects are funded to provide stipend support to scholars pursuing a degree or certificate in the field of rehabilitation counseling.

Generally, we do not address technical and other minor changes or suggested changes the law does not authorize us to make under the applicable statutory authority. In addition, we do not address general comments that raise concerns not directly related to the proposed waiver and extension with funding.

## Final Waiver and Extension of the Project Period With Funding

The Department believes aligning the projects' period of performance for ALNs 84.129B, 84.129H, 84.129P, and 84.129Q is in the best interest of the public, as the extension reduces financial and administrative burden by allowing the Department to conduct a single competition for ALNs 84.129B, 84.129H, 84.129P and 84.129Q grants in FY 2025, with a five-year performance period that would run from October 1, 2025, through September 30, 2030.

Consequently, the Secretary waives the requirements in 34 CFR 75.250, which prohibit project periods exceeding five years, as well as the requirements in 34 CFR 75.261(a) and (c)(2), which allow the extension of a project period only if the extension does not involve the obligation of additional Federal funds. This waiver allows the Department to issue a one-year FY 2024 continuation award to each of the 51 currently funded FY 2019 84.129B, 84.129H, 84.129P, and 84.129Q projects. Any activities carried out during the year of this continuation award must be consistent with the scope, goals, and objectives of the grantees' applications as approved in the FY 2019 competition. The requirements for continuation awards are set forth in 34 CFR 75.253.

## Regulatory Flexibility Act Certification

The Secretary certifies that the proposed waiver and extension of the project period with funding would not have a significant economic impact on a substantial number of small entities. The only entities that would be affected by the proposed waiver and extension of the project period are the 51 grants that were awarded in FY 2019 under ALNs 84.129B, 84.129H, 84.129P, and 84.129Q.

The Secretary certifies that the proposed waiver and extension of the project period with funding would not have a significant economic impact on these entities because the extension of an existing project period imposes minimal compliance costs, and the activities required to support the additional year of funding would not impose additional regulatory burdens or require unnecessary Federal supervision.

## Paperwork Reduction Act of 1995

This final waiver and extension of the project period with funding does not contain any information collection requirements.

## Intergovernmental Review

These programs are subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides final notification of our specific plans and actions for these programs.

**Accessible Format:** On request to the program contact person listed under **FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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(PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at [www.federalregister.gov](http://www.federalregister.gov). Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

**Danté Allen,**

*Commissioner, Rehabilitation Services Administration, Office of Special Education and Rehabilitative Services.*

[FR Doc. 2023-28490 Filed 12-26-23; 8:45 am]

**BILLING CODE 4000-01-P**

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 4

**RIN 2900-AR51**

## Exceptions to Applying the Bilateral Factor in VA Disability Calculations

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) adopts as final, without changes, an interim final rule that amended the regulation governing the bilateral factor for diseases and injuries of both arms, both legs, or paired skeletal muscles.

**DATES:** *Effective Date:* This rule is effective December 27, 2023.

**FOR FURTHER INFORMATION CONTACT:** Howard McCuinen, Jr., Regulations Analyst, VA Schedule for Rating Disabilities (VASRD) Regulations Staff (218A), Compensation Service, Veteran Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461-9700. (This is not a toll-free telephone number.)

**SUPPLEMENTARY INFORMATION:** On April 14, 2023, VA published the interim final rule in the **Federal Register** to allow VA adjudicators to exclude certain disabilities that would be calculated using the bilateral factor to determine the combined evaluation if, by their exclusion, a higher combined evaluation can be achieved. See 88 FR 22914. VA received one comment during the 60-day public comment period. The commenter agreed with VA's amendment but offered two considerations for how VA implements it.

## I. Limiting Application of Regulation

The commenter expressed concern that application of the bilateral factor rule may fail to maximize benefits at the 80 percent combined evaluation level (in addition to the 90 percent level) and, in support of this assessment, cited the decision of the United States Court of Appeals for Veterans Claims (CAVC) in *Wilburn v. McDonough*, No. 22–5577, 2023 WL 5217853 (Ct. Vet. App. Aug. 15, 2023). This commenter suggested that since VA cannot guarantee that the anomaly described in the interim final rule is limited to the 90 percent to 100 percent range, VA should apply this systemic fix to all cases where the bilateral factor has been or will be considered to ensure it has complied with the duty to maximize benefits as described in *Wilburn*.

VA agrees that the application of the bilateral factor rule should not be limited to 90 percent combined evaluations. While the interim final rule stated that “it is only at the low 90-percent level where it may reduce a combined evaluation,” VA has since determined that there are limited scenarios where a combined 80-percent evaluation could be increased to 90 percent. Nevertheless, the regulatory text of the bilateral factor rule does not limit its application to only 90 percent combined evaluations but will apply whenever “the combined evaluation is lower than what could be achieved by not including one or more bilateral disabilities in the bilateral factor calculation.” See 38 CFR 4.26(d). Therefore, no changes to the regulatory text are necessary, and the regulatory impact analysis of this final rule reflects the additional Veterans who are eligible for increased combined evaluations based on its application to Veterans at all possible combination levels.

## II. Liberalizing Law

The commenter also suggested that VA should retroactively apply this regulatory amendment back to the original applicable effective date for each Veteran rather than the effective date of the rulemaking amending 38 CFR 4.26, which is April 16, 2023. Specifically, the commenter contended that this regulatory amendment is not a “liberalizing law” because it does not bring about a substantive change that creates a new or different entitlement as defined by *Spencer v. Brown*, 17 F.3d 368, 372 (Fed. Cir. 1994). Instead, the commenter asserted that this amendment merely clarifies the proper application of the bilateral factor to both more accurately account for the full disability picture and to comply with

VA’s duty to maximize benefits. The commenter further asserted that any instance in the past in which VA did not properly apply the bilateral factor (based on its now clarified application) and did not maximize benefits was a clear and unmistakable error; therefore, VA should correct this error back to the date it originally occurred.

VA disagrees that this regulatory amendment merely clarified the proper application of the bilateral factor rule and that previous decisions were in error. The instructions for applying “old” 38 CFR 4.26 (hereinafter referred to as the “prior bilateral factor rule”) were unambiguously clear, and no clarification was necessary for applying them. The prior bilateral factor rule stated that whenever there was a partial disability or disabilities that affected both arms, both legs, or paired skeletal muscles, those partial disabilities “will be combined as usual, and 10 percent of this value will be added (i.e., not combined) before proceeding with further combinations, or converting to degree of disability.” The prior bilateral factor rule had no exceptions or other caveats that would have allowed claims processors to forego combining all partial disabilities, and it used the term “will,” indicating an obligation to perform. Additionally, the prior bilateral factor rule did not include any provisions to disregard its instructions if a higher evaluation could be assigned. Conversely, there are many examples in 38 CFR part 4 of provisions that allow claims processors to apply or disregard an instruction if doing so results in a higher evaluation. One such example is note 2 of 38 CFR 4.118, DC 7801, Burn scar(s) or scar(s) due to other causes, not of the head, face, or neck, that are associated with underlying soft tissue damage. The note directs the claims processor to separately evaluate each affected zone of the body and then combine each evaluation. However, it also states that the claims processor may combine all of the zones into a single evaluation if that would result in a higher evaluation.

As such, this regulatory amendment was necessary to create an exception to the application of the prior bilateral factor rule. Because a regulatory amendment was necessary, retroactive application of its provisions is limited by 38 U.S.C. 5110(g), which states, in part, that “the effective date of such award or increase (pursuant to any Act or administrative issue) shall be fixed in accordance with the facts found but shall not be earlier than the effective date of the Act or administrative issue.”

In addition to the public comment, a different organization identified the

problem of certain Veterans receiving lower combined evaluations due to the application of the prior bilateral factor rule and brought it to VA’s attention before VA published the interim final rule on April 14, 2023. VA informed the organization that it was aware of this problem and was drafting a regulation to address it. During that discussion, the organization also inquired about whether VA could employ equitable relief as a basis for retroactive application of this regulatory amendment. VA has determined that it cannot apply equitable relief based on the application of the prior bilateral factor rule. Equitable relief provisions under 38 U.S.C. 503 only apply in cases where VA has made an administrative error or an erroneous determination. Since VA has always interpreted the use of the prior bilateral factor rule as mandatory without exception, previous evaluations using the prior bilateral factor rule were not in error. Therefore, 38 U.S.C. 503 is not applicable. Furthermore, a clear and unmistakable error finding likewise would not be authorized with regard to claims already finally decided under the prior bilateral factor rule because VA’s decision would have been in accordance with the law as it existed at the time the claim was decided.

While VA is committed to ensuring benefits are maximized to the full extent of the law, retroactive application is not authorized in this instance, as it is limited by statute and regulation. Accordingly, VA makes no changes based on this comment.

Since VA makes no changes based on the comment received, this document adopts as a final rule the interim final rule published in the **Federal Register** on April 14, 2023, 88 FR 22914.

## Administrative Procedure Act

VA has considered all relevant input and information contained in the comment submitted in response to the interim final rule (88 FR 22914) and, for the reasons set forth above, has concluded that no changes to the interim final rule are warranted. Accordingly, based upon the authorities and reasons set forth in the interim final rule, as supplemented by the additional reasons provided in this document in response to the comment received, VA is adopting the provisions of the interim final rule at 88 FR 22914 as a final rule without changes.

## Executive Orders 12866, 13563 and 14094

Executive Order (E.O.) 12866 (Regulatory Planning and Review) directs agencies to assess the costs and

benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). E.O. 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. E.O. 14094 (Executive Order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in E.O. 12866 of September 30, 1993 (Regulatory Planning and Review), and E.O. 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rulemaking is not a significant regulatory action under E.O. 12866, as amended by E.O. 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at [www.regulations.gov](http://www.regulations.gov).

#### Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act, 5 U.S.C. 601–612, is not applicable to this rulemaking because notice of proposed rulemaking is not required. 5 U.S.C. 601(2), 603(a), 604(a).

#### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

#### Paperwork Reduction Act (PRA)

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

#### Assistance Listing

The Assistance Listing numbers and titles for the programs affected by this document are 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity

Compensation for Service-Connected Death.

#### Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

#### List of Subjects in 38 CFR Part 4

Disability benefits.

#### Signing Authority

Denis McDonough, Secretary of Veterans Affairs, signed and approved this document on December 18, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

#### Luvenia Potts,

*Regulation Development Coordinator, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.*

■ For the reasons stated in the preamble, VA adopts as final the interim final rule published on April 14, 2023, at 88 FR 22914.

[FR Doc. 2023–28241 Filed 12–26–23; 8:45 am]

BILLING CODE 8320–01–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 19

[FRL–5906.8–01–OECA]

#### Civil Monetary Penalty Inflation Adjustment

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is promulgating this final rule to adjust the level of the maximum (and minimum) statutory civil monetary penalty amounts under the statutes the EPA administers. This action is mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended through the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (“the 2015 Act”). The 2015 Act prescribes a formula for annually adjusting the statutory maximum (and minimum) amount of civil monetary penalties to reflect inflation, maintain the deterrent effect of statutory civil monetary penalties, and promote compliance with the law. The rule does not establish specific civil monetary penalty amounts

the EPA may seek in particular cases. The EPA calculates those amounts, as appropriate, based on the facts of particular cases and applicable agency penalty policies. The EPA’s civil penalty policies, which guide enforcement personnel on how to exercise the EPA’s discretion within statutory penalty authorities, take into account a number of fact-specific considerations, *e.g.*, the seriousness of the violation, the violator’s good faith efforts to comply, any economic benefit gained by the violator as a result of its noncompliance, and the violator’s ability to pay.

**DATES:** This final rule is effective December 27, 2023.

#### FOR FURTHER INFORMATION CONTACT:

David Smith-Watts, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, Mail Code 2241A, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460, telephone number: (202) 564–4083; [smith-watts.david@epa.gov](mailto:smith-watts.david@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The 2015 Act<sup>1</sup> requires each Federal agency to adjust the statutory civil monetary penalties under the laws implemented by that agency annually, to account for inflation. Section 4 of the 2015 Act requires each Federal agency to publish these adjustments by January 15 of each year. The purpose of the 2015 Act is to maintain the deterrent effect of civil monetary penalties by translating originally enacted statutory civil penalty amounts to today’s dollars and rounding statutory civil penalties to the nearest dollar.

Since January 15, 2017, the EPA has made seven annual adjustments: (1) on January 12, 2017, effective on January 15, 2017 (82 FR 3633); (2) on January 10, 2018, effective on January 15, 2018 (83 FR 1190); (3) on February 6, 2019, effective the same day (84 FR 2056), with a subsequent correction on February 25, 2019 (84 FR 5955); (4) on January 13, 2020, effective the same day (85 FR 1751); (5) on December 23, 2020, effective the same day (85 FR 83818); (6) on January 12, 2022, effective the same day (87 FR 1676); and (7) on January 6, 2023, effective the same day (88 FR 986). This rule implements the eighth annual adjustment mandated by the 2015 Act.

<sup>1</sup> The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701 of Pub. L. 114–74) was signed into law on November 2, 2015, and amended the Federal Civil Penalties Inflation Adjustment Act of 1990.

The 2015 Act provides a formula for calculating the adjustments. Each statutory maximum and minimum<sup>2</sup> civil monetary penalty, as currently adjusted, is multiplied by the cost-of-living adjustment multiplier, which is the percentage by which the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October 2023 exceeds the CPI-U for the month of October 2022.<sup>3</sup>

With this rule, the new statutory maximum and minimum penalty levels listed in the third column of Table 1 of 40 CFR 19.4 will apply to all civil monetary penalties assessed on or after December 27, 2023, for violations that occurred after November 2, 2015, the date the 2015 Act was enacted. The former maximum and minimum statutory civil monetary penalty levels, which are in the fourth column of Table 1 to 40 CFR 19.4, will now apply only to violations that occurred after November 2, 2015, where the penalties were assessed on or after January 6, 2023, but before December 27, 2023. The statutory civil monetary penalty levels that apply to violations that occurred on or before November 2, 2015, are codified at Table 2 to 40 CFR 19.4. The fifth column of Table 1 and the seventh column of Table 2 display the statutory civil monetary penalty levels as originally enacted.

The formula for determining the cost-of-living or inflation adjustment to statutory civil monetary penalties consists of the following steps:

**Step 1:** The cost-of-living adjustment multiplier for 2024 is the percentage by which the CPI-U of October 2023 (307.671) exceeds the CPI-U for the month of October 2022 (298.012), which is 1.03241.<sup>4</sup> Multiply 1.03241 by the

current penalty amount. This is the raw adjusted penalty value.

**Step 2:** Round the raw adjusted penalty value. Section 5 of the 2015 Act states that any adjustment shall be rounded to the nearest multiple of \$1. The result is the final penalty value for the year.

## II. The 2015 Act Requires Federal Agencies To Publish Annual Penalty Inflation Adjustments Notwithstanding Section 553 of the Administrative Procedure Act

Pursuant to section 4 of the 2015 Act, each Federal agency is required to publish adjustments no later than January 15 each year. In accordance with section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553, most rules are subject to notice and comment and are effective no earlier than 30 days after publication in the **Federal Register**. However, section 4(b)(2) of the 2015 Act provides that each agency shall make the annual inflation adjustments “notwithstanding section 553” of the APA. Consistent with the language of the 2015 Act, this rule is not subject to notice and an opportunity for public comment and will be effective on December 27, 2023.

## III. Statutory and Executive Order Reviews

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 not a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094, and was therefore not subject to a requirement for Executive Order 12866 review.

### B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. This rule merely increases the level of statutory civil monetary penalties that can be imposed in the context of a Federal civil administrative

percentage (if any) for each civil monetary penalty by which—

(A) the Consumer Price Index for the month of October preceding the date of the adjustment, exceeds

(B) the Consumer Price Index for the month of October 1 year before the month of October referred to in subparagraph (A).

Because the CPI-U for October 2023 is 307.671 and the CPI-U for October 2022 is 298.012, the cost-of-living multiplier is 1.03241 (307.671 divided by 298.012).

enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations.

### C. Regulatory Flexibility Act (RFA)

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA), 5 U.S.C. 553, or any other statute. Because the 2015 Act directs Federal agencies to publish this rule notwithstanding section 553 of the APA, this rule is not subject to notice and comment requirements or the RFA.

### 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. This action is required by the 2015 Act, without the exercise of any policy discretion by the EPA. This action also imposes no enforceable duty on any state, local or tribal governments or the private sector. Because the calculation of any increase is formula-driven pursuant to the 2015 Act, the EPA has no policy discretion to vary the amount of the adjustment.

### E. Executive Order 13132: Federalism

This action does not have federalism implications. It will 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.

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

This action does not have Tribal implications as specified in Executive Order 13175. This rule merely reconciles the real value of current statutory civil monetary penalty levels to reflect and keep pace with the levels originally set by Congress when the statutes were enacted or amended. The calculation of the increases is formula-driven and prescribed by statute, and the EPA has no discretion to vary the amount of the adjustment to reflect any views or suggestions provided by commenters. Accordingly, this rule will not have a substantial direct effect 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. Thus, Executive Order 13175 does not apply to this action.

<sup>2</sup> Under Section 3(2)(A) of the 2015 Act, a “civil monetary penalty” [is] any penalty, fine or other sanction that is for a specific monetary amount as provided by Federal law; or has a maximum amount provided for by Federal law.” EPA-administered statutes generally refer to statutory maximum penalties, with the following exceptions: Section 311(b)(7)(D) of the Clean Water Act, 33 U.S.C. 1321(b)(7)(D), refers to a minimum penalty of “not less than \$100,000. . .”; Section 104b(d)(1)(A) of the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1414b(d)(1)(A), refers to an exact penalty of \$600 “[f]or each dry ton (or equivalent) of sewage sludge or industrial waste dumped or transported by the person in violation of this subsection in calendar year 1992. . .”; and Section 325(d)(1) of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11045(d)(1), refers to an exact civil penalty of \$25,000 for each frivolous trade secret claim.

<sup>3</sup> Current and historical CPI-U’s can be found on the Bureau of Labor Statistics’ websites here: <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202309.pdf> and <https://www.bls.gov/news.release/pdf/cpi.pdf>.

<sup>4</sup> Section 5(b) of the 2015 Act provides that the term “cost-of-living adjustment” means the

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the 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 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 Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use*

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act (NTTAA)*

The 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. As mandated by the 2015 Act, this rule adjusts for inflation the statutory civil monetary penalty amounts of the statutes administered by the EPA.

EPA acknowledges that the annual mandatory increase in civil penalty amounts to account for inflation may result in further deterrents of environmental violations that may trigger civil penalties. Deterring violations has the benefit of promoting the overarching purpose of

environmental enforcement and may have a positive impact on the human health or environment of all populations including communities with environmental justice concerns.

*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 finds that the APA’s notice and comment rulemaking procedures are unnecessary because the 2015 Act directs Federal agencies to publish their annual penalty inflation adjustments “notwithstanding section 553 [of the APA].”

**List of Subjects in 40 CFR Part 19**

Environmental protection, Administrative practice and procedure, Penalties.

**Michael S. Regan,**  
Administrator.

For the reasons set out in the preamble, the EPA amends title 40, chapter I, part 19 of the Code of Federal Regulations as follows:

**PART 19—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION**

■ 1. The authority citation for part 19 continues to read as follows:

**Authority:** Pub. L. 101–410, Oct. 5, 1990, 104 Stat. 890, as amended by Pub. L. 104–134, title III, sec. 31001(s)(1), Apr. 26, 1996, 110 Stat. 1321–373; Pub. L. 105–362, title XIII, sec. 1301(a), Nov. 10, 1998, 112 Stat. 3293; Pub. L. 114–74, title VII, sec. 701(b), Nov. 2, 2015, 129 Stat. 599.

■ 2. Revise § 19.2 to read as follows:

**§ 19.2 Effective date.**

(a) The statutory civil monetary penalty levels set forth in the third column of Table 1 of § 19.4 apply to all violations which occur or occurred after November 2, 2015, where the penalties are assessed on or after December 27,

2023. The statutory civil monetary penalty levels set forth in the fourth column of Table 1 of § 19.4 apply to all violations which occurred after November 2, 2015, where the penalties were assessed on or after January 6, 2023, but before December 27, 2023.

(b) The statutory monetary penalty levels in the third column of Table 2 to § 19.4 apply to all violations which occurred after December 6, 2013, through November 2, 2015, and to violations occurring after November 2, 2015, where penalties were assessed before August 1, 2016. The statutory civil monetary penalty levels set forth in the fourth column of Table 2 of § 19.4 apply to all violations which occurred after January 12, 2009, through December 6, 2013. The statutory civil monetary penalty levels set forth in the fifth column of Table 2 of § 19.4 apply to all violations which occurred after March 15, 2004, through January 12, 2009. The statutory civil monetary penalty levels set forth in the sixth column of Table 2 of § 19.4 apply to all violations which occurred after January 30, 1997, through March 15, 2004.

■ 3. Revise the section heading, introductory text, and Table 1 of § 19.4 to read as follows:

**§ 19.4 Statutory civil monetary penalties, as adjusted for inflation, and tables.**

Table 1 of this section sets out the statutory civil monetary penalty provisions of statutes administered by the EPA, with the third column setting out the latest operative statutory civil monetary penalty levels for violations that occur or occurred after November 2, 2015, where penalties are assessed on or after December 27, 2023. The fourth column displays the operative statutory civil monetary penalty levels where penalties were assessed on or after January 6, 2023, but before December 27, 2023. Table 2 of this section sets out the statutory civil monetary penalty provision of statutes administered by the EPA, with the operative statutory civil monetary penalty levels, as adjusted for inflation, for violations that occurred on or before November 2, 2015, and for violations that occurred after November 2, 2015, where penalties were assessed before August 1, 2016.

TABLE 1 OF § 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

| U.S. Code citation                       | Environmental statute                                                           | Statutory civil monetary penalties for violations that occur or occurred after November 2, 2015, where penalties are assessed on or after December 27, 2023 | Statutory civil monetary penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after January 6, 2023, but before December 27, 2023 | Statutory civil monetary penalties, as enacted |
|------------------------------------------|---------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------|
| 7 U.S.C. 136(a)(1) .....                 | FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA).                    | \$24,255                                                                                                                                                    | \$23,494                                                                                                                                                                        | \$5,000                                        |
| 7 U.S.C. 136(a)(2) <sup>1</sup> .....    | FIFRA .....                                                                     | 3,558/2,293/3,558                                                                                                                                           | 3,446/2,221/3,446                                                                                                                                                               | 1,000/500/1,000                                |
| 15 U.S.C. 2615(a)(1) .....               | TOXIC SUBSTANCES CONTROL ACT (TSCA).                                            | 48,512                                                                                                                                                      | 46,989                                                                                                                                                                          | 25,000                                         |
| 15 U.S.C. 2647(a) .....                  | TSCA .....                                                                      | 13,946                                                                                                                                                      | 13,508                                                                                                                                                                          | 5,000                                          |
| 15 U.S.C. 2647(g) .....                  | TSCA .....                                                                      | 11,524                                                                                                                                                      | 11,162                                                                                                                                                                          | 5,000                                          |
| 31 U.S.C. 3802(a)(1) .....               | PROGRAM FRAUD CIVIL REMEDIES ACT (PFCRA).                                       | 13,946                                                                                                                                                      | 13,508                                                                                                                                                                          | 5,000                                          |
| 31 U.S.C. 3802(a)(2) .....               | PFCRA .....                                                                     | 13,946                                                                                                                                                      | 13,508                                                                                                                                                                          | 5,000                                          |
| 33 U.S.C. 1319(d) .....                  | CLEAN WATER ACT (CWA) .....                                                     | 66,712                                                                                                                                                      | 64,618                                                                                                                                                                          | 25,000                                         |
| 33 U.S.C. 1319(g)(2)(A) .....            | CWA .....                                                                       | 26,685/66,712                                                                                                                                               | 25,847/64,618                                                                                                                                                                   | 10,000/25,000                                  |
| 33 U.S.C. 1319(g)(2)(B) .....            | CWA .....                                                                       | 26,685/333,552                                                                                                                                              | 25,847/323,081                                                                                                                                                                  | 10,000/125,000                                 |
| 33 U.S.C. 1321(b)(6)(B)(i) .....         | CWA .....                                                                       | 23,048/57,617                                                                                                                                               | 22,324/55,808                                                                                                                                                                   | 10,000/25,000                                  |
| 33 U.S.C. 1321(b)(6)(B)(ii) .....        | CWA .....                                                                       | 23,048/288,080                                                                                                                                              | 22,324/279,036                                                                                                                                                                  | 10,000/125,000                                 |
| 33 U.S.C. 1321(b)(7)(A) .....            | CWA .....                                                                       | 57,617/2,304                                                                                                                                                | 55,808/2,232                                                                                                                                                                    | 25,000/1,000                                   |
| 33 U.S.C. 1321(b)(7)(B) .....            | CWA .....                                                                       | 57,617                                                                                                                                                      | 55,808                                                                                                                                                                          | 25,000                                         |
| 33 U.S.C. 1321(b)(7)(C) .....            | CWA .....                                                                       | 57,617                                                                                                                                                      | 55,808                                                                                                                                                                          | 25,000                                         |
| 33 U.S.C. 1321(b)(7)(D) .....            | CWA .....                                                                       | 230,464/6,913                                                                                                                                               | 223,229/6,696                                                                                                                                                                   | 100,000/3,000                                  |
| 33 U.S.C. 1414b(d)(1)(A) .....           | MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA).                       | 1,535                                                                                                                                                       | 1,487                                                                                                                                                                           | 600                                            |
| 33 U.S.C. 1415(a) .....                  | MPRSA .....                                                                     | 242,550/319,953                                                                                                                                             | 234,936/309,909                                                                                                                                                                 | 50,000/125,000                                 |
| 33 U.S.C. 1901 note (see 1409(a)(2)(A)). | CERTAIN ALASKAN CRUISE SHIP OPERATIONS (CACSO).                                 | 17,683/44,206                                                                                                                                               | 17,128/42,818                                                                                                                                                                   | 10,000/25,000                                  |
| 33 U.S.C. 1901 note (see 1409(a)(2)(B)). | CACSO .....                                                                     | 17,683/221,026                                                                                                                                              | 17,128/214,087                                                                                                                                                                  | 10,000/125,000                                 |
| 33 U.S.C. 1901 note (see 1409(b)(1)).    | CACSO .....                                                                     | 44,206                                                                                                                                                      | 42,818                                                                                                                                                                          | 25,000                                         |
| 33 U.S.C. 1908(b)(1) .....               | ACT TO PREVENT POLLUTION FROM SHIPS (APPS).                                     | 90,702                                                                                                                                                      | 87,855                                                                                                                                                                          | 25,000                                         |
| 33 U.S.C. 1908(b)(2) .....               | APPS .....                                                                      | 18,139                                                                                                                                                      | 17,570                                                                                                                                                                          | 5,000                                          |
| 42 U.S.C. 300g–3(b) .....                | SAFE DRINKING WATER ACT (SDWA) .....                                            | 69,733                                                                                                                                                      | 67,544                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 300g–3(g)(3)(A) .....          | SDWA .....                                                                      | 69,733                                                                                                                                                      | 67,544                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 300g–3(g)(3)(B) .....          | SDWA .....                                                                      | 13,946/48,586                                                                                                                                               | 13,508/47,061                                                                                                                                                                   | 5,000/25,000                                   |
| 42 U.S.C. 300g–3(g)(3)(C) .....          | SDWA .....                                                                      | 48,586                                                                                                                                                      | 47,061                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 300h–2(b)(1) .....             | SDWA .....                                                                      | 69,733                                                                                                                                                      | 67,544                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 300h–2(c)(1) .....             | SDWA .....                                                                      | 27,894/348,671                                                                                                                                              | 27,018/337,725                                                                                                                                                                  | 10,000/125,000                                 |
| 42 U.S.C. 300h–2(c)(2) .....             | SDWA .....                                                                      | 13,946/348,671                                                                                                                                              | 13,508/337,725                                                                                                                                                                  | 5,000/125,000                                  |
| 42 U.S.C. 300h–3(c) .....                | SDWA .....                                                                      | 24,255/51,744                                                                                                                                               | 23,494/50,120                                                                                                                                                                   | 5,000/10,000                                   |
| 42 U.S.C. 300i(b) .....                  | SDWA .....                                                                      | 29,154                                                                                                                                                      | 28,239                                                                                                                                                                          | 15,000                                         |
| 42 U.S.C. 300i–1(c) .....                | SDWA .....                                                                      | 169,700/1,697,012                                                                                                                                           | 164,373/1,643,738                                                                                                                                                               | 100,000/1,000,000                              |
| 42 U.S.C. 300j(e)(2) .....               | SDWA .....                                                                      | 12,127                                                                                                                                                      | 11,746                                                                                                                                                                          | 2,500                                          |
| 42 U.S.C. 300j–4(c) .....                | SDWA .....                                                                      | 69,733                                                                                                                                                      | 67,544                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 300j–6(b)(2) .....             | SDWA .....                                                                      | 48,586                                                                                                                                                      | 47,061                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 300j–23(d) .....               | SDWA .....                                                                      | 12,799/127,983                                                                                                                                              | 12,397/123,965                                                                                                                                                                  | 5,000/50,000                                   |
| 42 U.S.C. 4852d(b)(5) .....              | RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992.                      | 21,699                                                                                                                                                      | 21,018                                                                                                                                                                          | 10,000                                         |
| 42 U.S.C. 4910(a)(2) .....               | NOISE CONTROL ACT OF 1972 .....                                                 | 45,850                                                                                                                                                      | 44,411                                                                                                                                                                          | 10,000                                         |
| 42 U.S.C. 6928(a)(3) .....               | RESOURCE CONSERVATION AND RECOVERY ACT (RCRA).                                  | 121,275                                                                                                                                                     | 117,468                                                                                                                                                                         | 25,000                                         |
| 42 U.S.C. 6928(c) .....                  | RCRA .....                                                                      | 73,045                                                                                                                                                      | 70,752                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 6928(g) .....                  | RCRA .....                                                                      | 90,702                                                                                                                                                      | 87,855                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 6928(h)(2) .....               | RCRA .....                                                                      | 73,045                                                                                                                                                      | 70,752                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 6934(e) .....                  | RCRA .....                                                                      | 18,139                                                                                                                                                      | 17,570                                                                                                                                                                          | 5,000                                          |
| 42 U.S.C. 6973(b) .....                  | RCRA .....                                                                      | 18,139                                                                                                                                                      | 17,570                                                                                                                                                                          | 5,000                                          |
| 42 U.S.C. 6991e(a)(3) .....              | RCRA .....                                                                      | 73,045                                                                                                                                                      | 70,752                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 6991e(d)(1) .....              | RCRA .....                                                                      | 29,221                                                                                                                                                      | 28,304                                                                                                                                                                          | 10,000                                         |
| 42 U.S.C. 6991e(d)(2) .....              | RCRA .....                                                                      | 29,221                                                                                                                                                      | 28,304                                                                                                                                                                          | 10,000                                         |
| 42 U.S.C. 7413(b) .....                  | CLEAN AIR ACT (CAA) .....                                                       | 121,275                                                                                                                                                     | 117,468                                                                                                                                                                         | 25,000                                         |
| 42 U.S.C. 7413(d)(1) .....               | CAA .....                                                                       | 57,617/460,926                                                                                                                                              | 55,808/446,456                                                                                                                                                                  | 25,000/200,000                                 |
| 42 U.S.C. 7413(d)(3) .....               | CAA .....                                                                       | 11,524                                                                                                                                                      | 11,162                                                                                                                                                                          | 5,000                                          |
| 42 U.S.C. 7524(a) .....                  | CAA .....                                                                       | 57,617/5,761                                                                                                                                                | 55,808/5,580                                                                                                                                                                    | 25,000/2,500                                   |
| 42 U.S.C. 7524(c)(1) .....               | CAA .....                                                                       | 460,926                                                                                                                                                     | 446,456                                                                                                                                                                         | 200,000                                        |
| 42 U.S.C. 7545(d)(1) .....               | CAA .....                                                                       | 57,617                                                                                                                                                      | 55,808                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 9604(e)(5)(B) .....            | COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA). | 69,733                                                                                                                                                      | 67,544                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 9606(b)(1) .....               | CERCLA .....                                                                    | 69,733                                                                                                                                                      | 67,544                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 9609(a)(1) .....               | CERCLA .....                                                                    | 69,733                                                                                                                                                      | 67,544                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 9609(b) .....                  | CERCLA .....                                                                    | 69,733/209,202                                                                                                                                              | 67,544/202,635                                                                                                                                                                  | 25,000/75,000                                  |
| 42 U.S.C. 9609(c) .....                  | CERCLA .....                                                                    | 69,733/209,202                                                                                                                                              | 67,544/202,635                                                                                                                                                                  | 25,000/75,000                                  |
| 42 U.S.C. 11045(a) .....                 | EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (EPCRA).                     | 69,733                                                                                                                                                      | 67,544                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 11045(b)(1)(A) .....           | EPCRA .....                                                                     | 69,733                                                                                                                                                      | 67,544                                                                                                                                                                          | 25,000                                         |

TABLE 1 OF § 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

| U.S. Code citation          | Environmental statute                                                           | Statutory civil monetary penalties for violations that occur or occurred after November 2, 2015, where penalties are assessed on or after December 27, 2023 | Statutory civil monetary penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after January 6, 2023, but before December 27, 2023 | Statutory civil monetary penalties, as enacted |
|-----------------------------|---------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------|
| 42 U.S.C. 11045(b)(2) ..... | EPCRA .....                                                                     | 69,733/209,202                                                                                                                                              | 67,544/202,635                                                                                                                                                                  | 25,000/75,000                                  |
| 42 U.S.C. 11045(b)(3) ..... | EPCRA .....                                                                     | 69,733/209,202                                                                                                                                              | 67,544/202,635                                                                                                                                                                  | 25,000/75,000                                  |
| 42 U.S.C. 11045(c)(1) ..... | EPCRA .....                                                                     | 69,733                                                                                                                                                      | 67,544                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 11045(c)(2) ..... | EPCRA .....                                                                     | 27,894                                                                                                                                                      | 27,018                                                                                                                                                                          | 10,000                                         |
| 42 U.S.C. 11045(d)(1) ..... | EPCRA .....                                                                     | 69,733                                                                                                                                                      | 67,544                                                                                                                                                                          | 25,000                                         |
| 42 U.S.C. 14304(a)(1) ..... | MERCURY-CONTAINING AND RE-CHARGEABLE BATTERY MANAGEMENT ACT (BATTERY ACT) ..... | 19,437                                                                                                                                                      | 18,827                                                                                                                                                                          | 10,000                                         |
| 42 U.S.C. 14304(g) .....    | BATTERY ACT .....                                                               | 19,437                                                                                                                                                      | 18,827                                                                                                                                                                          | 10,000                                         |

<sup>1</sup> Note that 7 U.S.C. 136(a)(2) contains three separate statutory maximum civil penalty provisions. The first mention of \$1,000 and the \$500 statutory maximum civil penalty amount were originally enacted in 1978 (Pub. L. 95–396), and the second mention of \$1,000 was enacted in 1972 (Pub. L. 92–516).

\* \* \* \*

[FR Doc. 2023–28555 Filed 12–26–23; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 660

[Docket No. 231219–0311]

RIN 0648–BM60

#### Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Pacific Coast Groundfish Fishery Management Plan; 2024 Specifications and Management Measures Corrections

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

**ACTION:** Final rule.

**SUMMARY:** This rule corrects 2024 harvest specifications for several species of groundfish where the numerical values were mathematically calculated incorrectly and do not accurately reflect the harvest policy recommendations of the Pacific Fishery Management Council (Council). These harvest specifications are for groundfish caught in the U.S. exclusive economic zone seaward of Washington, Oregon, and California, consistent with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Pacific Coast Groundfish Fishery Management Plan (PCGFMP). This rule revises harvest limits or allocations that were previously calculated based on incorrect annual catch limits (ACLs). This action implements corrected

numerical values that align with the Council's intended harvest policy decisions and considers the most recent fishery information available at the time those policies were recommended.

**DATES:** This final rule is effective December 27, 2023.

**ADDRESSES:** This rule is accessible via the internet at the Office of the Federal Register website at <https://www.federalregister.gov/>. Background information and documents including an analysis for the policy decisions underpinning this action (Analysis), which addresses the statutory requirements of the Magnuson-Stevens Act are available from the Council's website at <https://www.pcouncil.org/>. The final 2022 Stock Assessment and Fishery Evaluation (SAFE) report for Pacific Coast groundfish, as well as the SAFE reports for previous years, are available from the Council's website at <https://www.pcouncil.org/>. The final Environmental Assessment (EA) and Regulatory Impact Review from the 2023–2024 harvest specifications is available from the NMFS website at <https://www.fisheries.noaa.gov/region/west-coast>.

**FOR FURTHER INFORMATION CONTACT:** Gretchen Hanshew, Fishery Management Specialist, at 206–526–6147 or [gretchen.hanshew@noaa.gov](mailto:gretchen.hanshew@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

This final rule corrects the numerical values of harvest specifications and resulting harvest target management measures for six species or stock complexes for 2024. The harvest policies by which these numerical values are derived were recommended by the Council at its April and June 2022 meetings and published in a proposed rule on October 14, 2022 (87 FR 62676) and final rule on December

16, 2022 (87 FR 77007). Hereafter, these proposed and final rules for the 2023–2024 harvest specifications and management measures will be referred to as the “original” proposed and final rules. In the original proposed and final rules, numerical values were miscalculated for a small subset (six species or stock complexes) of those harvest specifications and harvest target management measures regulations for 127 groundfish stocks or management units. Numerical values were either too high (increasing risk of overfishing) or too low (increasing risk of not achieving optimum yield). Specific details on the errors and corrected values for each species or stock complex are discussed in detail in the proposed rule for this action (88 FR 73810, October 27, 2023).

The harvest policies used to calculate the numerical values of the corrected harvest specifications and harvest target management measures in this rule are not revised from those described in the original proposed and final rules for the 2023–2024 harvest specifications and management measures. The Council recommended these corrections at its September 2023 meeting.

#### Corrections to Harvest Specifications and Harvest Targets

As described in the proposed rule (88 FR 73810, October 27, 2023) a few species and stock complex harvest specifications, which are numerical values of the harvestable surplus and include overfishing limits (OFLs), annual biological catch (ABCs), and ACLs, were calculated in error. Subsequent harvest target calculations that stem from the ACLs were also erroneous. This final rule corrects the numerical values of harvest specifications and applies the same sharing agreements to corrected ACLs to recalculate harvest targets. The OFLs,

ABCs, and ACLs in this rule are based on the best available biological data, including projected biomass trends, information on assumed distribution of stock biomass, and technical methods used to calculate stock biomass and apportion that biomass within the allocation structure of the PCGFMP. This rule corrects errors in the original proposed and final rules for the 2023–2024 harvest specifications and management measures, as recommended by the Council at its September 7–14, 2023 meeting.

Due to the timing of being made aware of these mistakes, and that the 2023 fishing season was more than 75 percent complete by the time the Council considered this issue at its September 2023 meeting, we are only implementing corrections for 2024. This action includes correctly calculated numerical values for 2024 that are representative of the Council-

recommended harvest control rules and that incorporate fishery and other scientific information that was inadvertently omitted. This action does not revise static numerical values deducted from the ACLs, such as set-asides for tribal fisheries or scientific research, except for sablefish north as described in the proposed rule (88 FR 73810, October 27, 2023). All other deductions from the ACLs remain the same as those described in the original proposed rule.

The Stock Assessment and Fishery Evaluation (SAFE) document for 2022, includes a detailed description of the scientific basis for all of the Council's Science and Statistical Committee-recommended OFLs implemented in this rule, and is available at the Council's website, <https://www.pcouncil.org>.

For all species described in the proposed rule (88 FR 73810, October 27, 2023), revised 2024 OFLs, ABCs, ACLs

and fishery harvest guidelines are revised at table 2a to subpart C, and in some cases other necessary adjustments to numerical harvest target management measures in footnotes to that table are also revised. For all species described below, except sablefish north, 2024 trawl or non-trawl allocations are revised at table 2b to subpart C. Also, for all species described in the proposed rule, 2024 shorebased IFQ allocations are revised at § 660.140(d)(1)(ii)(D). Any additional species-specific regulatory changes are described in the proposed rule (88 FR 73810, October 27, 2023).

### Summary

NMFS is correcting the harvest specifications and harvest targets for six species and complexes for 2024 as described in the proposed rule (88 FR 73810, October 27, 2023) and as summarized in table 1. The 2024 fishing season begins on January 1, 2024.

TABLE 1—PROPOSED REVISED 2024 OFLs, ABCs, ACLs, AND FISHERY HARVEST GUIDELINES (HGs) FOR 6 SPECIES OR COMPLEXES

| Stock/complex                    | Area                    | OFL (mt)            | ABC (mt)           | ACL (mt) | Fishery HG (mt)             |
|----------------------------------|-------------------------|---------------------|--------------------|----------|-----------------------------|
| YELLOW EYE ROCKFISH .....        | Coastwide .....         | 91.2                | 75.9               | 53.3     | 42.6                        |
| Canary Rockfish .....            | Coastwide .....         | 1,434               | 1,296              | 1,296    | 1,227.4                     |
| Darkblotched Rockfish .....      | Coastwide .....         | 857                 | 782                | 782      | 758.7                       |
| Sablefish .....                  | N of 36° N lat .....    | <sup>1</sup> 10,670 | <sup>1</sup> 9,923 | 7,730    | Not Applicable <sup>2</sup> |
|                                  | S of 36° N lat .....    |                     |                    | 2,193    | 2,165.6                     |
| Yellowtail Rockfish .....        | N of 40°10' N lat ..... | 5,795               | 5,291              | 5,291    | 4,263.3                     |
| Minor Shelf Rockfish South ..... | S of 40°10' N lat ..... | 1,833               | 1,464              | 1,464    | 1,331.4                     |

**Note:** Rebuilding stocks are capitalized.

<sup>1</sup> Values are the same as those in the 2023–2024 original proposed and final rules and are not revised in this final rule.

<sup>2</sup> Sablefish north of 36° N lat. has a different long-term allocation framework in the PCGFMP than the other species in this rule. Numerical values following this framework under the new, lower, proposed ACL are found in table 2c to subpart C.

### Comments and Responses

The proposed rule had a public comment period open from October 27, 2023 through November 13, 2023 and received no public comments.

### Changes From the Proposed Rule

There are 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 PCGFMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

The errors were discovered in August 2023 and the recommendations from the Council to correct these errors were transmitted to NMFS on September 20, 2023. NMFS immediately prepared and published a proposed rule with a comment period open from the date of

publication on October 27, 2023 through November 13, 2023, the final rule was submitted to DOC OGC for review and clearance on December 12, 2023, and the errors need to be corrected by the start of the fishing year on January 1, 2024. This timeline necessitates that NMFS waive the 30-day delay in effective date of this final rule so that the corrected, calculated values can be in effect by the start of the fishing year. Failure to implement the revised harvest specifications as soon as possible leaves harvest specifications in place that are inconsistent with the best scientific information available and the Council's recommended harvest policies and would cause unnecessary restrictions to industry.

Therefore, NMFS finds that waiving the 30-day delay in effectiveness is warranted under 5 U.S.C. 553(d)(1) because delaying the effective date on these corrective measures beyond January 1, 2024 to allow for a 30-day

delay in effectiveness will restrict fisheries by delaying the issuance of some 2024 quota pounds for the subject species and stock complexes. If the 2024 quotas calculated and released by NMFS based on the corrected 2024 harvest specifications in this rule are delayed, shareholders for those quotas effectively receive zero pounds for the start of the year and will be unable to begin fishing. Making this final rule effective upon publication in the **Federal Register** would relieve restrictions on the amounts of quota pounds that can be issued (and potentially fished) at the start of the fishing year. Therefore, NMFS finds reason to waive the 30-day delay in effectiveness pursuant to 5 U.S.C. 553(d)(1) so that this final rule may become effective upon publication in the **Federal Register**.

Additionally, a 30-day delay in effectiveness would confuse the industry as to what quota pounds NMFS will issue to holders of quota share for

2024. This could negatively impact vessels because they could end up planning fishing operations under two different quota pound scenarios for 2024. Failure to implement the revised harvest specifications by the start of the fishing year on January 1, 2024 will keep harvest specifications in place that were not calculated to be consistent with harvest policies adopted by the Council and NMFS, and will cause confusion for the regulated public. This outcome runs contrary to the public interest.

Pursuant to Executive Order 13175, this final rule was developed after meaningful consultation and collaboration with tribal officials from the area covered by the PCGFMP. Under the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council must be a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction. This rule revises the numerical values of the sablefish north ACL to correctly apply the harvest control rules recommended by the Council. As a result, the regulations that implement the long-term allocation and sharing agreements for sablefish north in the PCGFMP, including the numerical calculation of the 10 percent tribal share, must be recalculated and revised in this rule. No other tribal management measures are revised in this rule. The regulations at 50 CFR 660.50 direct NMFS to develop tribal allocations and regulations in consultation with the affected tribes. In this instance, no change to harvest policies was proposed, and therefore additional tribal consultation was not required and none was conducted.

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

NMFS prepared documentation for the original proposed and final rules, which address the statutory requirements of the Magnuson-Stevens Act, Executive Order 12866, and the Regulatory Flexibility Act. The full suite of alternatives analyzed by the Council can be found on the Council's website at <https://www.pcouncil.org>. NMFS addressed the statutory requirements of the National Environmental Policy Act through preparation of an environmental impact statement (EIS). NMFS prepared an EIS for the 2015–2016 biennial harvest specifications and management measures and is available from NMFS (see ADDRESSES) and tiered

environmental analyses (EA) every biennium since then. This EIS and subsequent EAs examined the harvest specifications and management measures for 2015–2016 and 10-year projections for routinely adjusted harvest specifications and management measures. The 10-year projections evaluated the impacts of the ongoing implementation of harvest specifications and management measures and to evaluate the impacts of the routine adjustments that are the main component of each biennial cycle. This final rule corrects the numerical values that result from the application of best scientific information available and default harvest control rules analyzed in that EIS. There are no environmental effects expected from this rule beyond those evaluated in the EIS and the Environmental Assessment for the 2023–2024 harvest specifications and management measures. The harvest levels for all six species or complexes have not been fully attained in recent years, so minor adjustments to the ACLs implemented in this rule are likely to result in no discernable difference to the fishery or communities.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that the 2023–2024 harvest specifications and management measures in the original proposed and final rules would not have a significant economic impact on a substantial number of small entities. The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. This final rule implements the proposed rule unchanged, making minor, corrective adjustments to harvest specifications and related allocations and harvest targets that are unlikely to make any appreciable difference to the expected harvests in this mixed-stock fishery because the six species and complexes with corrected numerical values are not constraining access to co-occurring species. This action affects only a small number of species, and in a mixed stock fishery the affected entities for these few species cannot be differentiated from those described in the original proposed rule. The same small entities identified in the original proposed rule are the same parties that would be subject to the minor regulatory

corrections in this rule. Additional information about the affected entities and expected impacts, in the context of the entire fishery and all species, can be found in the original proposed rule (87 FR 62676, October, 14, 2022). No environmental or socioeconomic impacts are expected from the changes in this rule, nor does the action diverge from the harvest policies considered in that certification. The corrections in this final rule do not change the overall framework and management measures from the original proposed and final rules and would affect large and small entities similarly. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

This rule contains no new information collection burden under the Paperwork Reduction Act of 1995.

#### List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: December 19, 2023.

**Samuel D. Rauch, III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out in the preamble, NOAA amends 50 CFR part 660 as follows:

#### PART 660—FISHERIES OFF WEST COAST STATES

- 1. The authority citation for part 660 continues to read as follows:

**Authority:** 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 773 *et seq.*, and 16 U.S.C. 7001 *et seq.*

- 2. In § 660.50, revise paragraph (f)(2)(ii) to read as follows:

##### § 660.50 Pacific Coast treaty Indian fisheries.

\* \* \* \* \*

(f) \* \* \*

(2) \* \* \*

(ii) The Tribal allocation is 849 mt in 2023 and 773 mt in 2024 per year. This allocation is, for each year, 10 percent of the Monterey through Vancouver area (North of 36° N lat.) ACL. The Tribal allocation is reduced by 1.7 percent for estimated discard mortality.

\* \* \* \* \*

- 3. Revise tables 2a, 2b, and 2c to subpart C to read as follows:

**Table 2a. to Part 660, Subpart C—2024, and Beyond, Specifications of OFL, ABC, ACL, ACT and Fishery Harvest Guidelines**

TABLE 2a. TO PART 660, SUBPART C—2024, AND BEYOND, SPECIFICATIONS OF OFL, ABC, ACL, ACT AND FISHERY HARVEST GUIDELINES

[(Weights in metric tons). Capitalized stocks are overfished.]

| Stocks                               | Area                            | OFL    | ABC    | ACL <sup>a</sup> | Fishery HG <sup>b</sup> |
|--------------------------------------|---------------------------------|--------|--------|------------------|-------------------------|
| YELLOW EYE ROCKFISH <sup>c</sup>     | Coastwide                       | 91     | 76     | 53.3             | 42.6                    |
| Arrowtooth Flounder <sup>d</sup>     | Coastwide                       | 20,459 | 14,178 | 14,178           | 12,083                  |
| Big Skate <sup>e</sup>               | Coastwide                       | 1,492  | 1,267  | 1,267            | 1,207.2                 |
| Black Rockfish <sup>f</sup>          | California (S of 42° N lat.)    | 364    | 329    | 329              | 326.6                   |
| Black Rockfish <sup>g</sup>          | Washington (N of 46°16' N lat.) | 319    | 289    | 289              | 270.5                   |
| Bocaccio <sup>h</sup>                | S of 40°10' N lat               | 2,002  | 1,828  | 1,828            | 1,779.9                 |
| Cabazon <sup>i</sup>                 | California (S of 42° N lat.)    | 185    | 171    | 171              | 169.4                   |
| California Scorpionfish <sup>j</sup> | S of 34°27' N lat               | 280    | 252    | 252              | 248                     |
| Canary Rockfish <sup>k</sup>         | Coastwide                       | 1,434  | 1,296  | 1,296            | 1,227.4                 |
| Chilipepper <sup>l</sup>             | S of 40°10' N lat               | 2,346  | 2,121  | 2,121            | 2,023.4                 |
| Cowcod <sup>m</sup>                  | S of 40°10' N lat               | 112    | 79     | 79               | 67.8                    |
| Cowcod                               | (Conception)                    | 93     | 67     | NA               | NA                      |
| Cowcod                               | (Monterey)                      | 19     | 12     | NA               | NA                      |
| Darkblotched Rockfish <sup>n</sup>   | Coastwide                       | 857    | 782    | 782              | 758.7                   |
| Dover Sole <sup>o</sup>              | Coastwide                       | 55,859 | 51,949 | 50,000           | 48,402.9                |
| English Sole <sup>p</sup>            | Coastwide                       | 11,158 | 8,960  | 8,960            | 8,700.5                 |
| Lingcod <sup>q</sup>                 | N of 40°10' N lat               | 4,455  | 3,854  | 3,854            | 3,574.4                 |
| Lingcod <sup>r</sup>                 | S of 40°10' N lat               | 855    | 740    | 722              | 706.5                   |
| Longnose Skate <sup>s</sup>          | Coastwide                       | 1,955  | 1,660  | 1,660            | 1,408.7                 |
| Longspine Thornyhead <sup>t</sup>    | N of 34°27' N lat               | 4,433  | 2,846  | 2,162            | 2,108.3                 |
| Longspine Thornyhead <sup>u</sup>    | S of 34°27' N lat               |        |        | 683              | 680.8                   |
| Pacific Cod <sup>v</sup>             | Coastwide                       | 3,200  | 1,926  | 1,600            | 1,094                   |
| Pacific Ocean Perch <sup>w</sup>     | N of 40°10' N lat               | 4,133  | 3,443  | 3,443            | 3,297.5                 |
| Pacific Whiting <sup>x</sup>         | Coastwide                       | (x)    | (x)    | (x)              | (x)                     |
| Petrale Sole <sup>y</sup>            | Coastwide                       | 3,563  | 3,285  | 3,285            | 2,898.8                 |
| Sablefish <sup>z</sup>               | N of 36° N lat                  | 10,670 | 9,923  | 7,730            | See table 2c            |
| Sablefish <sup>aa</sup>              | S of 36° N lat                  |        |        | 2,193            | 2,165.6                 |
| Shortspine Thornyhead <sup>bb</sup>  | N of 34°27' N lat               | 3,162  | 2,030  | 1,328            | 1,249.7                 |
| Shortspine Thornyhead <sup>cc</sup>  | S of 34°27' N lat               |        |        | 702              | 695.3                   |
| Spiny Dogfish <sup>dd</sup>          | Coastwide                       | 1,883  | 1,407  | 1,407            | 1,055.5                 |
| Splitnose <sup>ee</sup>              | S of 40°10' N lat               | 1,766  | 1,553  | 1,553            | 1,534.3                 |
| Starry Flounder <sup>ff</sup>        | Coastwide                       | 652    | 392    | 392              | 343.7                   |
| Widow Rockfish <sup>gg</sup>         | Coastwide                       | 12,453 | 11,482 | 11,482           | 11,243.7                |
| Yellowtail Rockfish <sup>hh</sup>    | N of 40°10' N lat               | 5,795  | 5,291  | 5,291            | 4,263.3                 |

## Stock Complexes

|                                          |                   |       |       |       |         |
|------------------------------------------|-------------------|-------|-------|-------|---------|
| Blue/Deacon/Black Rockfish <sup>ii</sup> | Oregon            | 671   | 594   | 594   | 592.2   |
| Cabazon/Kelp Greenling <sup>jj</sup>     | Washington        | 22    | 17    | 17    | 15      |
| Cabazon/Kelp Greenling <sup>kk</sup>     | Oregon            | 198   | 180   | 180   | 179.2   |
| Nearshore Rockfish North <sup>ll</sup>   | N of 40°10' N lat | 109   | 91    | 91    | 87.7    |
| Nearshore Rockfish South <sup>mm</sup>   | S of 40°10' N lat | 1,097 | 902   | 891   | 886.5   |
| Other Fish <sup>nn</sup>                 | Coastwide         | 286   | 223   | 223   | 201.8   |
| Other Flatfish <sup>oo</sup>             | Coastwide         | 7,946 | 4,874 | 4,874 | 4,653.2 |
| Shelf Rockfish North <sup>pp</sup>       | N of 40°10' N lat | 1,610 | 1,278 | 1,278 | 1,207   |
| Shelf Rockfish South <sup>qq</sup>       | S of 40°10' N lat | 1,833 | 1,464 | 1,464 | 1,331.4 |
| Slope Rockfish North <sup>rr</sup>       | N of 40°10' N lat | 1,797 | 1,516 | 1,516 | 1,450.6 |
| Slope Rockfish South <sup>ss</sup>       | S of 40°10' N lat | 868   | 697   | 697   | 658.1   |

<sup>a</sup> Annual catch limits (ACLs), annual catch targets (ACTs) and harvest guidelines (HGs) are specified as total catch values.<sup>b</sup> Fishery HGs means the HG or quota after subtracting Pacific Coast treaty Indian tribes allocations and projected catch, projected research catch, deductions for fishing mortality in non-groundfish fisheries, and deductions for EFPs from the ACL or ACT.<sup>c</sup> Yelloweye rockfish. The 53.3 mt ACL is based on the current rebuilding plan with a target year to rebuild of 2029 and an SPR harvest rate of 65 percent. 10.7 mt is deducted from the ACL to accommodate the Tribal fishery (5 mt), EFP fishing (0.12 mt), research catch (2.92 mt), and incidental open access mortality (2.66 mt) resulting in a fishery HG of 42.6 mt. The non-trawl HG is 39.2 mt. The combined non-nearshore/nearshore HG is 8.2 mt. Recreational HGs are: 10 mt (Washington); 9.1 mt (Oregon); and 11.8 mt (California). In addition, the non-trawl ACT is 30.7, and the combined non-nearshore/nearshore ACT is 6.4 mt. Recreational ACTs are: 7.9 mt (Washington), 7.2 (Oregon), and 9.3 mt (California).<sup>d</sup> Arrowtooth flounder. 2,094.98 mt is deducted from the ACL to accommodate the Tribal fishery (2,041 mt), research catch (12.98 mt) and incidental open access mortality (41 mt), resulting in a fishery HG of 12,083 mt.<sup>e</sup> Big skate. 59.8 mt is deducted from the ACL to accommodate the Tribal fishery (15 mt), research catch (5.49 mt), and incidental open access mortality (39.31 mt), resulting in a fishery HG of 1,207.2 mt.<sup>f</sup> Black rockfish (California). 2.26 mt is deducted from the ACL to accommodate EFP fishing (1.0 mt), research catch (0.08 mt), and incidental open access mortality (1.18 mt), resulting in a fishery HG of 326.6 mt.<sup>g</sup> Black rockfish (Washington). 18.1 mt is deducted from the ACL to accommodate the Tribal fishery (18 mt) and research catch (0.1 mt), resulting in a fishery HG of 270.5 mt.<sup>h</sup> Bocaccio south of 40°10' N lat. Bocaccio are managed with stock-specific harvest specifications south of 40°10' N lat. and within the Minor Shelf Rockfish complex north of 40°10' N lat. 48.12 mt is deducted from the ACL to accommodate EFP fishing (40 mt), research catch (5.6 mt), and incidental open access mortality (2.52 mt), resulting in a fishery HG of 1,779.9 mt. The California recreational fishery south of 40°10' N lat. has an HG of 749.7 mt.<sup>i</sup> Cabazon (California). 1.63 mt is deducted from the ACL to accommodate EFP fishing (1 mt), research catch (0.02 mt), and incidental open access mortality (0.61 mt), resulting in a fishery HG of 169.4 mt.<sup>j</sup> California scorpionfish south of 34°27' N lat. 3.89 mt is deducted from the ACL to accommodate research catch (0.18 mt) and incidental open access mortality (3.71 mt), resulting in a fishery HG of 248 mt.

<sup>k</sup>Canary rockfish. 68.91 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), EFP fishing (6 mt), research catch (10.08 mt), and incidental open access mortality (2.83 mt), resulting in a fishery HG of 1,227.4 mt. The combined nearshore/non-nearshore HG is 122.4 mt. Recreational HGs are: 41.8 mt (Washington); 62.9 mt (Oregon); and 112.9 mt (California).

<sup>l</sup>Chilipepper rockfish south of 40°10' N lat. Chilipepper are managed with stock-specific harvest specifications south of 40°10' N lat. and within the Minor Shelf Rockfish complex north of 40°10' N lat. 97.7 mt is deducted from the ACL to accommodate EFP fishing (70 mt), research catch (14.04 mt), incidental open access mortality (13.66 mt), resulting in a fishery HG of 2,023.4 mt.

<sup>m</sup>Cowcod south of 40°10' N lat. Cowcod are managed with stock-specific harvest specifications south of 40°10' N lat. and within the Minor Shelf Rockfish complex north of 40°10' N lat. 11.17 mt is deducted from the ACL to accommodate EFP fishing (1 mt), research catch (10 mt), and incidental open access mortality (0.17 mt), resulting in a fishery HG of 67.8 mt.

<sup>n</sup>Darkblotched rockfish. 23.76 mt is deducted from the ACL to accommodate the Tribal fishery (5 mt), EFP fishing (0.5 mt), research catch (8.46 mt), and incidental open access mortality (9.8 mt) resulting in a fishery HG of 758.7 mt.

<sup>o</sup>Dover sole. 1,597.11 mt is deducted from the ACL to accommodate the Tribal fishery (1,497 mt), research catch (50.84 mt), and incidental open access mortality (49.27 mt), resulting in a fishery HG of 48,402.9 mt.

<sup>p</sup>English sole. 259.52 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), research catch (17 mt), and incidental open access mortality (42.52 mt), resulting in a fishery HG of 8,700.5 mt.

<sup>q</sup>Lingcod north of 40°10' N lat. 279.63 mt is deducted from the ACL for the Tribal fishery (250 mt), research catch (17.71 mt), and incidental open access mortality (11.92 mt) resulting in a fishery HG of 3,574.4 mt.

<sup>r</sup>Lingcod south of 40°10' N lat. 15.5 mt is deducted from the ACL to accommodate EFP fishing (4 mt), research catch (3.19 mt), and incidental open access mortality (8.31 mt), resulting in a fishery HG of 706.5 mt.

<sup>s</sup>Longnose skate. 251.3 mt is deducted from the ACL to accommodate the Tribal fishery (220 mt), and research catch (12.46 mt), and incidental open access mortality (18.84 mt), resulting in a fishery HG of 1,408.7 mt.

<sup>t</sup>Longspine thornyhead north of 34°27' N lat. 53.71 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), research catch (17.49 mt), and incidental open access mortality (6.22 mt), resulting in a fishery HG of 2,108.3 mt.

<sup>u</sup>Longspine thornyhead south of 34°27' N lat. 2.24 mt is deducted from the ACL to accommodate research catch (1.41 mt) and incidental open access mortality (0.83 mt), resulting in a fishery HG of 680.8 mt.

<sup>v</sup>Pacific cod. 506 mt is deducted from the ACL to accommodate the Tribal fishery (500 mt), research catch (5.47 mt), and incidental open access mortality (0.53 mt), resulting in a fishery HG of 1,094 mt.

<sup>w</sup>Pacific ocean perch north of 40°10' N lat. Pacific ocean perch are managed with stock-specific harvest specifications north of 40°10' N lat. and within the Minor Slope Rockfish complex south of 40°10' N lat. 145.48 mt is deducted from the ACL to accommodate the Tribal fishery (130 mt), EFP fishing, research catch (5.39 mt), and incidental open access mortality (10.09 mt), resulting in a fishery HG of 3,297.5 mt.

<sup>x</sup>Pacific whiting. Pacific whiting are assessed annually. The final specifications will be determined consistent with the U.S.-Canada Pacific Whiting Agreement and will be announced in 2024.

<sup>y</sup>Petrale sole. 386.24 mt is deducted from the ACL to accommodate the Tribal fishery (350 mt), EFP fishing (1 mt), research catch (24.14 mt), and incidental open access mortality (11.1 mt), resulting in a fishery HG of 2,898.8 mt.

<sup>z</sup>Sablefish north of 36° N lat. The sablefish coastwide ACL value is not specified in regulations. The sablefish coastwide ACL value is apportioned north and south of 36° N lat., using the rolling 5-year average estimated swept area biomass from the NMFS NWFSC trawl survey, with 77.9 percent apportioned north of 36° N lat. and 22.1 percent apportioned south of 36° N lat. The northern ACL is 7,730 mt and is reduced by 773 mt for the Tribal allocation (10 percent of the ACL north of 36° N lat.). The 773 mt Tribal allocation is reduced by 1.7 percent to account for discard mortality. Detailed sablefish allocations are shown in table 1c.

<sup>aa</sup>Sablefish south of 36° N lat. The ACL for the area south of 36° N lat. is 2,193 mt (22.1 percent of the calculated coastwide ACL value). 27.4 mt is deducted from the ACL to accommodate research catch (2.40 mt) and the incidental open access fishery (25 mt), resulting in a fishery HG of 2,165.6 mt.

<sup>bb</sup>Shortspine thornyhead north of 34°27' N lat. 78.3 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), research catch (10.48 mt), and incidental open access mortality (17.82 mt), resulting in a fishery HG of 1,249.7 mt for the area north of 34°27' N lat.

<sup>cc</sup>Shortspine thornyhead south of 34°27' N lat. 6.71 mt is deducted from the ACL to accommodate research catch (0.71 mt) and incidental open access mortality (6 mt), resulting in a fishery HG of 695.3 mt for the area south of 34°27' N lat.

<sup>dd</sup>Spiny dogfish. 351.48 mt is deducted from the ACL to accommodate the Tribal fishery (275 mt), EFP fishing (1 mt), research catch (41.85 mt), and incidental open access mortality (33.63 mt), resulting in a fishery HG of 1,055.5 mt.

<sup>ee</sup>Splitnose rockfish south of 40°10' N lat. Splitnose rockfish in the north is managed in the Slope Rockfish complex and with stock-specific harvest specifications south of 40°10' N lat. 18.42 mt is deducted from the ACL to accommodate EFP fishing (1.5 mt), research catch (11.17 mt), and incidental open access mortality (5.75 mt), resulting in a fishery HG of 1,534.3 mt.

<sup>ff</sup>Starry flounder. 48.28 mt is deducted from the ACL to accommodate the Tribal fishery (2 mt), research catch (0.57 mt), and incidental open access mortality (45.71 mt), resulting in a fishery HG of 343.7 mt.

<sup>gg</sup>Widow rockfish. 238.32 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), EFP fishing (18 mt), research catch (17.27 mt), and incidental open access mortality (3.05 mt), resulting in a fishery HG of 11,243.7 mt.

<sup>hh</sup>Yellowtail rockfish north of 40°10' N lat. Yellowtail rockfish are managed with stock-specific harvest specifications north of 40°10' N lat. and within the Minor Shelf Rockfish complex south of 40°10' N lat. 1,027.55 mt is deducted from the ACL to accommodate the Tribal fishery (1,000 mt), research catch (20.55 mt), and incidental open access mortality (7 mt), resulting in a fishery HG of 4,263.3 mt.

<sup>ii</sup>Black rockfish/Blue rockfish/Deacon rockfish (Oregon). 1.82 mt is deducted from the ACL to accommodate research catch (0.08 mt), and incidental open access mortality (1.74 mt), resulting in a fishery HG of 592.2 mt.

<sup>jj</sup>Cabazon/kelp greenling (Washington). 2 mt is deducted from the ACL to accommodate the Tribal fishery, resulting in a fishery HG is 15 mt.

<sup>kk</sup>Cabazon/kelp greenling (Oregon). 0.79 mt is deducted from the ACL to accommodate research catch (0.05 mt) and incidental open access mortality (0.74 mt), resulting in a fishery HG of 179.2 mt.

<sup>ll</sup>Nearshore Rockfish north of 40°10' N lat. 3.27 mt is deducted from the ACL to accommodate the Tribal fishery (1.5 mt), research catch (0.47 mt), and incidental open access mortality (1.31 mt), resulting in a fishery HG of 87.7 mt. State-specific HGs are 17.2 mt (Washington), 30.9 mt (Oregon), and 39.9 mt (California). The ACT for copper rockfish (California) is 6.99 mt. The ACT for quillback rockfish (California) is 0.96 mt.

<sup>mm</sup>Nearshore Rockfish south of 40°10' N lat. 4.54 mt is deducted from the ACL to accommodate research catch (2.68 mt) and incidental open access mortality (1.86 mt), resulting in a fishery HG of 886.5 mt. The ACT for copper rockfish is 87.73 mt. The ACT for quillback rockfish is 0.97 mt.

<sup>nn</sup>Other Fish. The Other Fish complex is comprised of kelp greenling off California and leopard shark coastwide. 21.24 mt is deducted from the ACL to accommodate research catch (6.29 mt) and incidental open access mortality (14.95 mt), resulting in a fishery HG of 201.8 mt.

<sup>oo</sup>Other Flatfish. The Other Flatfish complex is comprised of flatfish species managed in the PCGFMP that are not managed with stock-specific OFLs/ABCs/ACLs. Most of the species in the Other Flatfish complex are unassessed and include: butter sole, curfin sole, flathead sole, Pacific sanddab, rock sole, sand sole, and rex sole. 220.79 mt is deducted from the ACL to accommodate the Tribal fishery (60 mt), research catch (23.63 mt), and incidental open access mortality (137.16 mt), resulting in a fishery HG of 4,653.2 mt.

<sup>pp</sup>Shelf Rockfish north of 40°10' N lat. 70.94 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), research catch (15.32 mt), and incidental open access mortality (25.62 mt), resulting in a fishery HG of 1,207.1 mt.

<sup>qq</sup>Shelf Rockfish south of 40°10' N lat. 132.77 mt is deducted from the ACL to accommodate EFP fishing (50 mt), research catch (15.1 mt), and incidental open access mortality (67.67 mt) resulting in a fishery HG of 1,331.4 mt.

<sup>rr</sup>Slope Rockfish north of 40°10' N lat. 65.39 mt is deducted from the ACL to accommodate the Tribal fishery (36 mt), research catch (10.51 mt), and incidental open access mortality (18.88 mt), resulting in a fishery HG of 1,450.6 mt.

<sup>ss</sup>Slope Rockfish south of 40°10' N lat. 38.94 mt is deducted from the ACL to accommodate EFP fishing (1 mt), research catch (18.21 mt), and incidental open access mortality (19.73 mt), resulting in a fishery HG of 658.1 mt. Blackgill rockfish has a stock-specific HG for the entire groundfish fishery south of 40°10' N lat. set equal to the species' contribution to the 40–10-adjusted ACL. Harvest of blackgill rockfish in all groundfish fisheries south of 40°10' N lat. counts against this HG of 169.9 mt.

**Table 2b to Part 660, Subpart C—2024, and Beyond, Allocations by Species or Species Group****TABLE 2b. TO PART 660, SUBPART C—2024, AND BEYOND, ALLOCATIONS BY SPECIES OR SPECIES GROUP**  
[Weight in metric tons]

| Stocks/stock complexes           | Area              | Fishery HG or ACT | Trawl        |          | Non-Trawl |         |
|----------------------------------|-------------------|-------------------|--------------|----------|-----------|---------|
|                                  |                   |                   | %            | Mt       | %         | Mt      |
| YELLOW EYE ROCKFISH <sup>a</sup> | Coastwide         | 42.6              | 8            | 3.41     | 92        | 39.2    |
| Arrowtooth flounder              | Coastwide         | 12,083            | 95           | 11,478.9 | 5         | 604.2   |
| Big skate <sup>a</sup>           | Coastwide         | 1,207.2           | 95           | 1,146.8  | 5         | 60.4    |
| Bocaccio <sup>a</sup>            | S of 40°10' N lat | 1,779.9           | 39.04        | 694.9    | 60.96     | 1,085   |
| Canary rockfish <sup>a</sup>     | Coastwide         | 1,227.4           | 72.3         | 887.4    | 27.7      | 340     |
| Chilipepper rockfish             | S of 40°10' N lat | 2,023.4           | 75           | 1,517.6  | 25        | 505.9   |
| Cowcod <sup>a b</sup>            | S of 40°10' N lat | 67.8              | 36           | 24.4     | 64        | 43.4    |
| Darkblotched rockfish            | Coastwide         | 758.7             | 95           | 720.8    | 5         | 37.9    |
| Dover sole                       | Coastwide         | 4,8402.9          | 95           | 45,982.7 | 5         | 2,420.1 |
| English sole                     | Coastwide         | 8,700.5           | 95           | 8265.5   | 5         | 435     |
| Lingcod                          | N of 40°10' N lat | 3,574.4           | 45           | 1,608.5  | 55        | 1,965.9 |
| Lingcod <sup>a</sup>             | S of 40°10' N lat | 706.5             | 40           | 282.6    | 60        | 423.9   |
| Longnose skate <sup>a</sup>      | Coastwide         | 1,408.7           | 90           | 1,267.8  | 10        | 140.9   |
| Longspine thornyhead             | N of 34°27' N lat | 2,108.3           | 95           | 2,002.9  | 5         | 105.4   |
| Pacific cod                      | Coastwide         | 1,094             | 95           | 1,039.3  | 5         | 54.7    |
| Pacific ocean perch              | N of 40°10' N lat | 3,297.5           | 95           | 3,132.6  | 5         | 164.9   |
| Pacific whiting <sup>c</sup>     | Coastwide         | TBD               | 100          | TBD      | 0         | 0       |
| Petrale sole <sup>a</sup>        | Coastwide         | 2898.8            | .....        | 2,868.8  | .....     | 30      |
| Sablefish                        | N of 36° N lat    | NA                | See table 2c |          |           |         |
| Sablefish                        | S of 36° N lat    | 2,165.6           | 42           | 909.6    | 58        | 1,256.0 |
| Shortspine thornyhead            | N of 34°27' N lat | 1,249.7           | 95           | 1,187.2  | 5         | 62.5    |
| Shortspine thornyhead            | S of 34°27' N lat | 695.3             | .....        | 50       | .....     | 645.3   |
| Splitnose rockfish               | S of 40°10' N lat | 1,534.3           | 95           | 1,457.6  | 5         | 76.7    |
| Starry flounder                  | Coastwide         | 343.7             | 50           | 171.9    | 50        | 171.9   |
| Widow rockfish <sup>a</sup>      | Coastwide         | 11,243.7          | .....        | 10,843.7 | .....     | 400     |
| Yellowtail rockfish              | N of 40°10' N lat | 4,263.3           | 88           | 3,751.7  | 12        | 511.6   |
| Other Flatfish                   | Coastwide         | 4,653.2           | 90           | 4,187.9  | 10        | 465.3   |
| Shelf Rockfish <sup>a</sup>      | N of 40°10' N lat | 1,207.1           | 60.2         | 726.7    | 39.8      | 480.4   |
| Shelf Rockfish <sup>a</sup>      | S of 40°10' N lat | 1,331.4           | 12.2         | 162.43   | 87.8      | 1,169.0 |
| Slope Rockfish                   | N of 40°10' N lat | 1,450.6           | 81           | 1,175.0  | 19        | 275.6   |
| Slope Rockfish <sup>a</sup>      | S of 40°10' N lat | 658.1             | 63           | 414.6    | 37        | 243.5   |

<sup>a</sup> Allocations decided through the biennial specification process.<sup>b</sup> The cowcod non-trawl allocation is further split 50:50 between the commercial and recreational sectors. This results in a sector-specific ACT of 21.7 mt for the commercial sector and 21.7 mt for the recreational sector.<sup>c</sup> Consistent with regulations at § 660.55(i)(2), the commercial harvest guideline for Pacific whiting is allocated as follows: 34 percent for the C/P Coop Program; 24 percent for the MS Coop Program; and 42 percent for the Shorebased IFQ Program. No more than 5 percent of the Shorebased IFQ Program allocation may be taken and retained south of 42° N lat. before the start of the primary Pacific whiting season north of 42° N lat.**Table 2c to Part 660, Subpart C—Sablefish North of 36° N Lat. Allocations, 2024 and Beyond****TABLE 2c. TO PART 660, SUBPART C—SABLEFISH NORTH OF 36° N LAT. ALLOCATIONS, 2024 AND BEYOND**  
[Weights in metric tons]

| Year | ACL    | Set-asides                            |                | Recreational estimate | Exempted fishing permit | Commercial harvest guideline (HG) | Limited entry HG |       | Open access HG |                |
|------|--------|---------------------------------------|----------------|-----------------------|-------------------------|-----------------------------------|------------------|-------|----------------|----------------|
|      |        | Tribal <sup>a</sup>                   | Research       |                       |                         |                                   | Percent          | mt    | Percent        | m <sup>b</sup> |
| 2024 | 7,730  | 773                                   | 30.7           | 6                     | 1                       | 6,919                             | 90.6             | 6,269 | 9.4            | 650            |
| Year | LE all | Limited entry (LE) trawl <sup>c</sup> |                |                       |                         | LE fixed gear (FG) <sup>d</sup>   |                  |       |                |                |
|      |        | All trawl                             | At-sea whiting | Shorebased IFQ        | All FG                  | Primary                           | Daily trip limit |       |                |                |
| 2024 | 6,269  | 3,636                                 | 100            | 3,536                 | 2,633                   | 2,238                             | 395              |       |                |                |

<sup>a</sup> The tribal allocation is further reduced by 1.7 percent for discard mortality resulting in 759.9 mt in 2024.<sup>b</sup> The open access HG is taken by the incidental OA fishery and the directed OA fishery.<sup>c</sup> The trawl allocation is 58 percent of the limited entry HG.<sup>d</sup> The limited entry fixed gear allocation is 42 percent of the limited entry HG.

■ 4. In § 660.140, revise table 1 to paragraph (d)(1)(ii)(D) to read as follows:

**§ 660.140 Shorebased IFQ Program.**

(1) \* \* \*  
(ii) \* \* \*  
(D) \* \* \*

**TABLE 1 TO PARAGRAPH (d)(1)(ii)(D)—SHOREBASED TRAWL ALLOCATIONS FOR 2023 AND 2024**

| IFQ species                              | Area                    | 2023 Shorebased trawl allocation (mt) | 2024 Shorebased trawl allocation (mt) |
|------------------------------------------|-------------------------|---------------------------------------|---------------------------------------|
| YELLOW EYE ROCKFISH .....                | Coastwide .....         | 4.42                                  | 3.41                                  |
| Arrowtooth flounder .....                | Coastwide .....         | 15,640.17                             | 11,408.87                             |
| Bocaccio .....                           | S of 40°10' N lat ..... | 700.33                                | 694.87                                |
| Canary rockfish .....                    | Coastwide .....         | 842.50                                | 851.42                                |
| Chilipepper .....                        | S of 40°10' N lat ..... | 1,563.80                              | 1517.60                               |
| Cowcod .....                             | S of 40°10' N lat ..... | 24.80                                 | 24.42                                 |
| Darkblotched rockfish .....              | Coastwide .....         | 646.78                                | 644.34                                |
| Dover sole .....                         | Coastwide .....         | 45,972.75                             | 45,972.75                             |
| English sole .....                       | Coastwide .....         | 8,320.56                              | 8,265.46                              |
| Lingcod .....                            | N of 40°10' N lat ..... | 1,829.27                              | 1,593.47                              |
| Lingcod .....                            | S of 40°10' N lat ..... | 284.20                                | 282.60                                |
| Longspine thornyhead .....               | N of 34°27' N lat ..... | 2,129.23                              | 2,002.88                              |
| Pacific cod .....                        | Coastwide .....         | 1,039.30                              | 1,039.30                              |
| Pacific halibut (IBQ) <sup>a</sup> ..... | N of 40°10' N lat ..... | TBD                                   | TBD                                   |
| Pacific ocean perch .....                | N of 40°10' N lat ..... | 2,956.14                              | 2,832.64                              |
| Pacific whiting <sup>b</sup> .....       | Coastwide .....         | 159,681.38                            | TBD                                   |
| Petrale sole .....                       | Coastwide .....         | 3,063.76                              | 2,863.76                              |
| Sablefish .....                          | N of 36° N lat .....    | 3,893.50                              | 3,535.91                              |
| Sablefish .....                          | S of 36° N lat .....    | 970.00                                | 909.55                                |
| Shortspine thornyhead .....              | N of 34°27' N lat ..... | 1,146.67                              | 1,117.22                              |
| Shortspine thornyhead .....              | S of 34°27' N lat ..... | 50                                    | 50                                    |
| Splitnose rockfish .....                 | S of 40°10' N lat ..... | 1,494.70                              | 1,457.60                              |
| Starry flounder .....                    | Coastwide .....         | 171.86                                | 171.86                                |
| Widow rockfish .....                     | Coastwide .....         | 11,509.68                             | 10,367.68                             |
| Yellowtail rockfish .....                | N of 40°10' N lat ..... | 3,761.84                              | 3,431.69                              |
| Other Flatfish complex .....             | Coastwide .....         | 4,142.09                              | 4,152.89                              |
| Shelf Rockfish complex .....             | N of 40°10' N lat ..... | 694.70                                | 691.65                                |
| Shelf Rockfish complex .....             | S of 40°10' N lat ..... | 163.02                                | 162.43                                |
| Slope Rockfish complex .....             | N of 40°10' N lat ..... | 894.43                                | 874.99                                |
| Slope Rockfish complex .....             | S of 40°10' N lat ..... | 417.1                                 | 414.58                                |

<sup>a</sup> Pacific halibut IBQ is set according to 50 CFR 660.55(m).

<sup>b</sup> Managed through an international process. This allocation will be updated when announced.

\* \* \* \* \*

■ 5. In § 660.231, revise paragraph (b)(3)(i) to read as follows:

**§ 660.231 Limited entry fixed gear sablefish primary fishery.**

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(i) A vessel participating in the primary season will be constrained by the sablefish cumulative limit associated with each of the permits registered for use with that vessel. During the primary season, each vessel authorized to fish in that season under paragraph (a) of this section may take, retain, possess, and land sablefish, up to the cumulative limits for each of the permits registered for use with that vessel (*i.e.*, stacked permits). If multiple limited entry permits with sablefish endorsements are registered for use with a single vessel, that vessel may land up to the total of all cumulative limits announced in this paragraph for the tiers for those permits, except as limited by paragraph (b)(3)(ii) of this section.

Up to 3 permits may be registered for use with a single vessel during the primary season; thus, a single vessel may not take and retain, possess or land more than 3 primary season sablefish cumulative limits in any one year. A vessel registered for use with multiple limited entry permits is subject to per vessel limits for species other than sablefish, and to per vessel limits when participating in the daily trip limit fishery for sablefish under § 660.232. In 2023, the following annual limits are in effect: Tier 1 at 72,904 lb (33,069 kg), Tier 2 at 33,138 lb (15,031 kg), and Tier 3 at 18,936 lb (8,589 kg). In 2024 and beyond, the following annual limits are in effect: Tier 1 at 66,377lb (30,108 kg), Tier 2 at 30,171 lb (13,685 kg), and Tier 3 at 17,241lb (7,820 kg).

\* \* \* \* \*

[FR Doc. 2023–28339 Filed 12–26–23; 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–XD567]

**Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pacific Cod in the Central 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 catcher vessels using trawl gear to vessels using jig gear, catcher/processors using trawl gear, and catcher vessels greater than or equal to 50 feet (15.2 meters (m)) length overall using hook-and-line gear in the Central 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 catcher vessels using trawl gear in the Central Regulatory Area of the GOA is 4,579 metric tons (mt), as established by the final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023).

The 2023 Pacific cod TAC specified for vessels using jig gear in the Central Regulatory Area of the GOA is 111 mt, as established by the final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023).

The 2023 Pacific cod TAC specified for catcher/processors using trawl gear in the Central Regulatory Area of the GOA is 462 mt, as established by the

final 2023 and 2024 harvest specifications for groundfish in the GOA (88 FR 13238, March 2, 2023).

The 2023 Pacific cod TAC specified for catcher vessels greater than or equal to 50 feet (15.2 m) length overall using hook-and-line gear in the Central Regulatory Area of the GOA is 738 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 that catcher vessels using trawl gear will not be able to harvest 395 mt of the 2023 Pacific cod TAC allocated to those vessels under § 679.20(a)(12)(i)(B)(4).

Therefore, in accordance with § 679.20(a)(12)(ii)(B), NMFS apportions 395 mt of Pacific cod from catcher vessels using trawl gear to the annual amounts specified for vessels using jig gear, catcher/processors using trawl gear, and catcher vessels greater than or equal to 50 feet (15.2 m) length overall using hook-and-line gear.

The harvest specifications for 2023 Pacific cod included in the final 2023 and 2024 harvest specifications for groundfish in the Central Regulatory Area of the GOA (88 FR 13238, March 2, 2023) is revised as follows: 4,184 mt to catcher vessels using trawl gear, 246 mt to vessels using jig gear, 597 mt to catcher/processors using trawl gear, and 863 mt to catcher vessels greater than or equal to 50 feet (15.2 m) length overall using hook-and-line 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. 2023-28486 Filed 12-21-23; 8:45 am]

**BILLING CODE 3510-22-P**

# Proposed Rules

Federal Register

Vol. 88, No. 247

Wednesday, December 27, 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.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 335

[Docket ID: OPM–2023–0041]

RIN 3206–AO52

### Time-Limited Promotions

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing a proposed regulation to clarify that bargaining-unit employees, who are detailed or temporarily promoted to higher grade duties of a higher-graded position, should be paid accordingly for the entire time performing these duties of a higher-graded position, when this action is pursuant to a final order by an arbitrator, adjudicative body, or court, under a collective bargaining agreement that provides for this action and the employees were assigned these duties outside of competitive hiring procedures. In addition, the proposed change clarifies that non-bargaining unit employees who are temporarily promoted to higher grade duties of a higher-graded position should be paid accordingly for the entire time performing these duties of a higher-graded position, as found pursuant to a final order by an adjudicative body or court. At present, non-competitive temporary promotions, and non-competitive details to duties of higher-graded positions are limited to no more than 120 days under OPM regulations regardless of the bargaining-unit status of the employee. Competitive procedures apply for any temporary promotion or detail to duties of a higher-graded position that exceeds 120-days, again, regardless of the bargaining-unit status of the employee.

**DATES:** Comments must be received on or before February 26, 2024.

**ADDRESSES:** You may submit comments, identified by the docket number or Regulation Identifier Number (RIN) for

this proposed rulemaking, via the Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for sending comments.

**Instructions:** All submissions must include the agency name and docket number or RIN for this rulemaking. Please arrange and identify your comments on the regulatory text by subpart and section number; if your comments relate to the supplementary information, please refer to the heading and page number. All comments received will be posted without change, including any personal information provided. Please ensure your comments are submitted within the specified open comment period. Before finalizing this rule, OPM will consider comments received on or before the closing date for comments. OPM may make changes to the final rule after considering the comments received.

**FOR FURTHER INFORMATION CONTACT:** Timothy Curry by email at [awr@opm.gov](mailto:awr@opm.gov) or by telephone at (202) 606–2930.

### SUPPLEMENTARY INFORMATION:

#### I. Background

On December 29, 1994, OPM issued interim regulations to maintain requirements under which agencies conduct merit promotion and internal placement programs in the competitive service.<sup>1</sup> These requirements were in the provisionally retained chapter 335 of the former Federal Personnel Manual (FPM) and related issuances. Adopting the interim rule prevented a lapse in government-wide requirements when FPM chapter 335 expired on December 31, 1994.<sup>2</sup> The interim rule was effective on January 1, 1995. Agencies were authorized by 5 CFR 335.103 to promote competitive service employees to positions for which the agency had adopted and administered a merit promotion program. The promotion program had to conform with the standards and requirements that were in provisionally retained chapter 335 of the former FPM. This included the requirement that competitive procedures must be followed for time-

limited promotions for more than 120 days to higher-graded positions. This requirement still exists today.

The Federal Labor Relations Authority (FLRA) has found union proposals requiring the temporary promotion of bargaining unit employees officially assigned to a higher-graded position, or to the duties of a higher-graded position, for certain specified time periods are within the duty to bargain.<sup>3</sup> The FLRA has further found that, under Federal personnel law, an employee may be entitled to a temporary promotion for performing the duties of a higher grade position for an extended period of time. However, the FLRA has emphasized that “the entitlement must be based on a provision of a collective bargaining agreement or an agency regulation making a temporary promotion mandatory for details to, or the performance of the duties of, a higher-grade position after a specified period of time.”<sup>4</sup> As a result, some collective bargaining agreements between Federal agencies and unions have provisions requiring the temporary promotion of employees officially assigned to a higher-graded position or to the duties of a higher-graded position when such assignment is made without use of competitive procedures. As provided for in 5 U.S.C. 7121, disagreements on application and interpretation of such provisions are subject to negotiated grievance procedures that provide for binding arbitration.

Prior to 2004, arbitrators awarded backpay to employees who filed grievances after being assigned to higher graded duties and were not temporarily promoted, and those awards were not time limited to 120 days. For example, in *Oklahoma City Air Logistics Center, Tinker AFB, OK and AFGE Local 9116*, 42 FLRA 62 (October 1991), the arbitrator directed the agency to provide a grievant a retroactive temporary promotion, with backpay, for the entire period of time in which the grievant performed work of a higher-graded position. The grievant, a WG–8 employee, filed a grievance claiming he should have been promoted to the WG–

<sup>1</sup> 59 FR 67121 (Dec. 29, 1994).

<sup>2</sup> OPM abolished the FPM in December 1993, as recommended by the National Performance Review. FPM chapter 335 was kept temporarily through December 31, 1994, to enable OPM to incorporate promotion and internal placement requirements in the CFR.

<sup>3</sup> See *National Federation of Federal Employees v. Department of the Interior Bureau of Land Management*, 29 FLRA 1491 (1987).

<sup>4</sup> See *National Treasury Employees Union v. Department of Treasury Internal Revenue Service*, 29 FLRA 348 (1987).

9 level. The arbitrator concluded the grievant was not wrongfully denied a permanent, competitive promotion to WG-9. The arbitrator found, however, the grievant “was temporarily assigned the grade-controlling duties of a WG-9” employee from February 1987 to February 1990. The arbitrator concluded the agency’s failure to promote the grievant temporarily violated the parties’ collective bargaining agreement and resulted in an unjustified or unwarranted personnel action. The arbitrator sustained the grievance, in part, and ordered the agency to make the grievant whole for the loss of WG-9 pay from March 29, 1987, to February 2, 1990. The decision was challenged to the FLRA. The FLRA stated, where parties to a collective bargaining agreement provide for the temporary promotion of employees assigned to perform the work of higher-graded positions, an arbitrator may order temporary promotions, with backpay, in accordance with that agreement. The FLRA modified the arbitration award and sustained the grievance in part finding the grievant must be made whole for loss of WG-9 pay for a 2-year period beginning March 29, 1987. The FLRA directed the agency to request OPM to formally authorize the Agency to grant the grievant a retroactive temporary promotion, with backpay, from the end of the 2-year period to February 2, 1990.

Another example concerns *U.S. Department of the Army, Fort Polk, LA, and the National Association of Government Employees, Local R5-168*, 44 FLRA 121 (1992). In this case, the employee filed a grievance claiming that, under the parties’ collective bargaining agreement, the grievant was entitled to a temporary promotion for having performed the duties of a higher-graded position for an extended period of time. The arbitrator sustained the grievance and awarded the grievant a retroactive temporary promotion with backpay. The FLRA stated, in order to award backpay, an arbitrator must find (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; (2) the personnel action directly resulted in the withdrawal or reduction of the grievant’s pay, allowance, or differentials; and (3) but for such action, the grievant otherwise would not have suffered the withdrawal or reduction. The FLRA found the arbitrator’s award satisfied these requirements for the Back Pay Act. Specifically, the Authority found the arbitrator made a properly supported award of backpay under the Back Pay Act when the arbitrator

determined the agency denied the grievant a temporary promotion to which the grievant was entitled for having performed the duties of a higher-graded position for an extended period of time. The award was modified to include the payment of interest on the award of backpay.

Finally, in *Social Security Administration and the American Federation of Government Employees, Local 220*, 57 FLRA 115 (2001), the arbitrator found the agency violated the parties’ collective bargaining agreement by failing to temporarily promote certain employees. One employee who performed mentoring duties was temporarily promoted while the other employees who performed the same duties were not. The arbitrator found that the agency’s failure to temporarily promote the other employees who performed mentoring duties violated the parties’ collective bargaining agreement. The arbitrator concluded that the agency’s actions constituted an unjustified and unwarranted personnel action that directly resulted in a reduction of pay within the meaning of the Back Pay Act. The arbitrator sustained the grievance and ordered the agency to grant retroactive temporary promotion to the employees who were not temporarily promoted and were eligible for a temporary promotion under the parties’ collective bargaining agreement. The FLRA found denying an employee a temporary promotion to which the employee is entitled under a collective bargaining agreement constitutes an unjustified or unwarranted personnel action, and so, the arbitrator’s award of backpay in these circumstances was authorized under the Back Pay Act.

On September 10, 2003, the FLRA, in accordance with 5 U.S.C. 7105(i), requested an advisory opinion from OPM regarding an interpretation of 5 CFR part 335 and posed the following question: “Where an agency violates a collective bargaining agreement provision entitling employees to noncompetitive temporary promotions and an arbitrator grants a retroactive temporary promotion of more than 120 days to remedy that violation with the retroactive promotion what is the applicability, if any, of the requirements of 5 CFR 335.103(c)(1)(i) that ‘competitive procedures’ apply to promotions exceeding 120 days. If the requirements apply, what effect do they have on the arbitral remedy of a retroactive temporary promotion exceeding 120 days?” On February 27, 2004, the OPM General Counsel provided a response to the FLRA. OPM noted: “Upon analysis of this issue,

OPM concludes that 5 CFR 335.103 applies and that the arbitration award in this matter is contrary to the regulatory requirement that executive agencies must apply competitive procedures for the purposes of implementing temporary promotions in excess of 120 days.”

The case before the FLRA that prompted the request to OPM for an advisory opinion was *United States Department of Veterans Affairs Ralph H. Johnson Medical Center Charleston, South Carolina, and National Association of Government Employees*, 60 FLRA 46 (2004) (*Johnson Medical Center*). In this case, an arbitrator granted a retroactive temporary promotion greater than 120 days. A GS-7 employee filed a grievance alleging she had been performing the duties of a computer specialist, GS-9, for approximately 2 years. The grievant alleged the agency failed to promote her temporarily to the higher grade in violation of the parties’ collective bargaining agreement that provided for the noncompetitive temporary promotion of employees detailed to a higher-graded position for more than 30 consecutive days.

In ordering a remedy of backpay exceeding two years, the arbitrator rejected the agency’s argument that competitive procedures were required for temporary promotions exceeding 120 days. Upon appeal to the FLRA, the agency alleged the remedy of a temporary promotion in excess of 120 days was contrary to 5 CFR 335.103 because competitive promotion procedures were not used to affect that promotion action.

The FLRA rendered its decision relying upon OPM’s February 27, 2004, advisory opinion about 5 CFR 335.103(c)(1)(i). OPM opined the arbitrator’s decision was contrary to a government-wide regulation by providing the grievant a retroactive temporary promotion exceeding 120 days because there had been no competitive process. Based on this advisory opinion, the FLRA modified the award and ordered the agency to grant the grievant a retroactive temporary promotion with backpay for the difference between GS-7 and GS-9 wage rate, effective August 1999, for a period of 120 days because there was no evidence that competitive procedures were applied in the promotion of the grievant. Furthermore, the FLRA decided there was no showing that a personnel action resulted in the withdrawal or reduction of the grievant’s pay and therefore the grievant was not entitled to back pay for the

period exceeding the 120-day limitation.<sup>5</sup>

Following its decision in 2004, the FLRA has found arbitration decisions deficient when the arbitrator ordered a temporary promotion with backpay for the pay differential for higher-graded work performed by an employee exceeding 120 days despite the lack of competitive procedures for the promotion. For example, in *United States Department of the Treasury Internal Revenue Service and National Treasury Employees*, 61 FLRA 667 (2006), an arbitrator determined the agency violated the collective bargaining agreement by “failing to detail [the grievant] for performing work” at a higher grade. The arbitrator expressly rejected the agency’s claim that monetary relief could not extend beyond 120 days under 5 CFR 335.103(c). In the arbitrator’s view, “[t]o deny a remedy longer than 120 days not only would be at odds with negotiated terms, but, in effect, would reward the agency with a monetary windfall for its persistent contractual transgression, despite grievances having been lodged, thereby subverting the deterrent value of the contract’s prohibitory language.” The agency filed exceptions with the FLRA. The FLRA noted that “a provision in a collective bargaining agreement establishing the requisite mandatory promotion is enforceable only to the extent consistent with civil service regulations pertaining to temporary promotions.” The FLRA also found controlling OPM’s advisory opinion in its 2004 *Johnson Medical Center* decision that placed a regulatory cap of 120 days on retroactive temporary promotions awarded by arbitrators without competition. As such, the FLRA set aside that portion of the award of backpay for a period exceeding 120 days.

More recently, in *United States Department of the Navy Commander, Navy Region Mid-Atlantic Naval Weapons Station Earle and International Association of Firefighters Local F-147*, 72 FLRA 533 (2021), an arbitrator found that the grievants were temporarily assigned the duties of a

higher-graded position. The arbitrator also found the agency violated the parties’ collective bargaining agreement, which required that employees temporarily assigned to higher-graded positions for two pay periods or more receive the higher rate of pay for the position to which they have been assigned. The agency challenged the amount of the backpay remedy noting it was contrary to 5 CFR 335.103(c)(1)(i). The FLRA once again found that “an award granting a temporary promotion is enforceable only to the extent that it is consistent with civil service regulations pertaining to such promotions.” Specifically, relying on OPM’s 2004 advisory opinion, the FLRA concluded “a retroactive temporary promotion and associated backpay of more than 120 days cannot be awarded unless the promotion was filled competitively.” The FLRA determined “no evidence has established that the temporary promotion was competed. Therefore, to the extent that the backpay remedy exceeds 120 days, it is contrary to law.”

## II. Proposed Amendment

OPM proposes amending 5 CFR part 335, as summarized below, to clarify that a bargaining unit employee found, pursuant to a final order by an arbitrator, adjudicative body, or court, to have been detailed or temporarily promoted to a higher-graded position should be paid accordingly (*i.e.*, higher compensation) for the entire time the employee performed the duties of the higher-graded position. This is limited to situations where an employee meets qualification and time-in-grade requirements established by OPM regulations, but the agency made the assignment without use of competitive procedures. For bargaining unit employees, this may include when a collective bargaining agreement provided for the temporary promotion of employees officially assigned to a higher-graded position or to the duties of a higher-graded position when such assignment is made without use of competitive procedures and the employee otherwise meets qualification and time-in-grade requirements. This amendment only applies when a third party has made a finding the employee is entitled to receive a retroactive temporary promotion. An adjudicative body could include, but not be limited to, a third party such as the U.S. Merit Systems Protection Board (MSPB) or the Equal Employment Opportunity Commission (EEOC).

Similarly, the proposed amendment clarifies that, when a non-bargaining unit employee has been temporarily

promoted to a higher-graded position as found by an adjudicative body or court, that employee should be paid accordingly (*i.e.*, higher compensation) for the entire time performing these duties of a higher-graded position, pursuant to a final order by that adjudicative body or court. Similar to what is discussed earlier for bargaining unit employees, this is limited to situations where an employee meets qualification and time-in-grade requirements established by OPM regulations, but the agency made the assignment without use of competitive procedures. While the background focused on disputes related to collective bargaining agreements, OPM recognizes that non-bargaining unit employees may pursue grievances or complaints related to temporary promotions in forums outside of procedures found in collective bargaining agreements. The proposed regulatory change addresses such matters for the sake of consistency and fairness regardless of the employee’s bargaining unit status. This amendment only applies when a third party has made a finding the employee is entitled to receive a retroactive temporary promotion. An adjudicative body could include, but not be limited to, a third party such as the MSPB or the EEOC.

### Part 335—Promotion and Internal Placement

#### Subpart A—General Provisions

#### Section 335.103—Agency Promotion Program

In § 335.103, agencies are authorized by OPM to make promotions under § 335.102 to positions under the competitive service and to insure systematic means of selection for promotion according to merit. OPM proposes to amend § 335.103 by adding a new paragraph (c)(2)(iii) to read, “Retroactive temporary promotions to higher-graded positions pursuant to a final order by an arbitrator, adjudicative body or court.” This added language will require agencies to pay an employee who has been found to have been noncompetitively, temporarily detailed to a higher-graded position at the higher grade even for a period of time that exceeds 120 days, pursuant to a final order by an arbitrator, adjudicative body, or court. As previously noted, this regulatory change would also apply to any employee, including non-bargaining unit employees, pursuant to a final order by an adjudicative body or court unrelated to procedures found in a collective bargaining agreement. For example, an employee may file a complaint with the

<sup>5</sup> In a concurrence to the *Johnson Medical Center* decision, Member Carol Waller Pope noted “I have concerns that OPM’s interpretation actually encourages agencies to violate, rather than comply with, § 335.103(c). Specifically, under OPM’s interpretation, an agency that ignores competitive procedures cannot be required to pay employees for higher-graded duties performed in excess of 120 days, while an agency that complies with competitive procedures can be required to pay employees for those duties. This provides agencies a strong incentive to ignore competitive procedures when they want to assign employees higher-graded duties for more than 120 days.”

Equal Employment Opportunity Commission alleging discrimination on matters related to a temporary promotion exceeding 120 days. Finally, as previously discussed, this is limited to situations where an employee meets qualification and time-in-grade requirements established by OPM regulations, but the agency made the assignment without use of competitive procedures.

OPM's interpretation of 5 CFR 335.103 continues to be that agencies covered by this regulation must apply competitive procedures for the purpose of implementing temporary promotions in excess of 120 days. This is consistent with the wording of regulatory language that has existed for decades OPM believes requiring competition for these opportunities when they exceed 120 days supports merit system principles at 5 U.S.C. 2301 and provides greater job opportunities to the workforce.

The merit system principles (MSPs)<sup>6</sup> are nine basic standards that govern the management of the executive branch workforce and serve as the foundation of the Federal civil service. The U.S. Merit Systems Protection Board (MSPB) has noted the general themes of the MSPs and prohibited personnel practices<sup>7</sup> are: (1) Fairness—treating employees fairly in all aspects of their employment; (2) Protection—refraining from misuse of authority and protecting employees from harm, such as reprisal for the exercise of a legally protected right; and (3) Stewardship—management employees in the short-term and long-term public interest.<sup>8</sup> For example, MSP # 1 provides that “Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.”<sup>9</sup> The MSPB has noted MSP # 1 “[f]ocuses on attaining a well-qualified and representative workforce through open recruitment and fair, job-related assessment of applicants.” Therefore, OPM believes 5 CFR 335.103 strikes the right balance between when competitive procedures are necessary and when they are not necessary, depending on the duration of the time-

limited promotion. For situations where agencies have more immediate, short-term needs of 120 days or less, it is appropriate for agencies to non-competitively assign higher-graded duties to qualified employees to meet these needs. For situations where agencies have longer-term needs exceeding 120 days, use of competitive procedures is consistent with the purpose of MSP # 1. However, OPM also considers it unfair for employees to be assigned these higher-graded duties and not be compensated accordingly for the higher-graded duties when employee has effectively been detailed to a higher-graded position for more than 120 days.

OPM reminds agencies that they should not assign employees to perform higher-graded duties for periods exceeding 120 days such that the employee has been effectively detailed to a higher-grade position without following applicable competitive procedures. Under this proposed regulation, agencies are reminded that they may be required to provide higher compensation as a result of arbitrator, adjudicative or court decisions. OPM also reminds agencies, subject to the requirements of 5 CFR part 335, that competitive procedures should always be followed if the agency anticipates the assignment of higher-graded duties may exceed 120 days. If the agency incorrectly anticipates the assignment of higher graded duties will last 120 days or less but later determines the need exceeds 120 days, the agency must follow competitive procedures for assignment of such duties beyond 120 days for any particular employee or assign the higher-graded work to another qualified employee, up to, but not exceeding 120 days. Finally, OPM reminds agencies to consider this when negotiating new collective bargaining agreement provisions regarding temporary promotions. Collective bargaining agreements must be consistent with requirements in government-wide regulations on this matter. In fact, newly negotiated collective bargaining agreements that allow non-competitive temporary promotion exceeding 120 days must be disapproved in agency head review for not complying with government-wide regulations.<sup>10</sup> However, some

agreements are silent on the length of the time-limited promotion and may not be in conflict with government-wide regulations as written.

It should be noted 5 CFR part 335 does not apply to positions in the Excepted Service. Therefore, the 2004 OPM advisory opinion and the various FLRA decisions on this matter are not applicable to the issue of when competitive procedures must be followed for time-limited promotions in the Excepted Service. However, agencies with employees in the Excepted Service are subject to Merit System Principles and should be mindful of these principles when assigning Excepted Service employees the duties of a higher-graded position.

### III. Regulatory Analysis

#### A. Statement of Need

This rulemaking has two purposes. First, OPM intends to remind agencies that competitive procedures must be followed when assigning duties of a higher-graded position to employees for a period of time exceeding 120 days. Second, in recognition that there continue to be situations where competitive procedures are not followed by agencies subject to 5 CFR part 335, this rulemaking provides the possibility of remedial relief to employees covered by collective bargaining agreements requiring temporary promotions to non-bargaining unit employees when an arbitrator, adjudicative body or court finds the employee has been detailed or temporarily promoted to a higher-graded position.

On August 5, 2022, OPM received a petition from the National Treasury Employees Union (NTEU), which represents Federal workers in 34 agencies and departments,<sup>11</sup> to amend OPM regulations at 5 CFR 335.103 “to remove the existing 120-day cap on back pay for employees who perform higher graded work during noncompetitive temporary promotions and details.” NTEU noted that OPM's existing regulation, as interpreted in a 2004 OPM advisory opinion, has led to “significant unfairness.” NTEU stated that prior to that advisory opinion, arbitrators had awarded back pay to employees who performed higher-graded duties. “Arbitrators made employees whole for the time they spent performing such work, without any 120-day limitation.” NTEU noted that the 2004 decision of the FLRA abandoned years of precedent by limiting the back pay remedy for employees performing higher-graded duties to 120 days each year. NTEU

<sup>11</sup> See NTEU, “Our Agencies,” <https://www.nteu.org/who-we-are/our-agencies>.

<sup>6</sup> 5 U.S.C. 2301: Merit system principles.

<sup>7</sup> 5 U.S.C. 2302: Prohibited personnel practices.

<sup>8</sup> The Merit System Principles: Keys to Managing the Federal Workforce (*mspb.gov*), October 2020, available at [https://www.mspb.gov/studies/studies/The\\_Merit\\_System\\_Principles\\_Keys\\_to\\_Managing\\_the\\_Federal\\_Workforce\\_1371890.pdf](https://www.mspb.gov/studies/studies/The_Merit_System_Principles_Keys_to_Managing_the_Federal_Workforce_1371890.pdf).

<sup>9</sup> See 5 U.S.C. 2301(b)(1).

<sup>10</sup> 5 U.S.C. 7114(c) provides that “(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.” and “(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision.”

correctly noted that FLRA's decision "was based entirely on [OPM's] advisory opinion."

NTEU notes that "although OPM's 2004 interpretation of the regulation was in error, NTEU is not [asking OPM] to revisit its analysis." NTEU stated it is proposing "instead that the regulation itself be changed to more clearly establish that employees detailed or temporarily promoted to a higher grade, or who perform higher-graded duties, should be paid accordingly, even if the detail, temporary promotion or performance of such duties exceeds 120 days."

On November 3, 2022, the National Federation of Federal Employees (NFFE), which represents approximately 110,000 government workers across the United States,<sup>12</sup> provided suggestions to OPM on revisions to existing OPM regulations, including 5 CFR 335.103(c)(1)(i). Specifically, NFFE requested revisions to "eliminate limit on back pay for temporary promotions to 120 days."

OPM's interpretation that competitive procedures must be followed for temporary promotions exceeding 120 days has not changed. Notwithstanding OPM's current interpretation of the requirements of 5 CFR 335.103, however, OPM agrees that employees should be compensated accordingly when an agency has been found to be out of compliance with requirements of a collective bargaining agreement and understands that the current text of the regulations could provide greater clarity. Furthermore, OPM's 2004 advisory opinion should not be cited as a basis for agencies to disregard, whether intentionally or unintentionally, government-wide regulations on use of competitive procedures and collective bargaining agreement requirements regarding temporary promotions for performing duties of a higher-graded position. Therefore, OPM is proposing to modify 5 CFR 335.103 to address these scenarios.

This proposed modification reinforces the President's recognition that Federal civil servants' rights deserve to be protected. President Biden has stated that "[c]areer civil servants are the backbone of the Federal workforce, providing the expertise and experience necessary for the critical functioning of the Federal Government. It is the policy of the United States to protect, empower, and rebuild the Federal workforce."<sup>13</sup> NTEU notes that it

supports merit-based competition for long-term promotions or details to positions that are properly classified at a higher grade to ensure that the merit system principles of fair and open competition are met.

NTEU notes that "[i]n practice, many of these cases arise where higher-graded duties are assigned to employees on a different, lower-graded position description, due to staffing shortages, budget constraints, retirements, etc. Agency managers, who are often tasked with delivering the agency's mission without the resources to do so, simply assign the higher graded work to whomever is available and convenient." NTEU notes that "these employees are precluded from any remedial relief beyond 120 days—not because the inequity has ceased to exist, but because the relevant regulation has been reinterpreted since 2004 to undermine, rather than strengthen, merit system principles." OPM believes the proposed modification is a reasonable solution to address those situations where an agency may assign higher-graded duties to an employee without using competitive procedures and where a collective bargaining agreement requires a temporary promotion.

#### *B. Regulatory Alternatives*

An alternative to this rulemaking is to not issue a regulation and to continue the possibility of agencies not using competitive procedures when assigning an employee the duties of a higher-graded position over 120 days because of an absence of clarification. As a result, employees may not have an opportunity to be made whole for time performing higher-graded duties in excess of 120 days even if the employee challenges the agency action in a grievance or complaint process. OPM has determined this is not a viable option. As NTEU noted, an inequity exists and employees are precluded from any remedial relief beyond 120 days because the relevant regulation has been reinterpreted since 2004 to undermine, rather than strengthen, merit system principles.

Another regulatory alternative is to address this issue through OPM's oversight function. OPM's statutory responsibility to oversee the Federal personnel system encompasses assessment of compliance with merit system principles, and supporting laws, rules, regulations, Executive orders, and OPM standards, as well as the effectiveness of personnel policies, programs, and operations.<sup>14</sup> The legal

authority for OPM oversight is 5 U.S.C. 1104(b)(2) and 5 CFR parts 5 and 10. Under this authority, OPM can evaluate the effectiveness of agency personnel policies, programs and operations and agency compliance with and enforcement of applicable laws, rules, regulations, and OPM directives. OPM can also direct corrective action where appropriate.

While OPM can, through its oversight process, identify situations where an agency is not complying with the requirement to use competitive procedures for time-limited promotions that exceed 120 days, OPM's enforcement process may not provide timely relief to employees who are impacted by an agency's failure to follow OPM procedures on time-limited promotions. Furthermore, based on OPM's 2004 advisory opinion, although OPM may direct, as part of its oversight process, an agency to follow competitive procedures for time-limited promotions exceeding 120 days, this would not provide any monetary relief for employees covered by collective bargaining agreements that require time-limited promotions and are identified by OPM as situations where OPM's regulations were not properly followed.

#### *C. Impact*

OPM is issuing this proposed regulation to authorize a retroactive temporary promotion when a competitive service employee, effectively, has been detailed or temporarily promoted to higher grade duties of a higher-graded position if a collective bargaining agreement requires it and the employee has been assigned these duties outside of competitive hiring procedures, as found pursuant to a final order by an arbitrator, adjudicative body, or court. By authorizing a retroactive promotion in these situations, OPM affirms that an employee should be paid accordingly for the entire time performing these duties of a higher-graded position. In addition, a non-bargaining unit competitive service employee who is temporarily promoted to higher grade duties of a higher-graded position should be paid accordingly for the entire time performing these duties of a higher-graded position, as found pursuant to a final order by an adjudicative body or court.

As discussed earlier, OPM reminds agencies to use competitive procedures when assigning an employee the duties of a higher-graded position when the assignment exceeds 120 days. This is

<sup>12</sup> See NFFE, About Us, <https://nffe.org/about/>.

<sup>13</sup> See Executive Order 14003, Protecting the Federal Workforce (January 22, 2021).

<sup>14</sup> OPM website, Compliance, What is our oversight responsibility?, available at <https://www.opm.gov/policy-data-oversight/oversight-activities/compliance/>.

not a new requirement and simply reinforces what agencies, subject to 5 CFR part 335, should already be doing and should have no impact. However, in those situations where an agency does not meet this regulatory requirement, it reinforces the commitment an agency has already made as part of the collective bargaining process under 5 U.S.C. chapter 71. It also provides all employees, whether bargaining unit or non-bargaining unit, an opportunity to be made whole if an agency does not properly follow policies related to temporary promotions and pursues a grievance or complaint in applicable grievance and complaint processes which may be available to employees.

#### *D. Costs*

This proposed rule will affect the operations of over 80 non-postal Federal agencies in the Executive Branch—ranging from cabinet-level departments to small independent agencies—with one or more labor organizations certified by the FLRA as the exclusive representative of employees in an appropriate unit pursuant to 5 U.S.C. 7112. We do not believe this proposed rule should substantially increase the ongoing administrative costs to agencies (including the administrative costs of administering the program) as this rulemaking leverages existing procedures and requires agencies to comply with collective bargaining agreements that they have made with unions. Furthermore, OPM believes costs should be negligible as we anticipate agencies will leverage existing resources to implement the reminders in this rulemaking and the regulatory requirements. Ultimately, costs are likely to vary from agency to agency since some agencies have collective bargaining unit agreements with language regarding the process for detailing bargaining unit employees to a higher graded position for more than 120 days. Furthermore, some agencies are currently already closely adhering to OPM regulations in § 335.103.

With the above in mind, we estimate this rulemaking will require agencies to review policies on time-limited promotions subject to 5 CFR part 335; update these policies if needed; and provide reminders and, if necessary, training to implement this proposed rule and reinforce existing requirements in 5 CFR part 335. For the purpose of this cost analysis, the assumed staffing for Federal employees performing the work required by the regulations in part 335 is one executive; one GS–15, step 5; a GS–14, step 5; and one GS–13, step 5 in the Washington, DC, locality area. The 2023 basic rate of pay for an

executive at an agency with a certified SES performance appraisal system is \$235,600 annually, or \$113.27 per hour. For General Schedule employees in the Washington, DC, locality area, the 2023 pay table rates are \$176,458 annually and \$84.55 hourly for GS–15, step 5; \$150,016 annually and \$71.88 for GS–14; and \$126,949 annually and \$60.83 hourly for GS–13, step 5. We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in assumed hourly labor costs of \$226.54 for an executive; \$169.10 for a GS–15, step 5; \$143.76 for a GS–14, step 5; and \$121.66 for a GS–13, step 5. In order to comply with the regulatory changes in this proposed rule and the reminder in this preamble to follow competitive procedures for time-limited promotions exceeding 120 days, affected agencies will need to review and update (if applicable) their policies, procedures and develop appropriate training or communications to appropriate personnel. Agencies are reminded to review 5 CFR part 335, agency merit promotion plans, and related guidance to ensure compliance. Agencies are also encouraged to communicate with managers, supervisors, and agency staff who are responsible for completing actions related to part 335. We estimate that this will require an average of 10 hours of work by employees with an average hourly cost of \$165.26. This would result in estimated costs of about \$1,653 per agency, and about \$132,212 in total government-wide. If an agency follows existing requirements to use competitive procedures for time-limited promotions exceeding 120 days, there should be no need for employees to file grievances ending in binding arbitration that could order backpay with interest. To the extent that grievances are filed and arbitration decisions order backpay, the costs will vary by agency depending on the number of employees impacted, the salaries of these employees, and the amount of time performing the higher-graded duties beyond 120 days. OPM does not have data to make a determination on potential costs related to arbitration decisions implementing the proposed regulatory language. OPM requests comments on the implementation and impacts of this proposed rule.

#### *E. Benefits*

This proposed rule has several important benefits. First, it supports merit system principles by reminding agencies to use competitive procedures for time-limited promotions exceeding 120 days. As discussed earlier, OPM

believes 5 CFR 335.103 strikes the right balance between when competitive procedures are necessary and when they are not necessary, depending on the duration of the time-limited promotion. OPM believes that fair and open competition is appropriate for performing duties for a period of time exceeding 120 days.

OPM also agrees that it is unfair for employees to be assigned these higher-graded duties and not be compensated accordingly when assignment of these duties exceeds 120 days and a third party orders the agency to compensate the employee accordingly. Therefore, the second benefit of this rulemaking is that it facilitates agencies' provision of monetary relief to employees who perform duties of a higher-graded position for more than 120 days where the agency has failed to follow the requirements of 5 CFR part 335. OPM expects this proposed rule to further incentivize agencies to follow proper procedures when assigning higher-graded duties and to honor the commitment agencies made in their collective bargaining agreement when they agreed to temporarily promote employees. This proposed rule not only reinforces merit system principles but reinforces the agency's obligations under the Federal Service Labor-Management Relations Statute.

#### **IV. Request for Comments**

OPM requests comments on the implementation and impacts of this proposed rule in general. Such information will be useful for better understanding the effect of these proposed revisions on time-limited promotions impacted by collective bargaining agreements. The type of information in which OPM is interested includes, but is not limited to, the following:

- Each year, out of the total number of grievances or administrative complaints filed by bargaining unit employees, what percentage of those grievances or other types of complaints claim appropriate compensation was denied after being non-competitively placed on time-limited promotions exceeding 120 days and despite collective bargaining agreement requirements?
- Each year, out of the total number of administrative grievances or complaints filed by non-bargaining unit employees, what percentage of those administrative grievances or other types of complaints claim commensurate compensation was denied after being non-competitively placed on time-limited promotions exceeding 120 days?

• OPM also requests comment on the options available to non-bargaining unit employees to seek redress after being non-competitively placed on a time-limited promotion exceeding 120 days without commensurate pay. Based on comments received, OPM could consider exercising its authority to confer jurisdiction on an adjudicative body to evaluate complaints filed by non-bargaining unit employees to the extent OPM can confer such jurisdiction.

#### Regulatory Review

Executive Orders 13563, 12866, and 14094 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). A regulatory impact analysis must be prepared for major rules with effects of \$200 million or more in any one year. This rulemaking does not reach that threshold; however, OMB has designated the rule as a “significant regulatory action” under Executive Order 14094.

#### Regulatory Flexibility Act

The Director of OPM certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

#### Federalism

This proposed rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

#### Civil Justice Reform

This proposed rule meets the applicable standard set forth in Executive Order 12988.

#### Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521)

This regulatory action is not expected to impose any reporting or recordkeeping requirements under the Paperwork Reduction Act.

#### List of Subjects in 5 CFR Part 335

Government employees.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

Accordingly, for the reasons stated in the preamble, OPM proposes to amend 5 CFR part 335 as follows:

#### PART 335—Promotion and Internal Placement

■ 1. The authority citation for part 335 continues to read as follows:

**Authority:** 5 U.S.C. 2301, 2302, 3301, 3302, 3330; E.O. 10577, E.O. 11478, 3 CFR 1966–1970, Comp., page 803, unless otherwise noted, E.O. 13087; and E.O. 13152, 3 CFR 19554–58 Comp., p.218; 5 U.S.C. 3304(f), and Pub. L. 106–117, and 5 CFR 2.2 and 7.1.

#### Subpart A—General Provisions

■ 2. Amend § 335.103 by adding new paragraph (c)(2)(iii) to read as follows:

#### § 335.103 Agency promotion programs.

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(iii) A retroactive temporary promotion to a higher-graded position pursuant to a final order by an arbitrator, adjudicative body, or court.

\* \* \* \* \*

[FR Doc. 2023–28458 Filed 12–26–23; 8:45 am]

**BILLING CODE 6325–39–P**

#### DEPARTMENT OF AGRICULTURE

#### Agricultural Marketing Service

#### 7 CFR Part 987

[Doc. No. AMS–SC–23–0058]

#### Domestic Dates Produced or Packed in Riverside County, California; Decreased Assessment Rate

**AGENCY:** Agricultural Marketing Service, Department of Agriculture (USDA).

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would implement a recommendation from the California Date Administrative Committee (Committee) to decrease the assessment rate established for the 2023–2024 and subsequent crop years. The proposed assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

**DATES:** Comments must be received by January 26, 2024.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposed rule. Comments can be sent to the Docket Clerk, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237. Comments can also be submitted to the Docket Clerk electronically by Email: [MarketingOrderComment@usda.gov](mailto:MarketingOrderComment@usda.gov) or via the internet at: <https://www.regulations.gov>. Comments should reference the document number and the date and page number of this issue of the **Federal Register**. Comments submitted in response to this proposed rule will be included in the record and will be made available to the public and can be viewed at: <https://www.regulations.gov>. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

#### FOR FURTHER INFORMATION CONTACT:

Bianca Bertrand, Marketing Specialist, or Gary Olson, Chief, West Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (503) 326–2724, or Email: [BiancaM.Bertrand@usda.gov](mailto:BiancaM.Bertrand@usda.gov) or [GaryD.Olson@usda.gov](mailto:GaryD.Olson@usda.gov).

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, or Email: [Richard.Lower@usda.gov](mailto:Richard.Lower@usda.gov).

#### SUPPLEMENTARY INFORMATION:

This action, pursuant to 5 U.S.C. 553, proposes to amend regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Order No. 987, as amended (7 CFR part 987), regulating the handling of domestic dates produced or packed in Riverside County, California. Part 987 referred to as the “Order” is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the “Act.” The Committee locally administers the Order and is comprised of producers and producer-handlers operating within the area of production.

The Agricultural Marketing Service (AMS) is issuing this proposed rule in conformance with Executive Orders 12866, 13563, and 14094. Executive Orders 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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 supplements and reaffirms Executive Orders 12866 and 13563 and directs agencies to conduct proactive outreach to engage interested and affected parties through a variety of means, such as through field offices, and alternative platforms and media. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Orders 12866, 13563, and 14094 review.

This proposed rule has been reviewed under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have Tribal implications. AMS has determined that this proposed rule is unlikely to have substantial direct effects on one or more Indian Tribes, 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.

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, California date handlers are subject to assessments. Funds to administer the Order are derived from such assessments. It is intended that the assessment rate would be applicable to all assessable dates for the 2023–2024 crop year, and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition,

provided an action is filed not later than 20 days after the date of the entry of the ruling.

This proposed rule would decrease the assessment rate for dates handled under the Order from \$0.20 per hundredweight, the rate that was established for the 2020–2021 and subsequent crop years, to \$0.15 per hundredweight for the 2023–2024 and subsequent crop years.

The Order authorizes the Committee, with the approval of AMS, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members of the Committee are familiar with the Committee's needs and with the costs of goods and services in their local area. Therefore, they can formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting, and all directly affected persons have an opportunity to participate and provide input.

For the 2020–2021 and subsequent crop years, the Committee recommended, and AMS approved, an assessment rate of \$0.20 per hundredweight of dates. That rate continues in effect from crop year to crop year until modified, suspended, or terminated by AMS upon recommendation and information submitted by the Committee or other information available to AMS.

The Committee met on June 27, 2023, and recommended 2023–2024 crop year expenditures of \$75,800 and an assessment rate of \$0.15 per hundredweight of dates handled for the 2023–2024 and subsequent crop years. In comparison, last year's budgeted expenditures were \$77,250. The proposed assessment rate of \$0.15 per hundredweight is \$0.05 lower than the rate currently in effect. The Committee recommended decreasing the assessment rate to better align assessment revenue with budgeted expenses and to keep the Committee's financial reserve within the amount allowed under the Order. The Committee projects that handlers will handle 426,000 hundredweight of California dates for the 2023–2024 crop year, which is the same quantity that was projected for the 2022–2023 crop year. The proposed lower rate would provide sufficient funds to cover most of the 2023–2024 crop year anticipated expenses, with the balance coming from other income and the Committee's financial reserve. Assessments on California dates handled would generate approximately \$63,900 in income at the recommended \$0.15 per hundredweight assessment rate.

The Committee's budgeted expenditures for the 2023–2024 crop year total \$75,800. The Committee's expenses include \$48,000 for management services, \$16,800 for office administration, and \$11,000 for the financial audit. In comparison, the previous crop year's total budget was \$77,250, with \$48,000 for management services, \$19,750 for office administration, and \$9,500 for the audit.

The assessment rate recommended by the Committee was derived by considering anticipated expenses, the expected volume of dates handled, and the amount of funds available in the operating reserve. Income derived from handler assessments of \$63,900 (426,000 hundredweight assessed at the proposed rate of \$0.15) would be adequate to cover most of the Committee's budgeted expenses of \$75,800, with the balance covered from \$5,100 in surplus allocation income and \$6,800 from reserve funds. After expending \$6,800 from the reserve on budgeted expenses, the ending 2023–2024 crop year balance in the financial reserve fund is expected to be \$49,400, which would be less than the average of the annual expenses of the preceding five years, as mandated by the Order in § 987.72(d).

Although this proposed assessment rate would be in effect for an indefinite period, the Committee would continue to meet prior to or during each crop year to recommend a budget of expenses and consider recommendations for modification of the assessment rate. The dates and times of Committee meetings are available from the Committee or AMS. Committee meetings are open to the public and interested persons may express their views at these meetings. AMS would evaluate Committee recommendations and other available information to determine whether modification of the assessment rate is needed. Further rulemaking would be undertaken as necessary. The Committee's 2023–2024 crop year budget, and those for subsequent crop years, will be reviewed and, as appropriate, approved by AMS.

#### **Initial Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS has considered the economic impact of this proposed rule on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the

Act, and the rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 70 producers of dates in the production area and 11 handlers subject to regulation under the Order. Small agricultural producers of dates are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$3,500,000 (NAICS code 111339), and small agricultural service firms are defined as those whose annual receipts are less than \$34,000,000 (NAICS code 115114) (13 CFR 121.201).

According to the National Agricultural Statistics Service (NASS), data for the most-recently completed crop year (2022) shows that California date farmers produced 49,200 tons of dates and that the producer price for fresh market California dates was \$2,840 per ton. With the estimated 49,200-ton crop, the total farm gate value for California date producers was approximately \$139,728,000 (49,200 multiplied by \$2,840). Therefore, the average fresh market date revenue for the 70 producers within the production area would be about \$1,996,114 (\$139,728,000 divided by 70). Thus, it can be concluded that the many of the date producers within the production area could be considered small entities.

Furthermore, USDA Market News reported an average terminal market price of \$53.90 per 11-pound carton for the 2021–2022 crop year. With approximately 98,400,000 pounds handled, the industry would have shipped an estimated 8,945,454 11-pound cartons (98,400,000 divided by 11-pound carton) of packaged dates for a total value of \$482,159,971 (8,945,454 multiplied by \$53.90). With 11 date handlers within the production area, the average revenue per handler is estimated to be \$43,832,724 for the 2021–2022 crop year (\$482,159,971 divided by 11). Thus, most California date handlers could be considered large entities.

This proposal would decrease the assessment rate collected from handlers for the 2023–2024 and subsequent crop years from \$0.20 to \$0.15 per hundredweight of assessable dates. The Committee unanimously recommended 2023–2024 crop year expenditures of \$75,800 and a \$0.15 per hundredweight assessment rate. The Committee expects the industry to handle 426,000 hundredweight of assessable dates during the 2023–2024 crop year. Thus, at the \$0.15 per hundredweight rate, the Committee anticipates \$63,900 in assessment income (426,000

hundredweight multiplied by \$0.15 per hundredweight). The Committee also expects to utilize surplus allocation (\$5,100) and the Committee's monetary reserve (\$6,800) to cover the remaining \$11,900 of expenses. Income derived from all sources are expected to be adequate to meet budgeted expenditures for the 2023–2024 crop year. The Committee's reserve balance (approximately \$49,400 at the end of the 2023–2024 crop year) would be maintained at a level that the Committee believes is appropriate and is compliant with the provisions of the Order.

The Committee's budgeted expenditures for the 2023–2024 crop year total \$75,800. The Committee's expenses include \$48,000 for management services, \$16,800 for office administration, and \$11,000 for the financial audit. In comparison, the previous crop year's total budget was \$77,250, with \$48,000 for management services, \$19,750 for office administration, and \$9,500 for the audit.

Prior to arriving at the budget and proposed assessment rate, the Committee discussed various alternatives. However, the Committee determined that the recommended assessment rate would be able to reduce the financial burden on the industry without drawing down reserves to an unsustainable rate. The assessment rate of \$0.15 per hundredweight of assessable dates was derived by considering anticipated expenses, the projected volume of dates handled, the projected monetary balance held in reserve, and additional pertinent factors.

A review of NASS information indicates that the average producer price for the 2022 crop year was \$2,840 per ton (\$142.00 per hundredweight). Utilizing the recommended assessment rate of \$0.15 per hundredweight, the estimated assessment revenue as a percentage of total producer revenue would be approximately 0.106 percent (\$0.15 per hundredweight divided by \$142.00 and multiplied by 100).

This proposed action would decrease the assessment obligation imposed on handlers. Assessments are applied uniformly on all handlers, and some of the costs may be passed on to producers. However, these costs are expected to be offset by the benefits derived by the operation of the Order.

The Committee's meetings are widely publicized throughout the production area. The California date industry and all other interested persons are invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the June 27, 2023, meeting was a public meeting and all entities, both large and small,

were able to express views on this issue. Finally, interested persons are invited to submit comments on this proposed rule, including the regulatory and information collection impacts of this action on small businesses.

In accordance with the Paperwork Reduction Act of 1995, (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581–0178, Vegetable and Specialty Crops. No changes in those requirements would be necessary as a result of this proposed rule. Should any changes become necessary, they would be submitted to OMB for approval.

This proposed rule would not impose any additional reporting or recordkeeping requirements on either small or large California date handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

AMS has not identified any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <https://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 30-day comment period is provided to allow interested persons to respond to this proposed rule. All written comments timely received will be considered before a final determination is made on this rule.

#### List of Subjects in 7 CFR Part 987

Dates, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Agricultural Marketing Service proposes to amend 7 CFR part 987 as follows:

## PART 987—DOMESTIC DATES PRODUCED OR PACKED IN RIVERSIDE COUNTY, CALIFORNIA

■ 1. The authority citation for 7 CFR part 987 continues to read as follows:

**Authority:** 7 U.S.C. 601–674.

■ 2. Revise 987.339 to read as follows:

### **§ 987.339 Assessment rate.**

On and after October 1, 2023, an assessment rate of \$0.15 per hundredweight is established for dates produced or packed in Riverside County, California.

**Erin Morris,**

*Associate Administrator, Agricultural Marketing Service.*

[FR Doc. 2023–28279 Filed 12–26–23; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF ENERGY

### 10 CFR Part 430

[EERE–2017–BT–STD–0019]

RIN 1904–AD91

### Energy Conservation Program: Energy Conservation Standards for Consumer Water Heaters

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

**ACTION:** Supplemental notice of proposed rulemaking and request for comment.

**SUMMARY:** The Energy Policy and Conservation Act, as amended (“EPCA”), prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including consumer water heaters. On July 28, 2023, the U.S. Department of Energy (“DOE” or “the Department”) proposed amended energy conservation standards for certain consumer water heaters, including circulating water heaters, along with supporting definitions. In this supplemental notice of proposed rulemaking (“SNOPR”) DOE proposes to amend the definition for circulating water heaters and clarify that circulating water heaters would be subject to the proposed energy conservation standards for storage-type water heaters. DOE requests comment on these proposed definitions.

#### **DATES:**

**Comments:** DOE will accept comments, data, and information regarding this SNOPR no later than January 10, 2024.

Interested persons are encouraged to submit comments using the Federal

eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) under docket number EERE–2017–BT–STD–0019. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2017–BT–STD–0019, by any of the following methods:

#### **Email:**

[ConsumerWaterHeaters2017STD0019@ee.doe.gov](mailto:ConsumerWaterHeaters2017STD0019@ee.doe.gov). Include the docket number EERE–2017–BT–STD–0019 in the subject line of the message.

**Postal Mail:** Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–1445. If possible, please submit all items on a compact disc (“CD”), in which case it is not necessary to include printed copies.

**Hand Delivery/Courier:** Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L’Enfant Plaza SW, 6th Floor, Washington, DC 20024. Telephone: (202) 287–1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimiles (“faxes”) will be accepted. For detailed instructions on submitting comments and additional information on this process, see section V of this document.

**Docket:** The docket for this activity, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at [www.regulations.gov](http://www.regulations.gov). All documents in the docket are listed in the [www.regulations.gov](http://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/EERE-2017-BT-STD-0019](http://www.regulations.gov/docket/EERE-2017-BT-STD-0019). The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section IV of this document for information on how to submit comments through [www.regulations.gov](http://www.regulations.gov).

EPCA requires the Attorney General to provide DOE a written determination of whether the proposed standard is likely to lessen competition. The U.S. Department of Justice Antitrust Division invites input from market participants and other interested persons with views on the likely competitive impact of the proposed standard. Interested persons may contact the Division at

[energy.standards@usdoj.gov](mailto:energy.standards@usdoj.gov) on or before the date specified in the **DATES** section. Please indicate in the “Subject” line of your email the title and Docket Number of this proposed rulemaking.

#### **FOR FURTHER INFORMATION CONTACT:**

Ms. Julia Hegarty, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Email: [ApplianceStandardsQuestions@ee.doe.gov](mailto:ApplianceStandardsQuestions@ee.doe.gov).

Ms. Melanie Lampton, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (240) 751–5157. Email: [Melanie.Lampton@hq.doe.gov](mailto:Melanie.Lampton@hq.doe.gov).

For further information on how to submit a comment or review other public comments and the docket, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: [ApplianceStandardsQuestions@ee.doe.gov](mailto:ApplianceStandardsQuestions@ee.doe.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Table of Contents**

- I. Synopsis
- II. Introduction
  - A. Background
  - B. Deviation From Appendix A
- III. Discussion
- IV. Procedural Issues and Regulatory Review
  - A. Review Under Executive Orders 12866, 13563 and 14094
  - B. Review Under the Regulatory Flexibility Act
  - C. Review Under the Paperwork Reduction Act
  - D. Review Under the National Environmental Policy Act of 1969
  - E. Review Under Executive Order 13132
  - F. Review Under Executive Order 12988
  - G. Review Under the Unfunded Mandates Reform Act of 1995
  - H. Review Under the Treasury and General Government Appropriations Act, 1999
  - I. Review Under Executive Order 12630
  - J. Review Under the Treasury and General Government Appropriations Act, 2001
  - K. Review Under Executive Order 13211
  - L. Information Quality
- V. Public Participation
  - A. Submission of Comments
  - B. Issues on Which DOE Seeks Comment
- VI. Approval of the Office of the Secretary

##### **I. Synopsis**

The Energy Policy and Conservation Act,<sup>1</sup> as amended, Public Law 94–163 (42 U.S.C. 6291–6317, as codified)

<sup>1</sup> All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020), which reflect the last statutory amendments that impact Parts A and A–1 of EPCA.

authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part B of EPCA<sup>2</sup> established the Energy Conservation Program for Consumer Products Other Than Automobiles. (42 U.S.C. 6291–6309) These products include consumer water heaters, the subject of this proposed rulemaking.

On July 28, 2023, DOE published a notice of proposed rulemaking (“NOPR”) proposing new and amended energy conservation standards for consumer water heaters. 88 FR 49058 (the “July 2023 NOPR”). These proposed standards, which are shown in Table I.1 of the July 2023 NOPR included separate standards for circulating water heaters. 88 FR 49058, 49060–49061. In response to the July 2023 NOPR, DOE received several comments from stakeholders requesting that DOE reconsider the standards proposed for circulating water heaters. In response to those comments, DOE has tentatively determined that these categories of water heaters should be treated as storage water heaters and, as a result, would be subject to the standards for storage water heaters proposed in the July 2023 NOPR. The Department requests additional comment on its tentative determination that circulating water heaters should be treated as storage water heaters.

## II. Introduction

The following section briefly discusses the relevant background of DOE’s regulation of circulating water heaters. A more comprehensive discussion of the rulemaking history of consumer water heaters, including relevant statutory authorities, can be found in the July 2023 NOPR. 88 FR 49058, 49065–49068.

### A. Background

On September 5, 2019, DOE issued an enforcement policy for consumer gas-fired “circulating water heaters” (the “September 2019 Enforcement Policy”). In that policy, DOE stated that it would not seek civil penalties for failing to certify these products or for non-

compliance with the applicable standards, on or before December 31, 2021.<sup>3</sup> In the September 2019 Enforcement Policy, the Department stated it had become aware of an issue with respect to certain consumer instantaneous water heaters commonly referred to by industry as “circulating water heaters.” These “circulating water heaters” operate differently than either the storage water heaters or the instantaneous water heaters that DOE considered in its previous rulemakings for consumer water heaters. DOE stated that it found several manufacturers producing consumer gas-fired “instantaneous” water heaters that are designed to be used with a volume of stored water (usually in a tank, but sometimes in a recirculating hot water system of sufficient volume) where the water heater does not directly provide hot water to fixtures, but rather replenishes heat lost from the tank or system through hot water draws or standby losses by circulating water to and from the tank or other system. Circulating water heaters are typically activated by an aquastat<sup>4</sup> installed in a separately sold storage tank or an inlet water temperature sensor. Due to these differences, circulating water heaters could not easily be tested using DOE’s test procedure for consumer water heaters.

In a June 21, 2023, final rule amending the test procedure for consumer water heaters and residential-duty commercial water heaters (the “June 2023 TP Final Rule”), DOE, among other things, addressed circulating water heaters by establishing a definition and method of test to determine UEF ratings for these products. 88 FR 40406. Specifically, DOE defined a “circulating water heater” as an instantaneous or heat pump-type water heater that does not have an operational scheme in which the burner, heating element, or compressor initiates and/or terminates

heating based on sensing flow; has a water temperature sensor located at the inlet or the outlet of the water heater or in a separate storage tank that is the primary means of initiating and terminating heating; and must be used in combination with a recirculating pump and either a separate storage tank or water circulation loop in order to achieve the water flow and temperature conditions recommended in the manufacturer’s installation and operation instructions. 10 CFR 430.2. DOE also determined that circulating water heaters with input ratings below 200,000 Btu/h (for gas-fired), 210,000 Btu/h (for oil-fired), or 12 kW (for electric) meet the definitional criteria for instantaneous consumer water heaters. 88 FR 40406, 40420–40422. Under the amended test procedure, gas-fired circulating water heaters, oil-fired circulating water heaters, and electric resistance circulating water heaters (which were tentatively considered the baseline category of electric circulating water heaters in the July 2023 NOPR) are to be tested with unfired hot water storage tanks (“UFHWSTs”) with measured volumes between 80 and 120 gallons. See section 4.10 of appendix E to subpart B of 10 CFR part 430. DOE had determined that the relationship between standby losses and storage volume is similar for electric storage water heaters above 55 gallons and for UFHWSTs. Thus, in its analysis, DOE adjusted the UEF-based standards for instantaneous water heaters by applying the linear decreases in the currently applicable standards for electric storage water heaters greater than 55 gallons in rated storage volume to result in the converted standards for circulating water heaters. As a result, in the July 2023 NOPR, DOE proposed to establish updated UEF standards that reflect the new test method as discussed further in section IV.C.2 of that document, beginning with the currently applicable standards for instantaneous water heaters.

DOE received comments in response to the July 2023 NOPR regarding the proposed standards for circulating water heaters from the interested parties listed in Table II.1.

<sup>2</sup> For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

<sup>3</sup> The September 2019 Enforcement Policy can be found online at: [www.energy.gov/sites/prod/files/2019/09/f66/Enforcement%20Policy-CirculatingWH.92019.pdf](http://www.energy.gov/sites/prod/files/2019/09/f66/Enforcement%20Policy-CirculatingWH.92019.pdf) (Last accessed: Oct. 30, 2023).

<sup>4</sup> An aquastat is a temperature measuring device typically used to control the water temperature in a separate hot water storage tank.

TABLE II.1—JULY 2023 NOPR COMMENTS ON CIRCULATING WATER HEATER STANDARDS<sup>5</sup>

| Commenter(s)                                                   | Abbreviation     | Comment No. in the docket | Commenter type     |
|----------------------------------------------------------------|------------------|---------------------------|--------------------|
| Bradford White Corporation .....                               | BWC .....        | 1164                      | Manufacturer.      |
| California Energy Commission .....                             | CEC .....        | 1173                      | State Agency.      |
| Rheem Manufacturing Company .....                              | Rheem .....      | 1177                      | Manufacturer.      |
| A.O. Smith Corporation .....                                   | A.O. Smith ..... | 1182                      | Manufacturer.      |
| New York State Energy Research and Development Authority ..... | NYSERDA .....    | 1192                      | State Agency.      |
| Air-Conditioning, Heating, and Refrigeration Institute .....   | AHRI .....       | 1167                      | Trade Association. |

### B. Deviation From Appendix A

In accordance with section 3(a) of 10 CFR part 430, subpart C, appendix A (“appendix A”), DOE notes that it is deviating from the provision in the Process Rule regarding the length of the comment period for a NOPR. Section 6(f)(2) of the Process Rule specifies that the length of the public comment period for a NOPR will be not less than 75 calendar days. For this limited-scope SNOPIR, DOE has opted instead to provide a shorter comment period. DOE believes a shorter comment period is appropriate as this SNOPIR solely addresses the categorization of circulating water heaters. The comment period provided will provide interested parties with a meaningful opportunity to comment on the issue addressed in this supplemental proposal.

### III. Discussion

DOE developed this supplemental proposal regarding circulating water heaters after considering oral and written comments, data, and information from interested parties that represent a variety of interests. The following discussion addresses issues raised by these commenters on this specific topic.

In response to the July 2023 NOPR, several commenters disagreed with DOE’s decision to treat circulating water heaters as instantaneous-type water heaters. Commenters also expressed concerns that circulating water heater designs could be used in lieu of traditional storage water heaters to offer consumers alternatives to products which must comply with more-stringent standards.

For example, CEC stated that a circulating water heater connected to a recirculation loop, where reheat is triggered by the temperature of the water flowing through the loop, is

effectively treating the loop itself as a storage tank. (CEC, No. 1173 at p. 9–10) Based on this comment, DOE understands that simplifying a circulating water heater system as essentially a water heater plus a separate storage tank is appropriate, even for products designed to work with recirculation loops and not tanks specifically.

NYSERDA stated that electric circulating water heaters are potentially capable of providing the same consumer utility as heat pump water heaters; therefore, the commenter recommended that DOE should either establish heat pump-level standards for these products or re-define circulating water heaters more narrowly so that they do not become the preferred market option to a heat pump water heater. NYSERDA suggested that DOE could address more-stringent, heat pump level standards for electric circulating water heaters in a separate rulemaking to ensure that the energy savings from this rulemaking are realized. (NYSERDA, No. 1192 at pp. 6–7) AHRI indicated that electric resistance circulating water heaters, while not presently sold with storage tanks (as this would make for a more difficult and less efficient installation), would not offer any benefit over an electric resistance storage water heater; therefore, there is confusion regarding the misalignment between electric circulating water heater standards and electric storage water heater standards. (AHRI, No. 1167 at pp. 10–11)

Along these same lines, CEC commented that a manufacturer could also separate the water heater into component parts in order to qualify for the current definition of a circulating water heater: a “kit” that includes the same heating element, storage tank and thermostat as a typical storage water heater, with the thermostat installed in the storage tank in the same manner as a storage water heater. (CEC, No. 1173 at p. 10) DOE understands the CEC comment may refer to manufacturers potentially selling storage water heaters as separate components, one of them being a “circulating water heater,” in

order to classify a product as a circulating water heater instead of as a storage water heater (which may have more stringent standards).

A.O. Smith stated that it believes that electric circulating water heaters meet the definition of an electric storage water heater and should therefore be held to the same standards as electric storage water heaters because the electric circulating water heaters on the market today cannot operate independent of a storage tank. A.O. Smith indicated that it is not aware of any performance-related features that would justify the creation of a separate product class and efficiency level for circulating water heaters. Additionally, the manufacturer raised a concern that electric circulating water heaters could be used instead of heat pump water heaters, and this would undermine energy savings resulting from this rule if electric circulating water heaters were held to a less-stringent standard. (A.O. Smith, No. 1182 at pp. 12–13) Rheem commented that an electric circulating water heater can be used with any size tank to easily replace a water heater where a heat pump storage-type water heater would otherwise be required, and thus the standards for these products should be aligned to meet a UEF of 2.3. (Rheem, No. 1177 at pp. 14–15)

Regarding gas-fired circulating water heaters, A.O. Smith added that creating a gas-fired circulating water heater product class with efficiencies achievable by non-condensing technology is also likely to undermine the energy savings from the gas-fired instantaneous water heater standards being proposed at condensing-level. Unlike heat pump circulating water heaters, A.O. Smith stated, the “heat engine” of a gas-fired circulating water heater can be operated without the use of a storage tank, and therefore these can be sold separately in place of gas-fired instantaneous water heaters. A.O. Smith recommended that gas-fired circulating water heaters be required to meet the same stringency of standard as gas-fired instantaneous water heaters (*i.e.*, a condensing level). (A.O. Smith, No.

<sup>5</sup> The parenthetical reference provides a reference for information located in the docket of DOE’s rulemaking to develop energy conservation standards for consumer water heaters. (Docket No. EERE–2017–BT–STD–0019, which is maintained at [www.regulations.gov](http://www.regulations.gov)). The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

1182 at p. 13) By “heat engine,” DOE understands A.O. Smith is referring to the burner, blower, combustion chamber, and hot water heat exchanger, which altogether can output hot water at the setpoint temperature.

Rheem did not support deferring consideration of more-stringent standards for gas-fired circulating water heaters because these products can be direct replacements for <2 gallon gas-fired instantaneous water heaters, which would have to achieve condensing efficiencies as a result of this rulemaking. Rheem noted that DOE has existing and recently finalized standards that would require condensing technology for consumer gas-fired storage water heaters with a rated storage volume greater than 55 gallons and less than or equal to 100 gallons, as well as residential-duty commercial gas-fired storage water heaters.<sup>6</sup> Rheem claimed that a gas-fired circulating water heater could easily replace a water heater where condensing efficiencies would otherwise be required, and the commenter concluded by recommending that DOE align the standards for gas-fired circulating water heaters with the standards for <2-gallon gas-fired instantaneous water heaters. Specifically, Rheem suggested DOE change the intercept in the gas-fired circulating water heater standards equations to match the values proposed for <2-gallon gas-fired instantaneous water heaters. (Rheem, No. 1177 at p. 14)

In response, DOE notes that circulating water heaters contain very little to no water on their own (*i.e.*, are “tankless”), but, as was determined in the June 2023 TP Final Rule, require a separate volume of water in order to function properly when installed in the field. 88 FR 40406, 40443. In other words, the circulating water heater and its separate tank or recirculation loop must be treated as one system. When considering the entire system—the circulating water heater plus the stored water volume required for its operation in the field—these water heaters are operationally very similar to storage-type water heaters. Thus, DOE agrees with commenters and has tentatively determined that it is appropriate to classify circulating water heaters as storage-type water heaters under its regulations.

With respect to the issue of whether circulating water heaters should constitute a separate product class of

storage-type water heaters, DOE notes that it must establish a separate standard for a group of covered products (*i.e.*, establish a separate product class) based on the type of energy used, or if DOE determines that the group of covered products has a capacity or other performance-related feature that other products do not have and such feature justifies a different standard. (42 U.S.C. 6295(q)) In determining whether a performance-related feature justifies a different standard, DOE must consider the utility of the feature to the consumer and other factors DOE determines are appropriate. (*Id.*)

DOE agrees with commenters who stated that circulating water heaters provide the same consumer utility as storage-type water heaters and has determined that there are no performance-related features which would support establishing a separate product class for circulating water heaters.

Further, in the June 2023 TP Final Rule, DOE established a new test method for circulating water heaters that requires them to be paired with a storage tank for testing, which is representative of how these products would be used in the field. DOE also defined the effective storage volume of circulating water heaters as the stored volume of hot water used when testing the circulating water heater (see section 6.3.1.1 of appendix E). 88 FR 40406, 40461. While there are no longer any models of circulating consumer water heaters on the market today, the products which could potentially exist would all be classified as storage-type under the EPCA definitions when the volume of water in the tank is considered. For example, consumer gas-fired circulating water heaters must be tested with an 80- to 120-gallon UFHWST, resulting in effective storage volumes in that range. For 80 gallons, because EPCA defines instantaneous-type water heaters as having no more than one gallon of water per 4,000 Btu/h of input (*see* 42 U.S.C. 6291(27)(B)), the circulating water heater would need to have at least 320,000 Btu/h of heat input to be considered instantaneous-type. This input rate is too high to be considered a consumer water heater for which EPCA limits the maximum input rating to 200,000 Btu/h for instantaneous-type water heaters (*see* 42 U.S.C. 6291(27)(A)). Electric and oil-fired water heaters similarly would require an input rate well above the EPCA-defined maximum thresholds to be considered a consumer instantaneous-type water heater. Therefore, a designation of these products as consumer instantaneous-

type water heaters is inaccurate and does not consider the function and operation of the product with its separately stored water.

There is also a clear parallel with split-system heat pump water heaters. These products, which consist of a heat pump module and a separate storage tank, have long been considered to be electric storage water heaters by DOE and do not have separate standards. In the July 2023 NOPR, DOE stated that it has not identified any unique performance-related features offered by split-system heat pump water heaters that would warrant a separate product class consideration at this time. 88 FR 49058, 49080. DOE also identified split-system heat pump water heaters as storage-type water heaters in the June 2023 TP Final Rule. 88 FR 40406, 40417.

The comments from A.O. Smith regarding gas-fired circulating water heaters appear to state that gas-fired circulating water heaters can be potential substitutes for gas-fired instantaneous water heaters, hence this commenter suggested establishing condensing-level standards for gas-fired circulating water heaters. However, Rheem’s comments appear to suggest that gas-fired circulating water heaters could be substitutes for any other type of gas-fired water heater (instantaneous or storage-type), hence coming to the same conclusion that standards for gas-fired circulating water heaters should reflect a condensing efficiency.

DOE’s test procedure in appendix E requires that gas-fired circulating water heaters be tested with an UFHWST having a volume between 80 and 120 gallons. (*See* section 4.10 of appendix E.) A re-classification of gas-fired circulating water heaters as storage-type water heaters results in condensing-level standards if the gas-fired circulating water heater is tested with an UFHWST that is between 80 and 100 gallons: such a configuration would result in an effective storage volume for the circulating water heater being 80 to 100 gallons, and for these volumes the current standards at 10 CFR 430.32(d) generally correspond to condensing efficiencies. If tested with an UFHWST that is between 100 and 120 gallons, the proposed standards correspond to noncondensing efficiencies.<sup>7</sup> In the July 2023 NOPR, DOE proposed standards for gas-fired storage water heaters using effective storage volume instead of rated storage volume such that, under the re-

<sup>6</sup> On October 6, 2023, DOE published a final rule establishing amended energy conservation standards for commercial water heaters, including residential-duty gas-fired storage water heaters. 88 FR 69686, 69822.

<sup>7</sup> DOE received comments from stakeholders presenting concerns with the lower stringency of the standards for gas-fired storage water heaters larger than 100 gallons, and the Department aims to address these comments in a future document.

classification proposed in this SNOPR, gas-fired circulating water heaters and traditional gas-fired storage water heaters can be evaluated on an equivalent basis.

DOE has tentatively determined that gas-fired circulating water heaters would not be direct substitutes for gas-fired instantaneous water heaters based on two factors that define circulating water heaters. First, circulating water heaters are defined as being thermostatically activated and not flow-activated. In its analysis for more-stringent standards for the gas-fired instantaneous water heater product classes, the Department has only come across products which have flow-activated control schemes. Products with flow-activated control schemes must be tested for a maximum gallons per minute (“maximum GPM”) delivery capacity and must be certified with such in order to determine a draw pattern. By contrast, products that are not flow-activated use a first-hour rating (“FHR”) delivery capacity metric and must be certified with such in order to determine a draw pattern. Currently, there are no gas-fired instantaneous water heaters less than 2 gallons and higher than 50,000 Btu/h of input certified to DOE with FHR. All products currently certified to DOE as demonstrating compliance with gas-fired instantaneous water heater standards certify a maximum GPM, indicating that these are all flow-activated products.

Second, gas-fired instantaneous water heaters possess design options that allow these products to meet the consumer demand for hot water (*i.e.*, achieve a high enough outlet water temperature) without the need for a recirculation pump and a separate stored volume of water, whereas, by definition, circulating water heaters require these components in order to operate correctly. Gas-fired instantaneous water heaters are capable of raising the temperature of cold inlet water to 125 °F ± 5 °F without a separate storage tank, and the maximum flow rate at which this is possible is the maximum GPM rating. Gas-fired instantaneous water heaters on the market today demonstrate this ability to raise the temperature to the desired setpoint at flow rates up to 6.0 gallons per minute. This is possible due to large burners with input rates as high as nearly 200,000 Btu/h, the statutory limit for gas-fired instantaneous water heaters. Classified as storage-type water heaters, gas-fired circulating water heaters may have no more than 75,000 Btu/h, which will provide hot water at

a much lower flow rate.<sup>8</sup> Because the vast majority of gas-fired instantaneous water heaters are certified to the medium and high draw patterns, it is unlikely for the “heat engine” of a circulating water heater to be applied in place of a gas-fired instantaneous water heater.

Altogether, the flow-activated control scheme and larger modulating burners are designs belonging to gas-fired instantaneous water heaters which allow gas-fired instantaneous water heaters to offer a distinct consumer utility. As discussed in the July 2023 NOPR, storage and instantaneous water heaters offer distinct utilities to a consumer: for example, instantaneous water heaters provide a continuous supply of hot water, up to the maximum flow rate, while storage water heaters are often better suited to handle large initial demands for hot water as opposed to continuous draws. 88 FR 49058, 49078. DOE has tentatively determined that gas-fired circulating water heaters cannot offer the utility of a continuous supply of hot water without having flow-activated control schemes and by virtue of reliance upon a recirculating pump and separate stored volume of hot water. Rather, the consumer utility of a gas-fired circulating water heater is akin to that of a gas-fired storage water heater.

DOE requests comment on its tentative determination that gas-fired circulating water heaters do not provide the same consumer utility as gas-fired instantaneous water heaters.

CEC stated their concern that DOE’s proposed definition of circulating water heater could allow for several configurations of products beyond an instantaneous water heater paired with a recirculation pump. Per its comments, CEC believed that the majority of consumer water heater products could meet the circulating water heater definition with no physical modification simply based on the lack of specificity provided regarding the control scheme and configuration. (CEC, No. 1173, p. 9) CEC recommended that the definition describe specific hardware differences (*e.g.*, thermostat controls, recirculation pump controls) in models manufactured for this purpose and not differences in published instructions or other documentation and added that definition also should not use the term “primary” and should instead state the specific methods of initiating and

terminating heating that are allowed for this product type. (CEC, No. 1173 at pp. 10–11) CEC added that the phrase “must be used in combination with a recirculating pump and either a separate storage tank or water circulation loop in order to achieve the water flow and temperature conditions recommended in the manufacturer’s installation and operation instructions” provides too much discretion to manufacturer-published recommendations to be enforceable. CEC suggested that, as written, this phrasing allows manufacturers to recommend one set of conditions for recirculating operation and specify alternate conditions for non-recirculating operation, provided that the recirculating conditions cannot be achieved without connection to a recirculating pump, resulting in a product that would be considered a circulating water heater solely due to its ability to be used with a recirculating loop. (CEC, No. 1173 at p. 10)

In response to these concerns, DOE notes that the re-classification of circulating water heaters as storage-type water heaters would entail that the same standards would apply for traditional storage water heaters and circulating water heaters, such that there would be no incentive to re-label a traditional storage water heater as a circulating water heater. As stated earlier in this section, DOE has tentatively determined that instantaneous, flow-activated water heaters are clearly distinguished from circulating water heaters. The definition of a circulating water heater, as proposed in this SNOPR, will continue to state that such a water heater “does not have an operational scheme in which the burner, heating element, or compressor initiates and/or terminates heating based on sensing flow.” Therefore, it is unlikely for traditional instantaneous water heaters to be re-labeled as circulating water heaters, because doing so would require manufacturers to remove the product’s ability to activate/terminate based on sensing flow.

With regards to the temperature conditions recommended in the manufacturer’s installation and operation instructions, the Department notes that it does not currently have sufficient information to apply additional specificity, nor did DOE receive comments from manufacturers suggesting what these conditions could be. As such, DOE is not proposing to amend this portion of the definition of a circulating water heater but may reassess this in a future rulemaking.

Altogether, after considering this feedback from stakeholders, and reexamining the characteristics and

<sup>8</sup> At even 100 percent recovery efficiency, a 75,000 Btu/h burner can only instantaneously raise water from 58 °F to 125 °F at a maximum of 2.25 gallons per minute, which corresponds to the low draw pattern.

consumer utility of circulating water heaters and storage-type water heaters, DOE has tentatively determined that the new and amended storage-type water heater standards, which were proposed in the July 2023 NOPR, are representative of circulating water heater designs. Therefore, DOE is proposing not to establish separate product classes for circulating water heaters; rather, DOE proposes that these products would be included in the applicable storage water heater product classes. Additionally, DOE is proposing to revise the definition of “circulating water heater” at 10 CFR 430.2 to designate these products as storage-type. The proposed revised definition of “circulating water heater” would additionally state that, “paired with a separate storage tank, a circulating water heater constitutes a storage-type water heater.”

BWC had objected to establishing separate product classes for circulating water heaters and reiterated its previous comments on the test procedure rulemaking, stating that circulating water heaters are utilized exclusively in commercial and industrial settings. (BWC, No. 1164 at pp. 10–11, 45–46) BWC stated that because circulating water heaters are often paired with large hot water storage tanks, they are impractical for most residential applications due to space constraints and smaller hot water load demands. The commenter added that the creation of product classes for circulating water heaters will introduce additional burdens and confusion for manufacturers, testing laboratories, as well as installers in the field, while providing no practical benefit for consumers. (BWC, No. 1164 at pp. 10–11) Regarding gas-fired circulating water heaters, A.O. Smith had noted that models of these products present on the market today are only used in commercial applications, and the UFHWST tank pairing for these products is not common in residential applications as it would result in a more expensive installation compared to a gas-fired storage water heater. (A.O. Smith, No. 1182 at p. 13)

As a result of this proposed amendment to the definition of circulating water heaters, the storage-type input rate limits apply when determining whether a circulating water heater is a consumer water heater. Specifically, these are: 75,000 Btu/h for gas-fired circulating water heaters, 105,000 Btu/h for oil-fired circulating water heaters, 12 kW for electric resistance circulating water heaters, and 24 A at 250 V for heat pump circulating water heaters (see the definition for

“water heater” at 10 CFR 430.2). Products with higher input rates would be commercial water heaters. For example, in earlier stages of this rulemaking, there were gas-fired circulating water heaters available on the market at input rates between 75,000 Btu/h and 200,000 Btu/h; these products would be classified as commercial water heaters should they re-enter the market. DOE understands that this designation as commercial water heaters aligns with BWC’s and A.O. Smith’s suggestion that these water heaters are used in commercial applications.

DOE requests comment on its proposed amended definition for circulating water heaters. DOE is seeking information on whether it is appropriate to classify these products as storage-type water heaters, and what the implications to industry might be.

DOE has not identified any consumer water heaters currently available in the United States that qualify as circulating water heaters. If any such models do exist, they would have similar cost and use profiles as gas-fired storage water heater or electric storage water heater market and would have very few shipments. In the absence of any models or current shipments, DOE concludes that the life-cycle cost (LCC) analysis results, national impact analysis (NIA) results, and other downstream analysis results presented in the July 2023 NOPR are unchanged and remain representative, for gas-fired, oil-fired, and electric storage water heaters, with the proposed amended definition for circulating water heaters, and the proposed standards for storage water heaters are applicable to circulating water heaters.

In this SNOPR DOE maintains its other proposals from the NOPR and will address other topics in a potential final rule adopting amended energy conservation standards for consumer water heaters. The proposals from the July 2023 NOPR not pertaining to the topics addressed herein (regarding circulating water heaters) have not been revised in this SNOPR; however, DOE continues to evaluate feedback received in response to the July 2023 NOPR prior to finalization.

#### 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”) in 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.

Section 6(a) of E.O. 12866 also requires agencies to submit “significant regulatory actions” to OIRA for review. OIRA has determined that the July 2023 NOPR constitutes a “significant regulatory action” within the scope of section 3(f)(1) of E.O. 12866. Accordingly, pursuant to section 6(a)(3)(C) of E.O. 12866, DOE has provided to OIRA an assessment, including the underlying analysis, of benefits and costs anticipated from the proposed regulatory action, together with, to the extent feasible, a quantification of those costs; and an assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned

regulation, and an explanation why the planned regulatory action is preferable to the identified potential alternatives. These assessments are summarized in the July 2023 NOPR, and further detail can be found in the accompanying technical support document.

#### *B. Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires 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. DOE has made its procedures and policies available on the Office of the General Counsel’s website ([www.energy.gov/gc/office-general-counsel](http://www.energy.gov/gc/office-general-counsel)). The proposed definition change for circulating water heaters does not affect the IRFA presented in the July 2023 NOPR.

#### *C. Review Under the Paperwork Reduction Act*

Manufacturers of consumer water heaters must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for consumer water heaters, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including consumer water heaters. (See generally 10 CFR part 429). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (“PRA”). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to

respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

#### *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 rulemakings that establish energy conservation standards for consumer products or industrial equipment. 10 CFR part 1021, subpart D, appendix B5.1. DOE anticipates that this rulemaking qualifies for categorical exclusion B5.1 because it is a rulemaking that establishes energy conservation standards for consumer products or industrial equipment, none of the exceptions identified in categorical exclusion B5.1(b) apply, 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. DOE will complete its NEPA review before issuing the final rule.

#### *E. Review Under Executive Order 13132*

E.O. 13132, “Federalism,” 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal 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 Executive order 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 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. 65 FR 13735. DOE has examined this proposed rule and has tentatively determined that it 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. EPCA governs and prescribes Federal preemption of State regulations as to

energy conservation for the products that are the subject of this proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) Therefore, no further action is required by Executive Order 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,” 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, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Regarding the review required by section 3(a), section 3(b) of E.O. 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the 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 the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 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, this proposed rule meets 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”) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, section 201 (codified at 2 U.S.C. 1531). 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), (b)) The 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 them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE’s policy statement is also available at [www.energy.gov/sites/prod/files/gcprod/documents/umra\\_97.pdf](http://www.energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf).

Although this proposed rule does not contain a Federal intergovernmental mandate, it may require expenditures of \$100 million or more in any one year by the private sector. Such expenditures may include: (1) investment in research and development and in capital expenditures by consumer water heaters manufacturers in the years between the final rule and the compliance date for the new standards and (2) incremental additional expenditures by consumers to purchase higher-efficiency consumer water heaters, starting at the compliance date for the applicable standard.

Section 202 of UMRA authorizes a Federal agency to respond to the content requirements of UMRA in any other statement or analysis that accompanies the proposed rule. (2 U.S.C. 1532(c)) The content requirements of section 202(b) of UMRA relevant to a private sector mandate substantially overlap the economic analysis requirements that apply under section 325(o) of EPCA and Executive Order 12866. The **SUPPLEMENTARY INFORMATION** section of the July 2023 NOPR and the accompanying technical support document respond to those requirements.

Under section 205 of UMRA, the Department is obligated to identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a written statement under section 202 is required. (2 U.S.C. 1535(a)) DOE is required to select from those alternatives the most cost-effective and least burdensome alternative that achieves the objectives of the proposed rule unless DOE publishes an explanation for doing otherwise, or the selection of such an alternative is inconsistent with law. As required by 42 U.S.C. 6295(m), the July 2023 NOPR would establish amended energy conservation standards for

consumer water heaters that are designed to achieve the maximum improvement in energy efficiency that DOE has determined to be both technologically feasible and economically justified, as required by 6295(o)(2)(A) and 6295(o)(3)(B). A full discussion of the alternatives considered by DOE is presented in chapter 17 of the TSD for the July 2023 NOPR.

#### *H. Review Under the Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 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*

Pursuant to E.O. 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (Mar. 15, 1988), DOE has determined that this proposed rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. 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 Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB’s guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (Oct. 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at [www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf](http://www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf). DOE has reviewed this NOPR 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*

E.O. 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 at OMB, a Statement of Energy Effects for any proposed significant energy action. A “significant energy action” is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 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.

DOE has tentatively concluded that this regulatory action, which proposes amended energy conservation standards for consumer water heaters, is not a significant energy action because the proposed standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on this proposed rule.

#### *L. Information Quality*

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (“OSTP”), issued its Final Information Quality Bulletin for Peer Review (“the Bulletin”). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government’s scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are “influential scientific information,” which the Bulletin defines as “scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions.” 70 FR 2664, 2667.

In response to OMB’s Bulletin, DOE conducted formal peer reviews of the

energy conservation standards development process and the analyses that are typically used and has prepared a report describing that peer review.<sup>9</sup> Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. Because available data, models, and technological understanding have changed since 2007, DOE has engaged with the National Academy of Sciences to review DOE's analytical methodologies to ascertain whether modifications are needed to improve the Department's analyses. DOE is in the process of evaluating the resulting report.<sup>10</sup>

## V. Public Participation

### A. Submission of Comments

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

*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, hand delivery/courier, or postal mail.*

Comments and documents submitted via email, hand delivery/courier, or postal mail 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. If you submit via postal mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. 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 of any defects or viruses. Documents should not contain special characters or any form of encryption

and, if possible, they should 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).

### B. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this SNOPR, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

(1) DOE requests comment on its tentative determination that gas-fired circulating water heaters do not provide the same consumer utility as gas-fired instantaneous water heaters.

(2) DOE requests comment on its proposed amended definition for circulating water heaters. DOE is seeking information on whether it is appropriate to classify these products as storage-type water heaters, and what the implications to industry might be.

## VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this Supplemental notice of proposed rulemaking and request for comment.

### List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Small businesses.

<sup>9</sup> The 2007 "Energy Conservation Standards Rulemaking Peer Review Report" is available at the following website: [energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0](https://energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0) (last accessed April 1, 2023).

<sup>10</sup> The report is available at [www.nationalacademies.org/our-work/review-of-methods-for-setting-building-and-equipment-performance-standards](https://www.nationalacademies.org/our-work/review-of-methods-for-setting-building-and-equipment-performance-standards).

### Signing Authority

This document of the Department of Energy was signed on December 21, 2023, by Jeffrey Marootian, Principal Deputy Assistant Secretary for Energy Efficiency and Renewable 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 21, 2023.

**Treena V. Garrett**

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

For the reasons set forth in the preamble, DOE proposes to amend part 430 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

### PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Amend § 430.2 by:

■ (a) Revising the definition for “Circulating water heater;” and  
 ■ (b) Adding in alphabetical order, the definitions for “Electric circulating water heater,” “Gas-fired circulating water heater,” and “Oil-fired circulating water heater.”

The revision and additions read as follows:

#### § 430.2 Definitions.

\* \* \* \* \*

*Circulating water heater* means a water heater that does not have an operational scheme in which the burner, heating element, or compressor initiates and/or terminates heating based on sensing flow; has a water temperature sensor located at the inlet or the outlet of the water heater or in a separate storage tank that is the primary means of initiating and terminating heating; and must be used in combination with a recirculating pump to circulate water and either a separate storage tank or water circulation loop in order to achieve the water flow and temperature

conditions recommended in the manufacturer’s installation and operation instructions. Paired with a separate storage tank, a circulating water heater constitutes a storage-type water heater.

\* \* \* \* \*

*Electric circulating water heater* means a circulating water heater with an input of 12 kW or less; contains more than one gallon of water per 4,000 Btu/h of input (including heat pump-only units with power inputs of no more than 24 A at 250 V).

\* \* \* \* \*

*Gas-fired circulating water heater* means a circulating water heater with a nominal input of 75,000 Btu/h or less; contains more than one gallon of water per 4,000 Btu/h of input.

\* \* \* \* \*

*Oil-fired circulating water heater* means a circulating water heater with a nominal input of 105,000 Btu/h or less; contains more than one gallon of water per 4,000 Btu/h of input.

\* \* \* \* \*

[FR Doc. 2023–28556 Filed 12–26–23; 8:45 am]

**BILLING CODE 6450–01–P**

### DEPARTMENT OF TRANSPORTATION

#### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. **FAA–2023–2400**; Project Identifier **MCAI–2023–00782–T**]

**RIN 2120–AA64**

#### Airworthiness Directives; BAE Systems (Operations) Limited Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to supersede Airworthiness Directive (AD) 2022–25–18, which applies to certain BAE Systems (Operations) Limited Model BAe 146 and Model Avro 146–RJ series airplanes. AD 2022–25–18 requires repetitive inspections for cracking of the main landing gear (MLG) side stay outer link and replacement if necessary. Since the FAA issued AD 2022–25–18, additional investigations of the causes of the cracking were conducted. This proposed AD would require a reduction of the repetitive visual inspection interval, provide optional repetitive special detailed inspections, accomplishing a one-off dimensional tolerance check and

performing a repetitive lubrication of the MLG side stay outer link pivot, as specified in a United Kingdom (U.K.) Civil Aviation Authority (CAA) (U.K. CAA) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by February 12, 2024.

**ADDRESSES:** You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- **Federal eRulemaking Portal:** Go to [regulations.gov](https://www.regulations.gov). Follow the instructions for submitting comments.

- **Fax:** 202–493–2251.

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

- **Hand Delivery:** Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**AD Docket:** You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. **FAA–2023–2400**; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

**Material Incorporated by Reference:**

- For U.K. CAA material incorporated by reference in this AD, contact Civil Aviation Authority, Aviation House, Beehive Ring Road, Crawley, West Sussex RH6 0YR, United Kingdom; telephone +44(0) 330 022 4401; email [continued.airworthiness@caa.co.uk](mailto:continued.airworthiness@caa.co.uk); website [caa.co.uk](https://www.caa.co.uk).

- For BAE Systems (Operations) Limited service information identified in this AD, contact BAE Systems (Operations) Limited, Customer Information Department, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland, United Kingdom; telephone +44 1292 675207; fax +44 1292 675704; email [RAPublications@baesystems.com](mailto:RAPublications@baesystems.com); website [regional-services.com](https://www.regional-services.com).

- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

#### FOR FURTHER INFORMATION CONTACT:

Todd Thompson, Aviation Safety Engineer, FAA, 1600 Stewart Avenue,

Suite 410, Westbury, NY 11590; telephone 206–231–3228; email [todd.thompson@faa.gov](mailto:todd.thompson@faa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Comments Invited**

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include “Docket No. FAA–2023–2400; Project Identifier MCAI–2023–00782–T” at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to [regulations.gov](https://www.regulations.gov), including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

##### **Confidential Business Information**

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as “PROPIN.” The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Todd Thompson, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3228; email [todd.thompson@faa.gov](mailto:todd.thompson@faa.gov). Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

##### **Background**

The FAA issued AD 2022–25–18, Amendment 39–22274 (87 FR 75915, December 12, 2022; corrected December 27, 2022 (87 FR 79236)) (AD 2022–25–

18), for certain BAE Systems (Operations) Limited Model BAe 146 and Model Avro 146–RJ series airplanes. AD 2022–25–18 was prompted by an MCAI originated by the U.K. CAA, which is the aviation authority for the United Kingdom. U.K. CAA issued AD G–2022–0018, dated October 18, 2022, to correct an unsafe condition.

AD 2022–25–18 requires repetitive inspections for cracking of the MLG side stay outer link and replacement if necessary. The FAA issued AD 2022–25–18 to address cracking on the shoulders of a MLG side stay outer link. The unsafe condition, if not addressed, could lead to failure of the MLG side stay outer link and MLG collapse, which could result in a runway departure and the engine or wing contacting the ground. The engine or wing contacting the ground could result in damage to the airplane, an increased risk of fire, the airplane flipping, and injury to occupants.

##### **Actions Since AD 2022–25–18 Was Issued**

Since the FAA issued AD 2022–25–18, U.K. CAA superseded AD G–2022–0018, dated October 18, 2022, and issued AD G–2023–0004R1, dated November 16, 2023 (U.K. CAA AD G–2023–004R1) (also referred to as the MCAI), to correct an unsafe condition for all BAE Systems (Operations) Limited Model BAe 146–301, BAe 146–100A, –200A, and –300A airplanes and Model Avro 146–RJ70A, 146–RJ85A, 146–RJ100A. Model BAe 146–301 airplanes are not certificated by the FAA and are not included on the U.S. type certificate data sheet; this AD therefore does not include those airplanes in the applicability. The MCAI states that further investigation resulted in a reduced repetitive detailed visual inspection interval and an option to do repetitive special detailed inspections; a new requirement for a one-time dimensional tolerance check; and a requirement to perform a repetitive lubrication of the MLG side stay outer link pivot.

The FAA is proposing this AD to address cracking of the MLG side stay outer link. The unsafe condition, could lead to failure of the MLG side stay outer link and MLG collapse, which could result in a runway departure and the engine or wing contacting the ground. The engine or wing contacting the ground could result in damage to the airplane, an increased risk of fire, the airplane flipping, and injury to occupants. You may examine the MCAI in the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2023–2400.

##### **Related Service Information Under 1 CFR Part 51**

U.K. CAA AD G–2023–004R1 specifies procedures for doing repetitive detailed visual inspections or special detailed inspections for cracking of the MLG side stay outer link and replacement if necessary; a one-time dimensional tolerance check of the MLG side stay outer link and corrective actions including replacement if necessary; and repetitive lubrication of the MLG side stay outer link pivot.

The FAA reviewed BAE Systems (Operations) Limited Alert Service Bulletin (ASB) ASB.32–A189, Revision 2, dated August 3, 2023. This service information describes procedures for doing, among other actions, detailed visual inspections and special detailed inspections (fluorescent dye penetrant) for cracking of the MLG side stay outer link, replacement of the side stay outer link; a one-time dimensional tolerance check of the MLG side stay outer link; removing the side stay outer link and contacting the manufacturer; re-applying protective treatment/paint; and lubrication of the MLG side stay outer link pivot.

This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

##### **FAA’s Determination**

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA’s bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI and service information referenced above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

##### **Proposed AD Requirements in This NPRM**

This proposed AD requires accomplishing the actions specified in U.K. CAA AD G–2023–0004R1 described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

##### **Interim Action**

The FAA considers that this proposed AD would be an interim action. If final action is later identified, the FAA might consider further rulemaking then.

**Explanation of Required Compliance Information**

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and

CAAs. As a result, the FAA proposes to incorporate U.K. CAA AD G–2023–004R1 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with U.K. CAA AD G–2023–004R1 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Service information required by U.K. CAA AD G–2023–004R1 for

compliance will be available at *regulations.gov* under Docket No. FAA–2023–2400 after the FAA final rule is published.

**Costs of Compliance**

The FAA estimates that this AD, if adopted as proposed, would affect 20 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

**ESTIMATED COSTS FOR REQUIRED ACTIONS**

| Labor cost                                 | Parts cost | Cost per product | Cost on U.S. operators |
|--------------------------------------------|------------|------------------|------------------------|
| 2 work-hours × \$85 per hour = \$170 ..... | \$0        | \$170            | \$3,400                |

**ESTIMATED COSTS FOR ON-CONDITION ACTIONS**

| Labor cost                                             | Parts cost          | Cost per product |
|--------------------------------------------------------|---------------------|------------------|
| Up to 5 work-hours × \$85 per hour = Up to \$425 ..... | Up to \$3,000 ..... | Up to \$3,425.   |

**Authority for This Rulemaking**

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. 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.

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: General requirements. Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD 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.

For the reasons discussed above, I certify this proposed regulation:

- (1) Is not a "significant regulatory action" under Executive Order 12866,
- (2) Would not affect intrastate aviation in Alaska, and

(3) Would not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

**The Proposed Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

**PART 39—AIRWORTHINESS DIRECTIVES**

- 1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

- 2. The FAA amends § 39.13 by:
  - a. Removing Airworthiness Directive 2022–25–18, Amendment 39 22274 (87 FR 75915, December 12, 2022; corrected December 27, 2022 (87 FR 79236)); and
  - b. Adding the following new Airworthiness Directive:

**BAE Systems (Operations) Limited:** Docket No. FAA–2023–2400; Project Identifier MCAI–2023–00782–T.

**(a) Comments Due Date**

The FAA must receive comments on this airworthiness directive (AD) by February 12, 2024.

**(b) Affected ADs**

This AD replaces AD 2022–25–18, Amendment 39 22274 (87 FR 75915,

December 12, 2022; corrected December 27, 2022 (87 FR 79236)).

**(c) Applicability**

This AD applies to all BAE Systems (Operations) Limited Model BAe 146–100A, –200A, and –300A airplanes and Model Avro 146–RJ70A, 146–RJ85A, and 146–RJ100A airplanes, certificated in any category.

**(d) Subject**

Air Transport Association (ATA) of America Code 32, Landing gear.

**(e) Unsafe Condition**

This AD was prompted by reports of cracking on the shoulders of a main landing gear (MLG) side stay outer link. The FAA is issuing this AD to address cracking of the MLG side stay outer link. The unsafe condition, if not addressed, could lead to failure of the MLG side stay outer link and MLG collapse, which could result in a runway departure and the engine or wing contacting the ground. The engine or wing contacting the ground could result in damage to the airplane, an increased risk of fire, the airplane flipping, and injury to occupants.

**(f) Compliance**

Comply with this AD within the compliance times specified, unless already done.

**(g) Requirements**

Except as specified in paragraphs (h) and (i) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, United Kingdom (U.K.) Civil Aviation Authority (CAA) (U.K. CAA) AD G–2023–0004R1, dated November 16, 2023 (U.K. CAA AD G–2023–0004R1).

**(h) Exceptions to U.K. CAA AD G–2023–0004R1**

(1) Where U.K. CAA AD G–2023–0004R1 refers to July 7, 2023 (the effective date of U.K. CAA AD G–2023–0004 at original

issue), this AD requires using the effective date of this AD.

(2) This AD does not adopt the paragraph that begins with “Required as indicated, unless accomplished previously in accordance with ASB.32–A189 . . .” and the Note that begins with “Prior accomplishment of inspection requirements . . .” specified in “Required Actions(s) and Compliance Time(s)” of U.K. CAA AD G–2023–0004R1.

(3) Where U.K. CAA AD G–2023–0004R1 refers to “ASB”, “the ASB”, or “ASB.32–A189 Revision 2”, this AD requires using BAE Systems (Operations) Limited Alert Service Bulletin (ASB) ASB.32–A189, Revision 2, dated August 3, 2023.

(4) Where U.K. CAA AD G–2023–0004R1 specifies a detailed visual inspection “every 500 flights or 6 months (whichever occurs first),” for this AD, replace those words with “repeat at intervals not to exceed 500 flight cycles or 6 months, whichever occurs first.”

(5) Where U.K. CAA AD G–2023–0004R1 specifies a special detailed inspection “every 1200 flights or 12 months (whichever occurs first),” for this AD, replace those words with “repeat at intervals not to exceed 1200 flight cycles or 12 months, whichever occurs first.”

(6) Where U.K. CAA AD G–2023–0004R1 specifies “in accordance with the dimensional limits provided in Appendix 2 then Safran Landing Systems must be contacted to provide further instructions,” this AD requires “before further flight, repair using a method approved by the Manager, International Validation Branch, FAA; or the United Kingdom (U.K.) Civil Aviation Authority (CAA) (U.K. CAA); or BAE Systems (Operations) Limited’s U.K. CAA Design Organization Approval (DOA). If approved by the DAO, the approval must include the DAO-authorized signature.”

(7) Where U.K. CAA AD G–2023–0004R1 specifies the lubrication of the MLG sidestay outer link pivots “every 500 flights or 6 months (whichever occurs first),” for this AD, replace those words with “repeat at intervals not to exceed 500 flight cycles or 6 months, whichever occurs first.”

(8) Where paragraph (5) of U.K. CAA AD G–2023–0004R1 specifies “as required by paragraphs (1) and (2) of this AD,” for this AD, replace those words with “as required by paragraphs (1), (2), and (3) of this AD.”

(9) Where the Note in paragraph (5) of U.K. CAA AD G–2023–0004R1 specifies “the part must have been inspected in accordance with paragraph (1) of this AD and a one-off dimensional check, airworthiness assessment and reporting performed in accordance with paragraph (2) of this AD,” for this AD, replace those words with “the part must have been inspected in accordance with paragraph (1) or (2) of this AD and a one-off dimensional check and airworthiness assessment performed in accordance with paragraph (3) of this AD.”

(10) This AD does not adopt the “Remarks” section of U.K. CAA AD G–2023–0004R1.

#### (i) No Reporting Requirement

Although the U.K. CAA AD G–2023–0004R1 and BAE Systems (Operations) Limited Alert Service Bulletin ASB.32–A189, Revision 2, dated August 3, 2023, specify to submit certain information to the

manufacturer, this AD does not include that requirement.

#### (j) Credit for Previous Actions

(1) This paragraph provides credit for actions required by paragraph (1) of U.K. CAA AD G–2023–0004R1, if those actions were performed before the effective date of this AD using BAE Systems (Operations) Limited Alert Service Bulletin ASB.32–A189, dated September 16, 2022, which was incorporated by reference in AD 2022–25–18, Amendment 39 22274 (87 FR 75915, December 12, 2022; corrected December 27, 2022 (87 FR 79236)); or BAE Systems (Operations) Limited Alert Service Bulletin ASB.32–A189, Revision 1, dated March 13, 2023, which is not incorporated by reference in this AD.

(2) This paragraph provides credit for actions required by paragraph (3) of U.K. CAA AD G–2023–0004R1, if those actions were performed before the effective date of this AD using BAE Systems (Operations) Limited Alert Service Bulletin ASB.32–A189, Revision 1, dated March 13, 2023, which is not incorporated by reference in this AD.

#### (k) Additional AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs)*: The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the International Validation Branch, mail it to the address identified in paragraph (l)(1) of this AD or email to: 9-AVS-AIR-730-AMOC@faa.gov. If mailing information, also submit information by email. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer*: For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Validation Branch, FAA; or the U.K. CAA; or BAE Systems (Operations) Limited’s U.K. CAA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

#### (l) Additional Information

(1) For more information about this AD, contact Todd Thompson, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3228; email [todd.thompson@faa.gov](mailto:todd.thompson@faa.gov).

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (m)(4) and (5) of this AD.

#### (m) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) BAE Systems (Operations) Limited Alert Service Bulletin ASB.32–A189, Revision 2, dated August 3, 2023.

(ii) United Kingdom Civil Aviation Authority (U.K. CAA) AD G–2023–0004R1, dated November 16, 2023.

(3) For U.K. CAA AD G–2023–0004R1, contact Civil Aviation Authority, Aviation House, Beehive Ring Road, Crawley, West Sussex RH6 0YR, United Kingdom; telephone +44(0) 330 022 4401; email [continued.airworthiness@caa.co.uk](mailto:continued.airworthiness@caa.co.uk); website [caa.co.uk](http://caa.co.uk).

(4) For BAE Systems (Operations) Limited service information identified in this AD, contact BAE Systems (Operations) Limited, Customer Information Department, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland, United Kingdom; telephone +44 1292 675207; fax +44 1292 675704; email [RApublications@baesystems.com](mailto:RApublications@baesystems.com); website [regional-services.com](http://regional-services.com).

(5) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(6) You may view this material at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, visit [www.archives.gov/federal-register/cfr/ibr-locationsoremailfr.inspection@nara.gov](http://www.archives.gov/federal-register/cfr/ibr-locationsoremailfr.inspection@nara.gov).

Issued on December 19, 2023.

**Victor Wicklund,**

*Deputy Director, Compliance & Airworthiness Division, Aircraft Certification Service.*

[FR Doc. 2023–28254 Filed 12–26–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA–2023–2513; Airspace Docket No. 23–AGL–26]

RIN 2120–AA66

#### Amendment of Jet Route J–211 and Revocation of VOR Federal Airway V–41; Youngstown, OH

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to amend Jet Route J–211 and to revoke Very High Frequency Omnidirectional Range (VOR) Federal Airway V–41. The FAA is proposing this action due to the planned decommissioning of the VOR portion of the Youngstown, OH (YNG), VOR/Tactical Air Navigation (VORTAC) navigational aid (NAVAID). The

Youngstown VOR is being decommissioned in support of the FAA's VOR Minimum Operational Network (MON) program.

**DATES:** Comments must be received on or before February 12, 2024.

**ADDRESSES:** Send comments identified by FAA Docket No. FAA–2023–2513 and Airspace Docket No. 23–AGL–26 using any of the following methods:

\* *Federal eRulemaking Portal:* Go to [www.regulations.gov](http://www.regulations.gov) and follow the online instructions for sending 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 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](http://www.regulations.gov) at any time. 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 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/](http://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:** Colby Abbott, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

#### **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 the 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 modify the National Airspace System (NAS) as necessary to preserve the safe and efficient flow of air traffic.

##### **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 overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. 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 one time 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, as well as 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 to do so 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), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

##### **Availability of Rulemaking Documents**

An electronic copy of this document may be downloaded through the internet at [www.regulations.gov](http://www.regulations.gov). Recently published rulemaking documents can also be accessed through the FAA's web page at [www.faa.gov/air\\_traffic/publications/airspace\\_amendments/](http://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 Operations office

(see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Central Service Center, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177.

##### **Incorporation by Reference**

Jet Routes are published in paragraph 2004 and VOR Federal Airways are published in paragraph 6010(a) of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. These updates would be published in the next update to FAA Order JO 7400.11. 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.

##### **Background**

The FAA is planning to decommission the Youngstown, OH, VOR in October 2024. The Youngstown VOR was one of the candidate VORs identified for discontinuance by the FAA's VOR MON program and listed in the final policy statement notice, "Provision of Navigation Services for the Next Generation Air Transportation System (NextGen) Transition to Performance-Based Navigation (PBN) (Plan for Establishing a VOR Minimum Operational Network)," published in the **Federal Register** on July 26, 2016 (81 FR 48694), Docket No. FAA–2011–1082.

Although the VOR portion of the Youngstown VORTAC is planned for decommissioning, the co-located Tactical Air Navigation (TACAN) portion of the NAVAID is being retained. The TACAN would continue to provide navigational service for military operations and distance measuring equipment (DME) service supporting current and future NextGen PBN flight procedure requirements.

The Air Traffic Service (ATS) routes affected by the Youngstown VOR decommissioning are J–211 and V–41. With the planned decommissioning of the Youngstown VOR, the remaining ground-based NAVAID coverage in the area is insufficient to enable the continuity of the affected ATS routes. As such, proposed modifications to J–211 would result in the route being shortened and to V–41 would result in the airway being revoked.

To address the proposed modifications to the affected ATS routes, instrument flight rules (IFR) pilots flying in the high-altitude enroute structure may circumnavigate the affected area by using adjacent Jet Routes J-60, J-61, J-64, and J-162 or request air traffic control (ATC) radar vectors through the affected area. Additionally, IFR pilots operating aircraft equipped with area navigation (RNAV) capabilities in the high-altitude enroute structure could use RNAV route Q-178 or navigate point-to-point using the existing Fixes and waypoints (WP) that will remain in place to support continued operations through the affected area. IFR pilots operating aircraft equipped with RNAV capabilities in the low altitude enroute structure could also navigate point-to-point using the existing Fixes and WPs that will remain in place to support continued operations through the affected area. Visual flight rules pilots who elect to navigate via the affected VOR Federal Airway may also take advantage of the ATC services listed previously.

### The Proposal

The FAA is proposing to amend 14 CFR part 71 by amending Jet Route J-211 and revoking VOR Federal Airway V-41. The FAA is proposing this action due to the planned decommissioning of the VOR portion of the Youngstown, OH, VORTAC. The proposed ATS route actions are described below.

**J-211:** J-211 currently extends between the Youngstown, OH, VORTAC and the Westminster, MD, VORTAC. The FAA proposes to remove the airway segment between the Youngstown VORTAC and the Johnstown, PA, VOR/DME. Additionally, the route description is being reversed to reflect a south to north orientation consistent with odd numbered route description requirements. As amended, the route would be changed to extend between the Westminster VORTAC and the Johnstown VOR/DME.

**V-41:** V-41 currently extends between the intersection of the Briggs, OH, VOR/DME 077° and Youngstown, OH, VORTAC 177° radials (CUTTA Fix) and the Youngstown VORTAC. The FAA proposes to remove the airway in its entirety.

The NAVAID radials listed in the Jet Route J-211 description in the proposed regulatory text of this NPRM are unchanged and stated in degrees True north.

### 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 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 in accordance with FAA Order 1050.1F, “Environmental Impacts: Policies and Procedures” prior to any FAA final regulatory action.

### List 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 14 CFR 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 2004 Jet Routes.*

\* \* \* \* \*

#### J-211 [Amended]

From Westminster, MD; INT Westminster 292° and Johnstown, PA, 130° radials; to Johnstown.

\* \* \* \* \*

*Paragraph 6010(a) Domestic VOR Federal Airways.*

\* \* \* \* \*

### V-41 [Removed]

\* \* \* \* \*

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

**Frank Lias,**

*Manager, Rules and Regulations Group.*

[FR Doc. 2023–28513 Filed 12–26–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA–2023–2483; Airspace Docket No. 23–AGL–24]

**RIN 2120-AA66**

### Amendment of VOR Federal Airways V-48, V-52, V-216, and V-434, and Revocation of VOR Federal Airway V-206 in the Vicinity of Ottumwa, IA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to amend Very High Frequency Omnidirectional Range (VOR) Federal Airways V-48, V-52, V-216, and V-434, and revoke VOR Federal Airway V-206. The FAA is proposing this action due to the planned decommissioning of the VOR portion of the Ottumwa, IA (OTM), VOR/Distance Measuring Equipment (VOR/DME) navigational aid (NAVAID). The Ottumwa VOR is being decommissioned in support of the FAA’s VOR Minimum Operational Network (MON) program.

**DATES:** Comments must be received on or before February 12, 2024.

**ADDRESSES:** Send comments identified by FAA Docket No. FAA–2023–2483 and Airspace Docket No. 23–AGL–24 using any of the following methods:

\* *Federal eRulemaking Portal:* Go to [www.regulations.gov](http://www.regulations.gov) and follow the online instructions for sending 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 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](http://www.regulations.gov) at any time. 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 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/](http://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:** Colby Abbott, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783.

#### **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 the 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 modify the National Airspace System (NAS) as necessary to preserve the safe and efficient flow of air traffic.

##### **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 overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. 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 one time 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, as well as 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 to do so 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), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

##### **Availability of Rulemaking Documents**

An electronic copy of this document may be downloaded through the internet at [www.regulations.gov](http://www.regulations.gov). Recently published rulemaking documents can also be accessed through the FAA's web page at [www.faa.gov/air\\_traffic/publications/airspace\\_amendments/](http://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 Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Central Service Center, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177.

##### **Incorporation by Reference**

VOR Federal airways are published in paragraph 6010(a) of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. These updates would be published in the next update to FAA Order JO 7400.11. 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.

##### **Background**

The FAA is planning to decommission the Ottumwa, IA, VOR in September 2024. The Ottumwa VOR was one of the candidate VORs identified for discontinuance by the FAA's VOR MON program and listed in the final policy statement notice, "Provision of Navigation Services for the Next Generation Air Transportation System (NextGen) Transition to Performance-Based Navigation (PBN) (Plan for Establishing a VOR Minimum Operational Network)," published in the **Federal Register** on July 26, 2016 (81 FR 48694), Docket No. FAA-2011-1082.

Although the VOR portion of the Ottumwa, IA, VOR/DME is planned for decommissioning, the co-located Distance Measuring Equipment (DME) will be retained to support current and future Area Navigation (RNAV) procedure requirements.

The VOR Federal Airways affected by the Ottumwa VOR decommissioning are V-48, V-52, V-206, V-216, and V-434. With the planned decommissioning of the Ottumwa VOR, the remaining ground-based NAVAID coverage in the area is insufficient to enable the continuity of the affected airways. As such, proposed modifications to V-48, V-52, and V-434 would result in the airways being shortened; to V-216 would result in an existing gap in the airway being expanded; and to V-206 would result in the airway being revoked.

To address the proposed modifications to the affected VOR Federal Airways, instrument flight rules (IFR) pilots may circumnavigate the affected area by using adjacent VOR Federal Airways V-6, V-8, V-10, V-67, and V-175 or request air traffic control (ATC) radar vectors through the affected area. Additionally, IFR pilots operating aircraft equipped with RNAV capabilities could navigate point-to-point using the existing Fixes and waypoints (WP) that will remain in place to support continued operations or use RNAV routes T-251 or T-397 though the affected area. Visual flight rules pilots who elect to navigate via the affected VOR Federal Airways may also take advantage of the ATC services listed previously.

##### **The Proposal**

The FAA is proposing to amend 14 CFR part 71 to amend VOR Federal Airways V-48, V-52, V-216, and V-434, and revoke VOR Federal Airway V-206. The FAA is proposing this action due to the planned decommissioning of the VOR portion of the Ottumwa, IA,

VOR/DME. The proposed airway actions are described below.

**V-48:** V-48 currently extends between the Ottumwa, IA, VOR/DME and the Pontiac, IL, VOR/DME. The FAA proposes to remove the airway segment between the Ottumwa VOR/DME and the Burlington, IA, VOR/DME. As amended, the airway would be changed to extend between the Burlington VOR/DME and the Pontiac VOR/DME.

**V-52:** V-52 currently extends between the Des Moines, IA, VOR/Tactical Air Navigation (VORTAC) and the Ottumwa, IA, VOR/DME; and between the St. Louis, MO, VORTAC and the Pocket City, IN, VORTAC. The FAA proposes to remove the airway segment between the Des Moines VORTAC and the Ottumwa VOR/DME. As amended, the airway would be changed to extend between the St. Louis VORTAC and the Pocket City VORTAC.

**V-206:** V-206 currently extends between the Napoleon, MO, VORTAC and the Ottumwa, IA, VOR/DME. The FAA proposes to remove the airway segment between the Kirksville, MO, VORTAC and the Ottumwa VOR/DME due to the planned decommissioning of the VOR portion of the Ottumwa VOR/DME. Additionally, the FAA proposes to also remove the airway segment between the Napoleon VORTAC and the Kirksville VORTAC due to that airway segment overlapping V-10 which will remain charted and provide navigational guidance between the two NAVAIDs. As amended, the airway would be revoked in its entirety.

**V-216:** V-216 currently extends between the Lamar, CO, VOR/DME and the Mankato, KS, VORTAC; and between the Lamoni, IA, VOR/DME and the Janesville, WI, VOR/DME. The FAA proposes to remove the airway segment between the Lamoni VOR/DME and the Iowa City, IA, VOR/DME. As amended, the airway would be changed to extend between the Lamar VOR/DME and the Mankato VORTAC and between the Iowa City VOR/DME and the Janesville VOR/DME.

**V-434:** V-434 currently extends between the Ottumwa, IA, VOR/DME and the Brickyard, IN, VORTAC. The FAA proposes to remove the airway segment between the Ottumwa VOR/DME and the Moline, IL, VOR/DME. As amended, the airway would be changed to extend between the Moline VOR/DME and the Brickyard VORTAC.

The NAVAID radials listed in the VOR Federal Airway descriptions in the proposed regulatory text of this NPRM are unchanged and stated in degrees True north.

## 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 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 in accordance with FAA Order 1050.1F, “Environmental Impacts: Policies and Procedures” prior to any FAA final regulatory action.

## List 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 14 CFR 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 6010(a) Domestic VOR Federal Airways.*

\* \* \* \* \*

### V-48 [Amended]

From Burlington, IA; Peoria, IL; to Pontiac, IL.

\* \* \* \* \*

### V-52 [Amended]

From St Louis, MO; Troy, IL; INT Troy 099° and Pocket City, IN, 311° radials; to Pocket City.

\* \* \* \* \*

### V-206 [Removed]

\* \* \* \* \*

### V-216 [Amended]

From Lamar, CO; Hill City, KS; to Mankato, KS. From Iowa City, IA; INT Iowa City 062° and Janesville, WI, 240° radials; to Janesville.

\* \* \* \* \*

### V-434 [Amended]

From Moline, IL; Peoria, IL; Champaign, IL; to Brickyard, IN.

\* \* \* \* \*

Issued in Washington, DC, on December 19, 2023.

**Frank Lias,**

*Manager, Rules and Regulations Group.*

[FR Doc. 2023–28381 Filed 12–26–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

### 18 CFR Part 33

[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 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 26, 2024 and reply comments are due April 25, 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](mailto: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](mailto: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 companies<sup>1</sup> under section 203(a)(2) of the Federal Power Act (FPA).<sup>2</sup> 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.<sup>3</sup>

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,<sup>4</sup> the Commission promulgated regulations to implement the amendments to section 203 in the Energy Policy Act of 2005 (EPAct 2005),<sup>5</sup> 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.<sup>6</sup> 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."<sup>7</sup> 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.<sup>8</sup> The blanket authorization requires that the securities be held either as a fiduciary, as principal for derivatives hedging purposes incidental

<sup>3</sup> *Id.*

<sup>4</sup> *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)).

<sup>5</sup> Energy Policy Act of 2005, Public Law 109-58, 119 Stat. 594 (2005).

<sup>6</sup> See 18 CFR 33.1(c).

<sup>7</sup> Order No. 669, 113 FERC ¶ 61,315 at P 4.

<sup>8</sup> 18 CFR 33.1(c)(9).

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).<sup>9</sup>

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.<sup>10</sup> 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."<sup>11</sup>

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.<sup>12</sup> 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,<sup>13</sup> 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

<sup>9</sup> See *id.* § (c)(9)(i)-(iv).

<sup>10</sup> *UBS AG*, 101 FERC ¶ 61,312 (2002), *order on reh'g*, 103 FERC ¶ 61,284, *order on reh'g*, 105 FERC ¶ 61,078 (2003).

<sup>11</sup> *UBS AG*, 105 FERC ¶ 61,078 at P 16.

<sup>12</sup> *Cap. Research & Mgmt. Co.*, 116 FERC ¶ 61,267 (2006).

<sup>13</sup> 15 U.S.C. 78a *et seq.*

<sup>1</sup> 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.

<sup>2</sup> 16 U.S.C. 824b(a)(2).

utilities.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

6. The Commission issued other individual blanket authorizations after its order in *Capital Research & Management Co.* applying similar conditions.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup> In that proceeding, the Commission issued a Notice of Proposed Rulemaking (NPR) 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.<sup>21</sup> 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 NPR 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 NPR and terminated the rulemaking proceeding.<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup> Index funds are estimated to have grown from 20% of the fund market in 2011 to 43% by the end of 2021.<sup>25</sup> 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.<sup>26</sup>

## 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

<sup>14</sup> *Cap. Research & Mgmt. Co.*, 116 FERC ¶ 61,267 at P 32.

<sup>15</sup> *Id.* PP 26–27 (citing 15 U.S.C. 79a *et seq.*).

<sup>16</sup> *Id.* P 28.

<sup>17</sup> 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, Abnett & 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).

<sup>18</sup> 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.”).

<sup>19</sup> See, e.g., *The Goldman Sachs Grp.*, 134 FERC ¶ 61,227 (2011); *BlackRock, Inc.*, 179 FERC ¶ 61,049 (2022).

<sup>20</sup> *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)).

<sup>21</sup> *Id.* PP 36–37 (requiring an affirmation from the investor that, among other things, it will: not seek 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).

<sup>22</sup> *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).

<sup>23</sup> 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>.

<sup>24</sup> Financial Times, *Index Funds Break Through \$10m-in-Assets Mark*, <https://www.ft.com/content/a7e20d96-318c-11ea-9703-eea0cae3f0de> (Jan. 7, 2020).

<sup>25</sup> Investment Company Institute, *2022 Investment Company Factbook*, at 29 (2022), [https://www.ici/factbook.org/pdf/2022\\_factbook.pdf](https://www.ici/factbook.org/pdf/2022_factbook.pdf).

<sup>26</sup> 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).

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 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).<sup>27</sup> 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%.<sup>28</sup> 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.<sup>29</sup> Additionally, some have 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.<sup>30</sup> 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

Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 724 (2019).

<sup>27</sup> 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 Sellers' filing demonstrates which, if any, of the elements of our regulation State Street satisfies.”).

<sup>28</sup> 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

<sup>29</sup> 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 of institutions has acquired large shareholdings in horizontal competitors throughout our economy, causing them to compete less vigorously with each other.”).

<sup>30</sup> 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).

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 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.<sup>31</sup> 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.<sup>32</sup> 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?

<sup>31</sup> See, e.g., *BlackRock, Inc.*, 131 FERC ¶ 61,063 at P 17.

<sup>32</sup> 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.").

(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?

### **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 26, 2024 and reply comments are due April 25, 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](mailto: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,<sup>1</sup> 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

<sup>1</sup> See, e.g., Va. Code Ann. § 56.1 *et seq.*

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),<sup>2</sup> it simply is no longer a 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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,<sup>6</sup> 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. 2023-28665 Filed 12-22-23; 2:00 pm]

**BILLING CODE 6717-01-P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R09-OAR-2023-0590; FRL-11615-01-R9]

#### Air Plan Approval; California; Yolo-Solano Air Quality Management District

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve, through parallel processing, state implementation plan (SIP) revisions from the Yolo-Solano Air Quality Management District (YSAQMD or "District") to address Clean Air Act (CAA or "Act") requirements related to the 2008 8-hour ozone national ambient air quality standards (NAAQS or "standards"). These revisions concern emissions of oxides of nitrogen (NO<sub>x</sub>) from biomass boilers, and also address reasonably available control technology (RACT) requirements for major sources of NO<sub>x</sub> in the portion of the Sacramento Metro, CA, nonattainment area that is subject to YSAQMD jurisdiction. We are taking comments on this proposal and plan to follow with a final action.

**DATES:** Comments must be received on or before January 26, 2024.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R09-OAR-2023-0590 at <https://www.regulations.gov>. For comments submitted at [Regulations.gov](https://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](https://www.regulations.gov). The 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. The written comment is considered the official comment and should include discussion of all points you wish to make. The 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). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit

<sup>2</sup> *BlackRock, Inc.*, 179 FERC ¶ 61,049 (2022) (Christie, Comm'r, concurring at P 3) (BlackRock Concurrence), available at <https://www.ferc.gov/news-events/news/commissioner-christies-concurrence-blackrocks-authorization-buy-voting-securities>.

<sup>3</sup> 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).

<sup>4</sup> See BlackRock Concurrence at PP 4-5.

<sup>5</sup> 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>.

<sup>6</sup> 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).

<https://www.epa.gov/dockets/commenting-epa-dockets>. If you need assistance in a language other than English or if you are a person with a disability who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:**

Eugene Chen, EPA Region IX, 75 Hawthorne Street (AIR-3-3), San Francisco, CA 94105. By phone: (415) 947-4304 or by email at [chen.eugene@epa.gov](mailto:chen.eugene@epa.gov).

**SUPPLEMENTARY INFORMATION:**

Throughout this document, “we,” “us,” and “our” refer to the EPA.

**Table of Contents**

- I. The State’s Submittal
  - A. What documents did the State submit?
  - B. Are there other versions of the submitted documents?
  - C. What is the purpose of the submitted documents?
- II. The EPA’s Evaluation and Action
  - A. How is the EPA evaluating the submitted documents?

B. Do the submitted documents meet the evaluation criteria?

- C. Public Comment and Proposed Action
- III. Incorporation by Reference
- IV. Statutory and Executive Order Reviews

**I. The State’s Submittal**

*A. What documents did the State submit?*

Table 1 lists the documents addressed by this proposal with the dates that they were adopted by the local air agency and submitted by the California Air Resources Board (CARB).

**TABLE 1—SUBMITTED DOCUMENTS**

| Local agency | Document/<br>rule No. | Document title                                                                                                                                 | Revised    | Submitted  |
|--------------|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------|------------|------------|
| YSAQMD ..... | .....                 | Reasonably Available Control Technology (RACT) State Implementation Plan (SIP) Analysis for the 2008 Federal Ozone Standard (“2017 RACT SIP”). | 09/13/2017 | 11/13/2017 |
| YSAQMD ..... | 2.43                  | Biomass Boilers (public draft version submitted for parallel processing) .....                                                                 | .....      | 11/27/2023 |

On September 13, 2017, the YSAQMD adopted the “Reasonably Available Control Technology (RACT) State Implementation Plan (SIP) Analysis for the 2008 Federal Ozone Standard” (“2017 RACT SIP”) to demonstrate that its stationary sources are subject to RACT rules for the 2008 8-hour ozone NAAQS. On November 13, 2017, the California Air Resources Board (CARB) submitted the 2017 RACT SIP to the EPA for approval as a revision to the California SIP. The EPA determined that the negative declarations portion of the 2017 RACT SIP met the SIP submittal completeness criteria in 40 CFR part 51, Appendix V on April 11, 2018.<sup>1</sup> The EPA determined that the remaining elements of the 2017 RACT SIP met the SIP completeness criteria on August 23, 2018.<sup>2</sup>

On November 27, 2023, CARB submitted a public draft version of amendments to Rule 2.43, “Biomass Boilers,” along with a request for parallel processing.<sup>3</sup> The EPA has

reviewed the submitted public draft version of Rule 2.43 and finds that it fulfills the completeness criteria of appendix V, with the exception of the requirements of paragraphs 2.1(e)–2.1(h), which do not apply to rules submitted for parallel processing. CARB’s November 27, 2023 letter states that the YSAQMD Governing Board was scheduled to consider adoption of the amended rule on December 13, 2023, and that if it was approved, CARB would submit the final package to the EPA as a revision to the SIP. While our evaluation of Rule 2.43 herein is based on the public draft of the rule submitted by CARB on November 27, 2023, the YSAQMD Governing Board has since approved the rule amendments from this draft, and the EPA is now awaiting the final rule submittal from CARB.

*B. Are there other versions of the submitted documents?*

On June 30, 2023, we took final action to partially approve and partially disapprove the 2017 RACT SIP.<sup>4</sup> Our partial disapproval related solely to the RACT element for major sources of NO<sub>x</sub>

that we are now proposing to approve in this action.

We approved an earlier version of Rule 2.43 into the SIP on July 2, 2012.<sup>5</sup> The District adopted amendments to the SIP-approved version of Rule 2.43 on April 12, 2023, and CARB submitted these amendments to the EPA on June 8, 2023. We will consider this earlier submittal to be superseded, by the time of our final action, by the version of Rule 2.43 that has been submitted for parallel processing once it is submitted to the EPA as a SIP revision. Therefore, we are proposing to act only on the version of the rule submitted on November 27, 2023, which includes all revisions made in the June 8, 2023 submittal. However, we have reviewed materials provided with the June 8, 2023 submittal, and our evaluation below considers the amendments made in that version of the rule.

*C. What is the purpose of the submitted documents?*

Emissions of NO<sub>x</sub> contribute to the production of ground-level ozone, smog and particulate matter (PM), which harm human health and the environment. Section 110(a) of the CAA requires states to submit plans that provide for implementation, maintenance, and enforcement of the NAAQS. In addition, CAA sections 182(b)(2) and (f) require that SIPs for ozone nonattainment areas classified as “Moderate” or higher implement RACT for any category of sources covered by a control techniques guidelines (CTG)

<sup>1</sup> Letter dated April 11, 2018, from Elizabeth J. Adams, Acting Director, Air Division, EPA Region IX, to Richard Corey, Executive Officer, CARB. A “negative declaration” is an assertion by a state or district that a nonattainment area contains no sources covered by a particular control techniques guidelines (CTG) document.

<sup>2</sup> Letter dated August 23, 2018, from Elizabeth J. Adams, Acting Director, Air Division, EPA Region IX, to Richard Corey, Executive Officer, CARB.

<sup>3</sup> “Parallel processing” refers to a process established under section 2.3 of Appendix V to 40 CFR part 51 that utilizes concurrent state and federal proposed rulemaking actions. Generally, the state submits a copy of the proposed regulation or other revisions to the EPA before conducting its public hearing and completing its public comment process under state law. The EPA reviews this proposed state or district action and prepares a notice of proposed rulemaking under federal law. In some cases, the EPA publishes its notice of

proposed rulemaking in the **Federal Register** during the same timeframe that the state or District is holding its own public hearing and public comment process. If, after completing its public comment process and after the EPA’s public comment process has run, the state materially changes its final SIP submission to the EPA from the initial proposed submission, the EPA evaluates those changes and decides whether to publish another notice of proposed rulemaking in light of those changes or to proceed to taking final action on its proposed action with a description of the state’s changes. Any final rulemaking action by the EPA will occur only after the state formally adopts and submits its final submission to the EPA.

<sup>4</sup> 88 FR 42252.

<sup>5</sup> 77 FR 39181. The EPA published a correcting amendment on March 28, 2018 (83 FR 13190) that corrected an error in the regulatory text of the July 2, 2012 final action.

document and for any major source of volatile organic compounds (VOCs) or NO<sub>x</sub>. The YSAQMD regulates the Yolo and Solano County portions of the Sacramento Metro, CA, ozone nonattainment area, which is classified as “Severe” nonattainment for the 2008 ozone NAAQS.<sup>6</sup> Therefore, the YSAQMD must, at a minimum, ensure that all categories of sources covered by a CTG document and all major sources of VOCs or NO<sub>x</sub> within the District implement RACT-level controls. Any stationary source that emits or has the potential to emit at least 25 tons per year (tpy) of VOCs or NO<sub>x</sub> in a Severe ozone nonattainment area is considered a major stationary source.

The YSAQMD relies upon Rule 2.43 to implement RACT for major sources of NO<sub>x</sub>.<sup>7</sup> As we explained in our June 30, 2023 final action on the 2017 RACT SIP, the current SIP-approved version of Rule 2.43 contains a provision that explicitly exempts affected units from complying with rule standards during periods of startup and shutdown and does not provide for an alternative emission limitation during such periods. This provision is inconsistent with the EPA’s Startup, Shutdown, and Malfunction (SSM) Policy as established in the EPA’s 2015 SSM SIP Action.<sup>8</sup> This deficiency was the basis for our disapproval of the major source NO<sub>x</sub> element of the 2017 RACT SIP. The Rule 2.43 amendments adopted on April 12, 2023, are intended to address this by establishing numeric NO<sub>x</sub> and carbon monoxide (CO) limits that apply during periods of startup and shutdown. The Rule 2.43 amendments that YSAQMD has proposed, will also establish additional recordkeeping and periodic reporting requirements. Our technical support document (TSD) has more detailed information about these rule revisions.

## II. The EPA’s Evaluation and Proposed Action

### A. How is the EPA evaluating the submitted documents?

Rules in the SIP must be enforceable (see CAA section 110(a)(2)), must not interfere with applicable requirements concerning attainment and reasonable further progress or other CAA requirements (see CAA section 110(l)), and must not modify certain SIP control

requirements in nonattainment areas without ensuring equivalent or greater emissions reductions (see CAA section 193).

Generally, SIP rules must require the implementation of RACT for each category of sources covered by a CTG, as well as each major source of NO<sub>x</sub> or VOC in ozone nonattainment areas classified as Moderate or higher (see CAA section 182(b)(2)). The YSAQMD regulates a portion of an ozone nonattainment area classified as “Severe” for the 2008 ozone NAAQS and is therefore responsible for ensuring the applicable sources implement RACT-level controls for that ozone standard. The YSAQMD relies upon Rule 2.43 to require the applicable sources to implement RACT-level controls to fulfill the requirements associated with the major source NO<sub>x</sub> element for the 2008 ozone NAAQS.

We note that the April 12, 2023 amendments to Rule 2.43 also establish emission standards for CO, which is not an ozone precursor, and therefore we are not assessing in this action whether the CO standard implements RACT-level controls. As a result, we have not evaluated CO emission standards in Rule 2.43 for stringency, but we have evaluated them under the enforceability and SIP relaxation criteria.

### B. Do the submitted documents meet the evaluation criteria?

In our June 30, 2023 final action on the 2017 RACT SIP, we evaluated the stringency of the 90 parts per million (ppm) (24-hour block average) NO<sub>x</sub> emissions limit established by the SIP-approved version of Rule 2.43.<sup>9</sup> However, the 90 ppm limit did not apply during periods of startup and shutdown. As a result, we determined that the emission limits in SIP-approved Rule 2.43 achieve RACT-level stringency but found that the lack of a continuous emissions limit that applies at all times (including periods of startup and shutdown) precluded us from determining that Rule 2.43 implemented RACT. We have not identified any information since our June 30, 2023 approval to alter our evaluation of the stringency of the SIP-approved NO<sub>x</sub> emission limits.

The April 12, 2023 amendments to Rule 2.43 established a NO<sub>x</sub> limit of 215 ppm on a 24-hour block average that applies during periods of startup and shutdown. We consider this emission limit to be consistent with the use of either combustion controls or good combustion practices that are the most

stringent control measures that can be feasibly utilized during periods of startup and shutdown. In addition, the YSAQMD identified other California air district rules for biomass boilers and indicated that these rules either exempted periods of startup and shutdown or had startup/shutdown limits that are less stringent than those in Rule 2.43. This supports an EPA determination that the amended rule establishes a RACT-level of control. Finally, we determined that the amended Rule 2.43 is consistent with each of the seven specific criteria recommended in the EPA’s SSM Policy as appropriate considerations for developing emission limitations in SIP provisions applicable during startup and shutdown. Additional information regarding our evaluation of Rule 2.43 with the seven criteria is discussed in greater detail in our TSD for this action.

The Rule 2.43 amendments adopted by YSAQMD on December 13, 2023, explicitly require that the results of any relative accuracy test audit (RATA) performed be maintained by the source as required records, and will also establish a requirement for the owner/operator of an affected source to submit all records required by the recordkeeping provisions of the rule to the EPA at least once every six months.<sup>10</sup> These reporting provision amendments will assist in ensuring compliance with emission standards and other rule requirements, and will also ensure that Rule 2.43 is enforceable by the District and the EPA as well as by members of the public.

Based on the stringency of the existing SIP-approved NO<sub>x</sub> limits, combined with the NO<sub>x</sub> limits established for periods of startup and shutdown, we propose to approve Rule 2.43 as complying with EPA’s SSM policy and as implementing RACT for this source category. As discussed previously, the absence of an emission limit during startup and shutdown was the basis for our disapproval of the major source NO<sub>x</sub> element of the 2017 RACT SIP. Since we are proposing to determine that Rule 2.43 satisfies the requirement to implement RACT, we are

<sup>10</sup> The amendments require that these records be submitted to the EPA via the Compliance and Emissions Data Reporting Interface (CEDRI) or an analogous EPA electronic submission system. CEDRI is an internet-based service maintained by the EPA that allows regulated sources to submit various reports for purposes of demonstrating compliance with federal requirements. In addition to regulated sources, state and local agency personnel may create user accounts on CEDRI and access the information submitted by sources located within their agency’s jurisdiction. Additional information can be found at <https://www.epa.gov/electronic-reporting-air-emissions/cedri>.

<sup>6</sup> May 21, 2012 (77 FR 30088).

<sup>7</sup> 2017 RACT SIP, pages 5 and 45.

<sup>8</sup> “State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA’s SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,” 80 FR 33840 (June 12, 2015).

<sup>9</sup> 88 FR 42252. See also TSD for that action, which is available in the docket for this rulemaking.

also proposing to determine that the District implements RACT for major sources of NO<sub>x</sub> associated with the area's Severe classification for the 2008 ozone NAAQS.

The existing SIP-approved version of the rule contains several monitoring, recordkeeping, and reporting provisions, including a requirement to operate continuous emission monitoring systems (CEMS) for NO<sub>x</sub> and CO; performance specification and calibration requirements for the CEMS; and requirements to maintain daily logs of emissions, fuel usage, and startup/shutdown durations. The amendments adopted on December 13, 2023 establish a new requirement for all records required by this rule to be submitted to the EPA at least once every six months. We consider these provisions adequate to ensure that compliance with rule requirements can be clearly determined, and that the rule is enforceable by the District and the EPA, as well as by members of the public. We are also proposing to determine that our approval of these amendments would comply with CAA section 110(l) because the proposed SIP revision would not interfere with any applicable CAA requirements. In addition, CAA section 193 does not apply to this action because Rule 2.43 is not a SIP-approved control requirement that was in effect before November 15, 1990. Additional information regarding our evaluation is discussed in greater detail in our TSD for this action.

### C. Public Comment and Proposed Action

As authorized in section 110(k)(3) of the Act, the EPA proposes to approve Rule 2.43, as amended on April 12, 2023, and as further amended on December 13, 2023, into the California SIP. Based on our discussion in Section II.B of this document, we propose to determine that Rule 2.43 as amended will comply with the EPA's SSM policy and other applicable CAA requirements and will implement RACT for this source category. In addition, we propose to approve the major source NO<sub>x</sub> RACT element of the 2017 RACT SIP. Because our proposed approval relies upon our evaluation of the public draft version of the Rule 2.43 amendments, subsequently adopted on December 13, 2023, but not yet formally submitted by CARB, we will not take final action until these amendments are submitted to us as a revision to the California SIP. If Rule 2.43 is not submitted in the form adopted on December 13, 2023, we will reconsider our proposed action accordingly. We will accept comments from the public on this proposal until

January 26, 2024. If we take final action to approve the submitted documents, our final action will incorporate this rule into the federally enforceable SIP.

### III. Incorporation by Reference

In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference YSAQMD Rule 2.43, "Biomass Boilers," amended on December 13, 2023, which regulates NO<sub>x</sub> and CO emissions from biomass-fueled boilers. The EPA has made, and will continue to make, these materials available through <https://www.regulations.gov> and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

### IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provision of the Act and applicable federal regulations. 42 U.S.C. 740(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to review state choices, and approve those choices if they meet the minimum criteria of the Act. Accordingly, this proposed action merely proposes to approve state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it proposes to approve a state program;

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act.

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address "disproportionately high and adverse human health or environmental effects" of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." The EPA further defines the term fair treatment to mean that "no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies."

The State did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an EJ analysis and did not consider EJ in this action. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements.

Dated: December 20, 2023.

**Martha Guzman Aceves,**

*Regional Administrator, Region IX.*

[FR Doc. 2023–28525 Filed 12–26–23; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA–R09–OAR–2023–0599; FRL–11591–01–R9]

#### Air Plan Approval; Arizona; Maricopa County Air Quality Department

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve revisions to the Maricopa County Air Quality Department (MCAQD) portion of the Arizona State Implementation Plan (SIP). These revisions concern a rule that includes definitions for certain terms that are necessary for the implementation of local rules that regulate sources of air pollution. We are proposing to approve the rule under the Clean Air Act (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

**DATES:** Comments must be received on or before January 26, 2024.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R09–OAR–2023–0599 at <https://www.regulations.gov>. For comments submitted at [Regulations.gov](https://www.regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](https://www.regulations.gov). The 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. The written comment is considered the official comment and should include discussion of all points you wish to make. The 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). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For 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>. If you need assistance in a language other than English or if you are a person with a

disability who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Kira Wiesinger, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 972–3827 or by email at [wiesinger.kira@epa.gov](mailto:wiesinger.kira@epa.gov).

#### SUPPLEMENTARY INFORMATION:

Throughout this document, “we,” “us” and “our” refer to the EPA.

#### Table of Contents

- I. The State’s Submittal
  - A. What rule did the State submit?
  - B. Are there other versions of this rule?
  - C. What is the purpose of the submitted rule revisions?
- II. The EPA’s Evaluation and Action
  - A. How is the EPA evaluating the rule?
  - B. Does the rule meet the evaluation criteria?
  - C. The EPA’s Recommendations to Further Improve the Rule
  - D. Public Comment and Proposed Action
- III. Incorporation by Reference
- IV. Statutory and Executive Order Reviews

#### I. The State’s Submittal

##### A. What rule did the State submit?

Table 1 lists the rule addressed by this proposal with the date that it was adopted by the local air agency and submitted by the Arizona Department of Environmental Quality (ADEQ) to the EPA.

TABLE 1—SUBMITTED RULE

| Local agency | Rule No.  | Rule title                               | Revised  | Submitted on           |
|--------------|-----------|------------------------------------------|----------|------------------------|
| MCAQD        | 100 ..... | General Provisions and Definitions ..... | 8/9/2023 | <sup>1</sup> 8/23/2023 |

Under CAA section 110(k)(1), the EPA must determine whether a SIP submittal meets the minimum completeness criteria established in 40 CFR part 51, appendix V for an official SIP submittal on which the EPA is obligated to take action. We find that the ADEQ’s August 23, 2023 SIP submittal for MCAQD Rule 100 meets the completeness criteria in 40 CFR part 51 Appendix V, which must be met before formal EPA review.

#### B. Are there other versions of this rulemaking?

We approved an earlier version of MCAQD Rule 100 into the SIP on February 15, 2022.<sup>2</sup> The Maricopa County Board of Supervisors adopted revisions to the SIP-approved version on

August 9, 2023, and the ADEQ submitted them to us on August 23, 2023. If we take final action to approve the August 9, 2023 version of Rule 100, this version will replace the previously approved version of this rule in the SIP.

#### C. What is the purpose of the submitted rule revisions?

The purpose of the submitted rule revisions is to clarify and update definitions in Rule 100 of the Maricopa County portion of the Arizona SIP as part of the MCAQD’s Title V permit program revision. Revisions include the following, but a more complete list and discussion can be found in the technical support document (TSD) for this action found in the docket:

- The addition of definitions for the terms “alternative operating scenario” and “business day or working day” and a revision of the definition of “major

source.” A definition for the term “alternative operating scenario” was added to allow MCAQD Title V permit applications the opportunity to submit an alternative operating scenario for their source. The “major source” definition has been revised to make it consistent with the Title V permit program definition of “major source,” by including language describing a 100 tons per year emission threshold.

#### II. The EPA’s Evaluation and Action

##### A. How is the EPA evaluating the rulemaking?

Rules in the SIP must be enforceable (see CAA section 110(a)(2)), must not interfere with applicable requirements concerning attainment and reasonable further progress or other CAA requirements (see CAA section 110(l)), and must not modify certain SIP control requirements in nonattainment areas

<sup>1</sup> ADEQ submitted the amendment to MCAQD Rule 100 electronically on August 23, 2023. ADEQ’s submittal letter is dated August 23, 2023.

<sup>2</sup> See 87 FR 8418 (February 15, 2022).

without ensuring equivalent or greater emissions reductions (see CAA section 193).

Since Rule 100 sets forth the legal authority for the Maricopa County Air Pollution Rules, which include MCAQD's Federal new source review (NSR) rules in Rule 240 for stationary sources located in nonattainment areas and in attainment and/or unclassifiable areas, the revisions must be more stringent, or at least as stringent, in all respects as the corresponding SIP definitions in 40 CFR part 51.165(a)(1) and 51.166(b), which are the implementing regulations for CAA parts C and D of title I. 40 CFR part 51.165(a)(1) contains the SIP definitions applicable to Federal NSR operating permit programs for stationary sources located in nonattainment areas, and 40 CFR 51.166(b) contains the SIP definitions for stationary sources located in attainment and/or unclassified areas. Guidance and policy documents that we used to evaluate enforceability, revision/relaxation and rule stringency requirements for the applicable criteria pollutants include the following:

1. "State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990," 57 FR 13498 (April 16, 1992); 57 FR 18070 (April 28, 1992).
2. "Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations," EPA, May 25, 1988 (the Bluebook, revised January 11, 1990).
3. "Guidance Document for Correcting Common VOC & Other Rule Deficiencies," EPA Region 9, August 21, 2001 (the Little Bluebook).

#### *B. Does the rule meet the evaluation criteria?*

This rule meets CAA requirements and relevant guidance regarding enforceability. The TSD has more information on our evaluation.

#### *C. The EPA's Recommendations To Further Improve the Rule*

The TSD includes a recommendation for the next time the local agency modifies Rule 100.

#### *D. Public Comment and Proposed Action*

As authorized in section 110(k)(3) of the Act, the EPA proposes to fully approve the submitted rule because it fulfills all relevant requirements. We will accept comments from the public on this proposal until January 26, 2024. If we take final action to approve the submitted rule, our final action will

incorporate this rule into the federally enforceable SIP.

### **III. Incorporation by Reference**

In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the MCAQD's Rule 100, General Provisions and Definitions, revised on August 9, 2023, which sets forth the legal authority for the Maricopa County Air Pollution Rules, and provides definitions of terms used throughout these rules. The EPA has made, and will continue to make, these materials available through <https://www.regulations.gov> and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

### **IV. Statutory and Executive Order Reviews**

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997)

because it proposes to approve a state program;

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act.

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on Tribal Governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address "disproportionately high and adverse human health or environmental effects" of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." The EPA further defines the term fair treatment to mean that "no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies."

The State did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of Executive Order 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 20, 2023.

**Martha Guzman Aceves,**

*Regional Administrator, Region IX.*

[FR Doc. 2023–28495 Filed 12–26–23; 8:45 am]

**BILLING CODE 6560–50–P**

**DEPARTMENT OF DEFENSE****Defense Acquisition Regulations System****48 CFR Parts 203, 204, 212, and 215**

[Docket DARS–2023–0043]

**RIN 0750–AK33**

**Defense Federal Acquisition Regulation Supplement: Inapplicability of Additional Defense-Unique Laws and Certain Non-Statutory DFARS Clauses to Commercial Item Contracts (DFARS Case 2018–D074); Extension of Comment Period**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed rule; extension of comment period.

**SUMMARY:** DoD published a proposed rule on November 17, 2023, proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Acts for Fiscal Years 2018 and 2019 regarding applicability of certain solicitation provisions and contract clauses to contracts and subcontracts for commercial products, commercial services, and commercially available off-the-shelf items. The deadline for submitting comments is being extended to provide additional time for interested parties to provide comments.

**DATES:** The comment period for the proposed rule published November 17, 2023, at 88 FR 80468, is being extended. Comments on the proposed rule should be submitted in writing to the address shown in **ADDRESSES** on or before March 15, 2024, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2018–D074, using either of the following methods:

○ *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for

“DFARS Case 2018–D074”. Select “Comment” and follow the instructions to submit a comment. Please include “DFARS Case 2018–D074” on any attached documents.

○ *Email:* [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2018–D074 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal 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:** Ms. Jeanette Snyder, telephone 703–508–7524.

**SUPPLEMENTARY INFORMATION:** On November 17, 2023, DoD published a proposed rule in the **Federal Register** at 88 FR 80468 seeking public comment on the proposed rule to amend the DFARS to implement sections of the National Defense Authorization Acts for Fiscal Year 2018 and 2019. These sections address requirements related to the applicability of DFARS solicitation provisions and contract clauses to commercial products, commercial services, and commercially available off-the-shelf items.

The comment period for the proposed rule is extended to March 15, 2024, to provide additional time for interested parties to comment on the proposed rule.

**List of Subjects in 48 CFR Part 203, 204, 212, and 215**

Government procurement.

**Jennifer D. Johnson,**

*Editor/Publisher, Defense Acquisition Regulations System.*

[FR Doc. 2023–28413 Filed 12–26–23; 8:45 am]

**BILLING CODE 6001–FR–P**

**DEPARTMENT OF DEFENSE****Defense Acquisition Regulations System****48 CFR Parts 207, 215, 227, and 252**

[Docket DARS–2023–0044]

**RIN 0750–AL24**

**Defense Federal Acquisition Regulation Supplement: Modular Open Systems Approaches (DFARS Case 2021–D005); Extension of Comment Period**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Advance notice of proposed rulemaking; extension of comment period.

**SUMMARY:** DoD published an advance notice of proposed rulemaking on November 17, 2023, seeking public input on a proposed revision to the Defense Federal Acquisition Regulation Supplement (DFARS) to implement certain elements of sections of the National Defense Authorization Acts for Fiscal Years 2012, 2017, and 2021, which establish contract requirements that enable modular open system approaches. The deadline for submitting comments is being extended to provide additional time for interested parties to provide comments.

**DATES:** The comment period for the advance notice of proposed rulemaking published November 17, 2023 at 88 FR 80258, is extended. Comments on the advance notice of proposed rulemaking should be submitted in writing to the address shown in **ADDRESSES** on or before February 15, 2024, to be considered in the formation of a proposed rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2021–D005, using either of the following methods:

○ *Federal eRulemaking Portal:* <https://www.regulations.gov>. Search for “DFARS Case 2021–D005.” Select “Comment” and follow the instructions provided to submit a comment. Please include “DFARS Case 2021–D005” on any attached documents.

○ *Email:* [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2021–D005 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal 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:** Mr. David Johnson, telephone 202–913–5764.

**SUPPLEMENTARY INFORMATION:** On November 17, 2023, DoD published an advance notice of proposed rulemaking (ANPR) in the **Federal Register** at 88 FR 80258 seeking public input on potential DFARS changes to implement certain elements of sections of the National Defense Authorization Acts for Fiscal Years 2012, 2017, and 2021. These sections establish contract requirements that enable modular open system approaches. DoD held a public meeting on December 14, 2023, regarding this

ANPR. DoD does not plan to hold a second public meeting on this ANPR.

The comment period for the ANPR is extended through February 15, 2024, to provide additional time for interested parties to comment on the potential DFARS changes.

#### List of Subjects in 48 CFR Parts 207, 215, 227, and 252

Government procurement.

Jennifer D. Johnson,  
Editor/Publisher, Defense Acquisition  
Regulations System.

[FR Doc. 2023-28415 Filed 12-26-23; 8:45 am]

BILLING CODE 6001-FR-P

## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 227 and 252

[Docket DARS-2023-0045]

RIN 0750-AK82

#### Defense Federal Acquisition Regulation Supplement: Rights in Technical Data (DFARS Case 2019- D044); Extension of Comment Period

**AGENCY:** Defense Acquisition  
Regulations System, Department of  
Defense (DoD).

**ACTION:** Advance notice of proposed  
rulemaking; extension of comment  
period.

**SUMMARY:** DoD published an advance notice of proposed rulemaking on November 17, 2023, seeking public input on a proposed revision to the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Acts for Fiscal Years 2012 and 2017, which address deferred ordering of technical data, including in cases when the Government does not challenge a restrictive marking or asserted restriction in technical data. The deadline for submitting comments is being extended to provide additional time for interested parties to provide comments.

**DATES:** The comment period for the advance notice of proposed rulemaking published November 17, 2023, at 88 FR 80260, is extended. Comments on the advance notice of proposed rulemaking should be submitted in writing to the address shown in **ADDRESSES** on or before February 15, 2024, to be considered in the formation of a proposed rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2019-D044, using either of the following methods:

• *Federal eRulemaking Portal:*  
<https://www.regulations.gov>. Search for “DFARS Case 2019-D044.” Select “Comment” and follow the instructions provided to submit a comment. Please include “DFARS Case 2019-D044” on any attached documents.

• *Email:* [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2019-D044 in the subject line of the message.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal 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:** Mr. David Johnson, telephone 202-913-5764.

**SUPPLEMENTARY INFORMATION:** On November 17, 2023, DoD published an advance notice of proposed rulemaking (ANPR) in the **Federal Register** at 88 FR 80260 seeking public input on potential DFARS changes to implement sections of the National Defense Authorization Acts for Fiscal Years 2012 and 2017. These sections address deferred ordering of technical data, including in cases when the Government does not challenge a restrictive marking or asserted restriction in technical data. DoD held a public meeting on December 15, 2023, regarding this ANPR. DoD does not plan to hold a second public meeting on this ANPR.

The comment period for the ANPR is extended through February 15, 2024, to provide additional time for interested parties to comment on the potential DFARS changes.

#### List of Subjects in 48 CFR Parts 227 and 252

Government procurement.

Jennifer D. Johnson,  
Editor/Publisher, Defense Acquisition  
Regulations System.

[FR Doc. 2023-28414 Filed 12-26-23; 8:45 am]

BILLING CODE 6001-FR-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 660

[Docket No. 231220-0313; RTID 0648-  
XD112]

#### Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Harvest Specifications for the Central Subpopulation of Northern Anchovy

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

**ACTION:** Proposed rule; request for  
comments.

**SUMMARY:** NMFS proposes to revise the overfishing limit (OFL) and acceptable biological catch (ABC), but maintain the annual catch limit (ACL), for the central subpopulation of northern anchovy (CSNA) in the U.S. exclusive economic zone (EEZ) off the West Coast under the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). NMFS is proposing an OFL of 243,779 metric tons (mt) and ABC of 60,945 mt, and an ACL of 25,000 mt. Under current regulations, if the ACL for this stock is reached or projected to be reached in a fishing year (January 1–December 31), then fishing will be closed until it reopens at the start of the next fishing year. This rulemaking is intended to conserve and manage CSNA off the U.S. West Coast.

**DATES:** Comments must be received by January 26, 2024.

**ADDRESSES:** You may submit comments on this document, identified by NOAA–NMFS–2023–0136, by the following method:

• *Electronic Submissions:* Submit all public comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA–NMFS–2023–0136 in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments.

*Instructions:* Comments sent by any other method 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:**

Joshua Lindsay, West Coast Region, NMFS, (562) 980-4034, [Joshua.Lindsay@noaa.gov](mailto:Joshua.Lindsay@noaa.gov).

**SUPPLEMENTARY INFORMATION:** The CPS fishery in the U.S. EEZ off the West Coast is managed under the CPS FMP in coordination with the Pacific Fishery Management Council (Council). The CPS FMP was developed pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act or MSA; 16 U.S.C. 1801 *et seq.*). The CPS FMP is implemented by regulations at 50 CFR part 660, subpart I.

**Background on CSNA Management**

CSNA is managed under multi-year catch limits and quantitative or qualitative reviews of available abundance data without required regular stock assessments or required annual adjustments to target harvest levels. This is in part due to the fact that it does not have biologically significant catch levels and, therefore, does not require intensive harvest management to ensure overfishing is prevented. Allowable catches are set well below maximum sustainable yield (MSY) levels to ensure overfishing does not occur. As a result, anchovy has been adequately managed by tracking landings and examining available abundance indices. CSNA may also be subject to management measures such as catch allocation, gear regulations, closed areas, or closed seasons.

In September 2011, NMFS approved Amendment 13 to the CPS FMP, which modified the framework process used to set and adjust fishery specifications and for setting ACLs and accountability measures. Amendment 13 conformed the CPS FMP with the 2007 reauthorization of the Magnuson-Stevens Act and revision to the Magnuson-Stevens Act National Standard 1 guidelines at 50 CFR 600.310, which, for the first time, required the establishment of ACLs for management unit species (with exceptions). Maintaining the existing reference points and the primary harvest control rules for CSNA, including the large uncertainty buffer built into the ABC control rule for the finfish stocks, Amendment 13 established a management framework under which the OFL for CSNA is set equal to its existing MSY value, if available, and ABC is set at 25 percent of the OFL. This 75 percent reduction from the OFL to the ABC is to provide a buffer for scientific uncertainty surrounding the

OFL. It was recognized at the time that due to the multi-year nature of the management approach, in combination with the biology of CSNA, there would be uncertainty associated with the OFLs; therefore, the Council's Scientific and Statistical Committee (SSC) recommended that a large uncertainty buffer be used (*i.e.*, 75 percent reduction) to prevent overfishing. The ACL is then set either equal to or lower than the ABC.

The OFL is set equal to an estimate of MSY—an estimate that is intended to reflect the largest average fishing mortality rate or yield that can be taken from a stock over the long term (if available) or set based on a stock-specific method if deemed more appropriate. The inclusion of a large non-discretionary buffer between the OFL and ABC both protects the stock from overfishing and allows for a relatively small sustainable harvest. In recognition of the low fishing effort and landings, the Council chose this type of multi-year management framework for some finfish stocks in the FMP because it has proven sufficient to prevent overfishing while allowing for sustainable annual harvests, even when the year-to-year biomasses of these stocks may fluctuate.

Although the allowable catch levels are not required to be adjusted each year for CSNA, the Council is required by regulation to produce an annual Stock Assessment and Fishery Evaluation report, which documents, among other scientific information, significant trends or changes in the resource, marine ecosystems, and fishery over time, and information on which to base catch specifications and status determinations.<sup>1</sup> The report documents trends in landings, changes in fishery dynamics and available population, and biological information for all CPS stocks and is available for Council review each year. The purpose of this report is to provide the Council with the ability to react to the best scientific information available and propose new catch limits if and when changes to management are needed to prevent overfishing or achieve the optimum yield (OY).

Additionally, in November 2021, the Council adopted into its Council Operating Procedures a flowchart and timeline to facilitate regular check-ins on CSNA management. This timeline includes conducting a new stock assessment every 8 years, the first being the one that occurred in 2022, and check-ins every 2 years between those assessments when the Council could revisit the ABC. This flowchart was

developed by the Council's Coastal Pelagic Species Management Team (CPSMT) in coordination with the Council's CPS Advisory Subpanel and SSC.

**Purpose of the Proposed Rule**

On December 31, 2020, NMFS published a final rule in response to a September 2020 court order<sup>2</sup> directing NMFS to implement new reference points for CSNA (85 FR 86855). That rule established the current reference points for CSNA—*i.e.*, an OFL of 119,153 mt, an ABC of 28,788 mt, and an ACL of 25,000 mt. Because NMFS had to publish the rule within 120 days of the court's ruling, and therefore outside the Council process, NMFS expressed intent to work with the Council to implement a new rule based on Council recommendations in the coming years. NMFS was again sued on this 2020 rule.<sup>3</sup> Although the Court ultimately upheld the referent points implemented in the December 2020 rule in a June 2022 order, NMFS and the Council have been working to review and implement new reference points for CSNA through the Council and FMP process.

At the Council's June 2022 meeting, the Council's SSC reviewed the Southwest Fisheries Science Center's recently completed benchmark assessment for CSNA and endorsed it as the best scientific information available for management of CSNA. Although trends in anchovy abundance have been tracked over time, including the development of abundance estimates of northern anchovy since 2015, this was the first stock assessment for CSNA since 1995.

The SSC determined that utilizing the biomass time series from this new assessment to calculate a new OFL represented a better OFL than the MSY-based default harvest control rule. The SSC utilized an average of the last 7 years of biomass estimates from the stock assessment, as well as an  $E_{MSY}$  (exploitation rate for deterministic equilibrium MSY) from the assessment to recommend an OFL. The FMP calls for applying a "DISTRIBUTION" term to biomass estimates that is an estimate of the portion of the population in foreign waters. A DISTRIBUTION of 0.82 was used to obtain an OFL value for U.S. waters specifically, which resulted in a U.S. OFL of 243,779 mt. As mentioned above, per the FMP the OFL is then reduced by 75 percent which equated to

<sup>2</sup> This order was issued in *Oceana v. Ross, et al.*, Case No. 19-cv-03809-LHK (N.D. Cal.).

<sup>3</sup> *Oceana v. Raimondo, et al.*, Case No. 21-cv-00736-VC (N.D. Cal.).

<sup>1</sup> See 50 CFR 600.315(d).

an ABC of 60,945 mt, which was endorsed by the SSC. Although the Council could have set the ACL equal to the ABC, based on socioeconomic and ecological considerations, they chose to recommend a lower ACL of 25,000 mt.

#### Proposed Reference Points

Based on the best available scientific information and recommendations from the SSC and CPSMT, the Council recommended, and NMFS proposes to implement, annual reference points for CSNA including an OFL of 243,779 mt, an ABC of 60,945, and an ACL of 25,000 mt. Because this ACL value is already in place (see 50 CFR 660.511(k)), no regulatory changes are necessary. NMFS has made the preliminary determination that these annual reference points are supported by the best scientific information available and will prevent overfishing. These proposed specifications are intended to conserve and manage CSNA off the U.S. West Coast. All sources of catch would be accounted for against the ACL, including any fishing occurring as part of an exempted fishing permit, the live bait fishery, and other minimal sources of harvest, such as incidental catch in CPS and non-CPS fisheries and minor directed fishing. Under current regulations at 50 CFR 660.509(a), if catch reaches the ACL, the NMFS West Coast Regional Administrator will publish a notice in the **Federal Register** to announce the closure of the fishery until the next fishing season (January 1). Additionally, to ensure that the regulated community is informed of any closure, NMFS will make announcements through other means available, including emails to fishermen, processors, and state fishery management agencies. These reference points would remain in place until new information or concerns arise. NMFS is confident that the proposed OFL in combination with the proposed ABC and ACL will prevent overfishing into the future, is representative of both the historical and recent abundance estimates, and takes into account potential fluctuations in anchovy biomass.

#### Classification

Pursuant to section 304(b)(1)(A) of the MSA, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the CPS FMP, other provisions of the MSA, and other applicable law, subject to further consideration after public comment.

This proposed rule is not subject to the requirements of Executive Order 12866.

Pursuant to Executive Order 13175, this proposed rule was developed after meaningful consultation and collaboration with the tribal representative on the Council.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities, for the reasons discussed below.

For Regulatory Flexibility Act (RFA) purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (North American Industry Classification System (NAICS) code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$11 million for all its affiliated operations worldwide.

The purpose of this proposed rule is to conserve and manage CSNA by preventing overfishing, while still allowing harvest opportunity among differing fishery sectors. This will be accomplished by implementing these annual specifications in the U.S. EEZ off the West Coast. The small entities that would be affected by the proposed action, if adopted, are the vessels that would be expected to harvest CSNA as part of the West Coast CPS small purse seine fleet. In the last 10 years, an average of 25 such vessels have made CSNA landings each year. In the most recent year (2022), 34 such vessels made CSNA landings. From 2012 to 2022, the average annual revenue per vessel for all CPS vessels, including the 34 vessels potentially affected by this rulemaking, was well below the threshold level of \$11 million. These 34 vessels that made CSNA landings averaged around \$1 million in annual revenue, and therefore are considered small businesses under the RFA. We do not collect or have access to information about affiliation between vessels or affiliation between vessels and processing entities in this fishery, or receipts in Alaska, Hawaii, or international fisheries, so it could be possible that some impacted entities may exceed \$11 million in ex-vessel

revenue. However, based on available data, NMFS has determined this to be unlikely. Because each affected vessel is a small business, this proposed rule, if adopted, is considered to equally affect all of these small entities in the same manner. Therefore, this rulemaking would not create disproportionate costs between small and large vessels/businesses.

NMFS used the ex-vessel revenue information for a profitability analysis, as the cost data for the harvesting operations of CPS finfish vessels was limited or unavailable. Because the ACL is not changing, this proposed rule, if adopted, is not expected to change the potential profitability for these small entities compared to the previous fishing year. Therefore, this proposed rule is not expected to have a significant economic impact on the 34 small entities described above.

In addition, CSNA is only one component of the multi-species CPS fishery. Therefore, the revenue derived from harvesting CSNA is typically only one of the sources of fishing revenue for the commercial vessels that participate in the CPS fishery. For example, many vessels in California also harvest mackerel and squid, as well as incidental or live-bait catch of sardine, as the directed fishery is currently closed. CPS vessels typically rely on multiple species for profitability because abundance of CSNA, like the other CPS stocks, is highly associated with ocean conditions and seasonality. Variability in ocean conditions and season results in variability in the timing and location of CPS harvest throughout the year. Because each species responds to ocean conditions in its own way, not all CPS stocks are likely to be abundant at the same time. Therefore, as abundance levels and markets fluctuate, the CPS fishery as a whole has relied on a group of species for its annual revenues. In the event that this proposed action might result in any unexpected decrease in the annual revenue derived from CSNA by the affected small entities, those small entities could be expected to compensate for the decrease by harvesting other CPS stocks.

For the reasons stated above, this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. As a result, an Initial Regulatory Flexibility Analysis is not required, and none has been prepared.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act. There are no relevant Federal rules that may duplicate,

overlap, or conflict with the proposed action.

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

Dated: December 20, 2023.

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

[FR Doc. 2023–28482 Filed 12–26–23; 8:45 am]

**BILLING CODE 3510–22–P**

# Notices

Federal Register

Vol. 88, No. 247

Wednesday, December 27, 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

### Animal and Plant Health Inspection Service

[Docket No. APHIS–2023–0022]

#### Movement of Organisms Modified or Produced Through Genetic Engineering; Notice of Proposed Exemptions; Reopening of Comment Period

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Reopening of comment period.

**SUMMARY:** We are reopening the comment period for our notice that proposes to add five new types of genetic modifications a plant can contain and be exempt from the regulations for the movement of organisms modified or produced through genetic engineering because such modifications could otherwise be achieved through conventional breeding methods. This action will allow interested persons additional time to prepare and submit comments.

**DATES:** The comment period for the notice published on November 15, 2023 (88 FR 78285–78291) is reopened. We will consider all comments that we receive on or before January 19, 2024.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to [www.regulations.gov](http://www.regulations.gov). Enter APHIS–2023–0022 in the Search field. Select the Documents tab, then select the Comment button in the list of documents.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2023–0022, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at [Regulations.gov](http://Regulations.gov) or in

our reading room, which is located in room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

**FOR FURTHER INFORMATION CONTACT:** Dr. Neil Hoffman, Science Advisor, Biotechnology Regulatory Services, APHIS, 4700 River Road, Unit 98, Riverdale, MD 20737–1238; [Neil.E.Hoffman@usda.gov](mailto:Neil.E.Hoffman@usda.gov); (301) 851–3947.

#### SUPPLEMENTARY INFORMATION:

On November 15, 2023, we published in the *Federal Register* (88 FR 78285–78291, Docket No. APHIS–2023–0022) a proposal that would add five new types of genetic modifications a plant can contain and be exempt from the regulations for the movement of organisms modified or produced through genetic engineering because such modifications could otherwise be achieved through conventional breeding methods.

Comments on the notice were required to be received on or before December 15, 2023. We are reopening the comment period on Docket No. APHIS–2023–0022 until January 19, 2024. This action will allow interested persons additional time to prepare and submit comments. We will also consider all comments received between December 16, 2023 (the day after the close of the original comment period) and the date of this notice.

*Authority:* 7 U.S.C. 7701–7772 and 7781–7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 21st day of December 2023.

**Michael Watson,**

*Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2023–28545 Filed 12–26–23; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### U.S. Codex Office

#### Codex Alimentarius Commission: Meeting of the Codex Committee on Food Hygiene

**AGENCY:** U.S. Codex Office, USDA.

**ACTION:** Notice of public meeting and request for comments.

**SUMMARY:** The U.S. Codex Office is sponsoring a public meeting on February 5, 2024. The objective of the public meeting is to provide information and receive public comments on agenda items and draft U.S. positions to be discussed at the 54th Session of the Codex Committee on Food Hygiene (CCFH) of the Codex Alimentarius Commission (CAC). CCFH54 will be held in Nairobi, Kenya, from March 11–March 15, 2024. The U.S. Manager for Codex Alimentarius and the Under Secretary for Trade and Foreign Agricultural Affairs recognize the importance of providing interested parties the opportunity to obtain background information on the 54th Session of the CCFH and to address items on the agenda.

**DATES:** The public meeting is scheduled for February 5, 2024, from 2:00–4:00 p.m. EST.

**ADDRESSES:** The public meeting will take place via Video Teleconference only. Documents related to the 54th Session of the CCFH will be accessible via the internet at the following address: <https://www.fao.org/fao-who-codexalimentarius/meetings/detail/en/?meeting=CCFH&session=54>.

Dr. Benjamin Warren, U.S. Delegate to the 54th Session of the CCFH, invites interested U.S. parties to submit their comments electronically to the following email address: [benjamin.warren@fda.hhs.gov](mailto:benjamin.warren@fda.hhs.gov).

*Registration:* Attendees may register to attend the public meeting here: <https://www.zoomgov.com/meeting/register/vJltc-6qqzMuH510Gf6uXw7xtk9Jq-9tGis#/registration>. After registering, you will receive a confirmation email containing information about joining the meeting.

For further information about the 54th Session of the CCFH, contact U.S. Delegate, Dr. Benjamin Warren, Senior Science Advisor for Food Safety, Office of Food Safety, Center for Food Safety and Applied Nutrition, U.S. Food and Drug Administration, [benjamin.warren@fda.hhs.gov](mailto:benjamin.warren@fda.hhs.gov), 1–240–645–7004. For an additional information regarding the public meeting, contact the U.S. Codex Office by email at: [uscodex@usda.gov](mailto:uscodex@usda.gov).

**SUPPLEMENTARY INFORMATION:**

## Background

The Codex Alimentarius Commission was established in 1963 by two United Nations organizations, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, Codex seeks to protect the health of consumers and ensure fair practices in the food trade.

The Terms of Reference of the Codex Committee on Food Hygiene (CCFH) are:

- (a) to draft basic provisions on food hygiene applicable to all food;
  - (b) to consider, amend if necessary and endorse provisions on hygiene prepared by Codex commodity committees and contained in Codex commodity standards, and
  - (c) to consider, amend if necessary, and endorse provisions on hygiene prepared by Codex commodity committees and contained in Codex codes of practice unless, in specific cases, the Commission has decided otherwise, or
  - (d) to draft provisions on hygiene applicable to specific food items or food groups, whether coming within the terms of reference of a Codex commodity committee or not;
  - (e) to consider specific hygiene problems assigned to it by the Commission;
  - (f) to suggest and prioritize areas where there is a need for microbiological risk assessment at the international level and to develop questions to be addressed by the risk assessors; and,
  - (g) to consider microbiological risk management matters in relation to food hygiene and in relation to the risk assessment of FAO and WHO.
- (h) (The term “hygiene” includes, where necessary, microbiological specifications for food and associated methodology.)

The CCFH is hosted by the United States, and the 54th Session of the CCFH will be co-hosted with Kenya.

## Issues To Be Discussed at the Public Meeting

The following items from the forthcoming Agenda for the 54th Session of the CCFH will be discussed during the public meeting:

- Matters referred to the Committee by the Codex Alimentarius Commission and/or its subsidiary bodies
- Matters arising from the work of FAO and WHO (including the FAO/

WHO Joint Expert Meetings on Microbiological Risk Assessments (JEMRA)

- Information from the World Organization for Animal Health (WOAH)
- Guidelines for the Control of Shiga Toxin-Producing *Escherichia coli* (STEC) in Raw Beef, Fresh Leafy Vegetables, Raw Milk and Raw Milk Cheeses, and Sprouts
  - Proposed draft Annex II on Fresh Leafy Vegetables at Step 4
  - Proposed draft Annex IV on Sprouts at Step 4
- Guidelines for the Safe Use and Reuse of Water in Food Production (Annex II on Fishery Products at Step 4 and Annex III on Dairy Products at Step 4)
  - Proposed draft revision on the *Guidelines on the Application of General Principles of Food Hygiene to the Control of Pathogenic Vibrio Species in Seafood* (CXG 73–2010) at Step 4
  - Proposed draft Guidelines for Food Hygiene Control Measures in Traditional Markets for Food at Step 4
- Alignment of Codex texts developed by CCFH with the revised *General Principles of Food Hygiene* (CXC 1–1969)
- Revision of the *Guidelines on the Application of General Principles of Food Hygiene to the Control of Viruses in Food* (CXG 79–2012)
- Discussion paper on the Revision of *Guidelines for the Control of Campylobacter and Salmonella in Chicken Meat* (CXG 78–2011)
- Discussion paper on the revision of *Guidelines on the Application of General Principles of Food Hygiene to the Control of Listeria monocytogenes in Foods* (CXG 61–2007)
- Other business and future work
  - New work/Forward workplan (Proposals in reply to CL 2023/30–FH)

## Public Meeting

At the February 5, 2024, public meeting, draft U.S. positions on the agenda items will be described and discussed, and attendees will have the opportunity to pose questions and offer comments. Written comments may be offered at the meeting or sent to Dr. Benjamin Warren, U.S. Delegate to the 54th Session of the CCFH, at [benjamin.warren@fda.hhs.gov](mailto:benjamin.warren@fda.hhs.gov). Written comments should state that they relate to activities of the 54th Session of the CCFH.

## Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, the U.S. Codex Office will announce this **Federal Register** publication on-line through the USDA Codex web page located at: <http://www.usda.gov/codex>, a link that also offers an email subscription service providing access to information related to Codex. Customers can add or delete their subscriptions themselves and have the option to password protect their accounts.

## USDA Non-Discrimination Statement

No agency, officer, or employee of the USDA shall, on the grounds of race, color, national origin, religion, sex, gender identity, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, or political beliefs, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the USDA.

## How To File a Complaint of Discrimination

To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at <https://www.usda.gov/oascr/filing-program-discrimination-complaint-usda-customer>, or write a letter signed by you or your authorized representative. Send your completed complaint form or letter to USDA by mail, fax, or email. Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250–9410; Fax: (202) 690–7442; Email: [program.intake@usda.gov](mailto:program.intake@usda.gov). Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact USDA’s TARGET Center at (202) 720–2600 (voice and TDD).

Done at Washington, DC, on December 21, 2023.

**Julie Chao,**

*Deputy U.S. Manager for Codex Alimentarius.*

[FR Doc. 2023–28533 Filed 12–26–23; 8:45 am]

**BILLING CODE P**

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meetings of the New Mexico Advisory Committee to the U.S. Commission on Civil Rights

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Announcement of virtual business meetings.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the New Mexico Advisory Committee (Committee) will hold a series of virtual business meetings via ZoomGov on the following dates and times for the purpose of reviewing their report on education adequacy for Native American students.

**DATES:** These meetings will take place on:

- Thursday, January 18, 2024, from 12 p.m.–1:30 p.m. MT
- Tuesday, February 6, 2024, from 12 p.m.–1:30 p.m. MT
- Tuesday, March 5, 2024, from 12 p.m.–1:30 p.m. MT
- Thursday, March 28, 2024, from 12 p.m.–1:30 p.m. MT

**ADDRESSES:**

Link to Join: (Audio/Visual)

- Thursday, January 18th: <https://www.zoomgov.com/join/1614508698?pwd=SjJDd2t2NDg0WExuSDRPTeg0MHc1dz09>
- Tuesday, February 6th: <https://www.zoomgov.com/join/1601766742?pwd=dLRXWlJxRUtuNUR0VzNyMlVUeHpDZz09>
- Tuesday, March 5th: <https://www.zoomgov.com/join/1608506313?pwd=Y21ia3ZDemR4YWZuR0lRR3NrZTgrUT09>
- Thursday, March 28th: <https://www.zoomgov.com/join/1609779704?pwd=ZTFPOUQ0MitzdURoQ1JiQlZ4czYwQT09>

**FOR FURTHER INFORMATION CONTACT:** Brooke Peery, Designated Federal Officer (DFO), at [bpeery@usccr.gov](mailto:bpeery@usccr.gov) or (202) 701-1376.

**SUPPLEMENTARY INFORMATION:**

Committee meetings are available to the public through the videoconference link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Closed captioning will be available for individuals who are

deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email Angelica Trevino, Support Services Specialist, [atrevino@usccr.gov](mailto:atrevino@usccr.gov) at least 10 business days prior to the meeting.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be mailed to Brooke Peery (DFO) at [bpeery@usccr.gov](mailto:bpeery@usccr.gov).

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at: <https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzlGAAQ>.

Please click on the “Meeting Details” and “Documents” links. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission’s website, <https://www.usccr.gov>, or may contact the Regional Programs Unit at [bpeery@usccr.gov](mailto:bpeery@usccr.gov).

**Agenda**

- I. Welcome and Roll Call
- II. Approval of Minutes
- III. Committee Discussion
- IV. Public Comment
- V. Adjournment

Dated: December 21, 2023.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2023-28559 Filed 12-26-23; 8:45 am]

**BILLING CODE 6335-01-P**

**COMMISSION ON CIVIL RIGHTS**

**Notice of Public Meeting of the Puerto Rico Advisory Committee to the U.S. Commission on Civil Rights**

**AGENCY:** Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a meeting of the Puerto Rico Advisory Committee to the Commission will convene by virtual web conference on Wednesday, January 24, 2024, at 3:30 p.m. Atlantic Time and

2:30 p.m. Eastern Time. The purpose is to continue discussion on their project on the civil rights impacts of the Insular Cases in Puerto Rico.

**DATES:** January 24, 2024, Wednesday, at 3:30 p.m. Atlantic Time (2:30 p.m. ET).

**ADDRESSES:** Meeting will be held via Zoom.

*Registration Link (Audio/Visual):*

<https://tinyurl.com/mwb3kvcc>

*Join by Phone (Audio Only):* 1-833 435

1820 USA Toll Free; Meeting ID: 160

787 0579#

**FOR FURTHER INFORMATION CONTACT:**

Email Victoria Moreno, Designated Federal Officer at [vmoreno@usccr.gov](mailto:vmoreno@usccr.gov), or by phone at 434-515-0204.

**SUPPLEMENTARY INFORMATION:** This meeting will take place in Spanish with English interpretation. This committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email [ebonor@usccr.gov](mailto:ebonor@usccr.gov) at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Victoria Moreno at [vmoreno@usccr.gov](mailto:vmoreno@usccr.gov). Persons who desire additional information may contact the Regional Programs Coordination Unit at 1-312-353-8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via [www.facadatabase.gov](https://www.facadatabase.gov) under the Commission on Civil Rights, Puerto Rico Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission’s website, <http://www.usccr.gov>, or may

contact the Regional Programs Coordination Unit at [ebohor@usccr.gov](mailto:ebohor@usccr.gov).

#### Agenda

1. Welcome & Roll Call
2. Committee Discussion on Project Regarding the Civil Rights Impacts of the Insular Cases in Puerto Rico
3. Next Steps
4. Public Comment
5. Other Business
6. Adjourn

Dated: December 21, 2023.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2023–28561 Filed 12–26–23; 8:45 am]

**BILLING CODE 6335–01–P**

### COMMISSION ON CIVIL RIGHTS

#### Notice of Public Meeting of the Nebraska Advisory Committee to the U.S. Commission on Civil Rights

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Nebraska Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a planning meeting via web conference. The purpose of the meeting will be to discuss their project on to the Effects of the Covid-19 Pandemic on K–12 Education in the state.

**DATES:** Thursday, January 25, 2024 at 4 p.m. central time.

**ADDRESSES:** The meeting will be held via Zoom.

January 25th Planning Meeting:

Registration Link (Audio/Visual):

<https://www.zoomgov.com/j/1615469071?pwd=TWx1YW9WVFdkRFFFdTc3Ny96WS93QT09>

Join by Phone (Audio Only): 1–833–435–1820 USA Toll Free; Meeting ID: 161 546 9071

**FOR FURTHER INFORMATION CONTACT:**

Victoria Moreno, DFO, at [vmoreno@usccr.gov](mailto:vmoreno@usccr.gov) or by phone at 434–515–0204.

**SUPPLEMENTARY INFORMATION:** Members of the public may listen to the discussions through the above call-in numbers (audio only) or online registration links (audio/visual). An open comment period at each meeting will be provided to allow members of the public to make a statement as time allows. Callers can expect to incur regular charges for calls they initiate

over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Individuals who are deaf, deafblind, and/or hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and meeting ID number.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meetings. Written comments may be emailed to Victoria at [vmoreno@usccr.gov](mailto:vmoreno@usccr.gov).

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meetings. Records of the meetings will be available via [www.facadatabase.gov](http://www.facadatabase.gov) under the Commission on Civil Rights, Nebraska Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, <http://www.usccr.gov>, or may contact the Regional Programs Unit at the above email or street address.

#### Agenda

- I. Welcome and Roll Call
- II. Chair's Comments
- III. Committee Business
- IV. Public Comment
- V. Adjournment

Dated: December 21, 2023.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2023–28565 Filed 12–26–23; 8:45 am]

**BILLING CODE 6335–01–P**

### COMMISSION ON CIVIL RIGHTS

#### Notice of Public Meeting of the Hawai'i Advisory Committee

**AGENCY:** Commission on Civil Rights.

**ACTION:** Notice of virtual briefing.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA), that the Hawai'i Advisory Committee (Committee) to the U.S. Commission on Civil Rights will convene by ZoomGov on Monday, February 12, 2024, from 2:00 p.m. to 4:30 p.m. HST, to collect testimony related to the Committee's topic "Examining Hawai'i's Child Welfare

System and its Impact on Native Hawaiian Children and Families."

**DATES:** Monday, February 12, 2024, from 2:00 p.m.–4:30 p.m. Hawai'i Standard Time.

**ADDRESSES:** The briefing will be held via Zoom.

Registration Link (Audio/Visual):

<https://www.zoomgov.com/s/1618091260?pwd=bGRZWUFhaFBmbmlcxMTlJQ256c1IDQT09>

Join by Phone (Audio Only): (833) 435–1820 USA Toll Free; Webinar ID: 161 809 1260#

**FOR FURTHER INFORMATION CONTACT:**

Kayla Fajota, Designated Federal Officer (DFO) at [kfajota@usccr.gov](mailto:kfajota@usccr.gov) or (434) 515–2395.

**SUPPLEMENTARY INFORMATION:**

Committee meetings are available to the public through the videoconference link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Closed captions will be provided for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email Angelica Trevino, Support Services Specialists, at [atrevino@usccr.gov](mailto:atrevino@usccr.gov) at least 10 business days prior to the meeting.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be emailed to Kayla Fajota at [kfajota@usccr.gov](mailto:kfajota@usccr.gov).

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at <https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzl0AAA>.

Please click on "Committee Meetings" tab. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee

are directed to the Commission's website, <https://www.usccr.gov>, or may contact the Regional Programs Coordination Unit at [kfajota@usccr.gov](mailto:kfajota@usccr.gov).

#### Agenda

- I. Welcome, Roll Call, and Opening Remarks
- II. Panelists Presentations
- III. Committee Question and Answer
- IV. Public Comment
- V. Committee Business
- VI. Adjournment

Dated: December 21, 2023.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2023–28570 Filed 12–26–23; 8:45 am]

**BILLING CODE 6335–01–P**

#### COMMISSION ON CIVIL RIGHTS

##### Notice of Public Meeting of the Texas Advisory Committee

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Announcement of Virtual Business Meetings.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act (FACA) that the Texas Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a series virtual business meeting via ZoomGov on the following dates listed below. These virtual business meetings are for the purpose of selecting their next project topic.

**DATES:** These meetings will take place on:

- Thursday, January 18, 2024, from 12 p.m.–1 p.m. CT
- Thursday, February 15, 2024, from 12 p.m.–1 p.m. CT
- Tuesday, March 19, 2024, from 12 p.m.–1 p.m. CT

#### ADDRESSES:

Link to Join (Audio/Visual)

- Thursday, January 18: <https://www.zoomgov.com/join/1602495775?pwd=U2ErdGNHYTVuOU5lbERxOHhqZGZlQT09>
- Thursday, February 15: <https://www.zoomgov.com/join/1615978834?pwd=d2pvT0kvTWUvdnZHVTVSV0NjBTMwUT09>
- Tuesday, March 19: <https://www.zoomgov.com/join/1610406607?pwd=b0VoMVh4amlWWFSR0lzc2tqVlQyd09>

#### FOR FURTHER INFORMATION CONTACT:

Brooke Peery, Designated Federal Officer (DFO) at [bpeery@usccr.gov](mailto:bpeery@usccr.gov) or by phone at (202) 701–1376.

#### SUPPLEMENTARY INFORMATION:

Committee meetings are available to the public through the videoconference link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email Angelica Trevino, Support Services Specialist, [atrevino@usccr.gov](mailto:atrevino@usccr.gov) at least 10 business days prior to the meeting.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be emailed to Brooke Peery (DFO) at [bpeery@usccr.gov](mailto:bpeery@usccr.gov).

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at <https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzkoAAA>.

Please click on the “Meeting Details” and “Documents” links. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission's website, <https://www.usccr.gov>, or may contact the Regional Programs Unit at [bpeery@usccr.gov](mailto:bpeery@usccr.gov).

#### Agenda

- I. Welcome & Roll Call
- II. Approval of Minutes
- III. Committee Discussion
- IV. Public Comment
- V. Adjournment

Dated: December 21, 2023.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2023–28560 Filed 12–26–23; 8:45 am]

**BILLING CODE P**

#### COMMISSION ON CIVIL RIGHTS

##### Notice of Public Meeting of the District of Columbia Committee to the U.S. Commission on Civil Rights

**AGENCY:** Commission on Civil Rights.

**ACTION:** Notice of virtual public meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the District of Columbia Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a meeting via Zoom. The purpose of the meeting is to plan and discuss matters related to the Committee's civil rights project.

**DATES:** Tuesday, January 23, 2023, from 12:00 p.m.–2:00 p.m. Eastern Time.

**ADDRESSES:** The meeting will be held via Zoom.

*Registration Link (Audio/Visual):*  
<https://bit.ly/47Z5CBw>

*Join by Phone (Audio Only):* 1–833–435–1820 USA Toll Free; Webinar ID: 160 450 3864#

#### FOR FURTHER INFORMATION CONTACT:

Mallory Trachtenberg, Designated Federal Officer, at [mtrachtenberg@usccr.gov](mailto:mtrachtenberg@usccr.gov) or 1–202–809–9618.

**SUPPLEMENTARY INFORMATION:** This Committee meeting is available to the public through the registration link above. Any interested member of the public may attend this meeting. An open comment period will be provided to allow members of the public to make oral statements as time allows. Pursuant to the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning is available by selecting “CC” in the meeting platform. To request additional accommodations, please email [svillanueva@usccr.gov](mailto:svillanueva@usccr.gov) at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the scheduled meeting. Written comments may be emailed to Mallory Trachtenberg at [mtrachtenberg@usccr.gov](mailto:mtrachtenberg@usccr.gov). Persons who desire additional information may contact the Regional Programs Coordination Unit at 1–202–809–9618.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via [www.facadatabase.gov](http://www.facadatabase.gov) under the Commission on Civil Rights, District of Columbia Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, <http://www.usccr.gov>, or may contact the Regional Programs Coordination Unit at [svillanueva@usccr.gov](mailto:svillanueva@usccr.gov).

## Agenda

- I. Welcome and Roll Call
- II. Approval of Minutes
- III. Project Planning
- IV. Public Comment
- V. Next Steps
- VI. Adjournment

Dated: December 21, 2023.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2023–28575 Filed 12–26–23; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A–201–845]

### Agreement Suspending the Antidumping Duty Investigation on Sugar From Mexico: Preliminary Results of the 2021–2022 Administrative Review and Postponement of Final Results

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The U.S. Department of Commerce (Commerce) preliminarily determines that the respondents selected for individual examination, respectively, *Compañía Industrial Azucarera S.A. de C.V.* and its affiliates and *Ingenio Presidente Benito Juárez S.A. de C.V.*, were in compliance with the terms of the Agreement Suspending the Antidumping Duty Investigation on Sugar from Mexico, as amended (*AD Agreement*) during the period of review

(POR) from December 1, 2021, through November 30, 2022. Commerce also preliminarily determines that the *AD Agreement* met the applicable statutory requirements during the POR.

**DATES:** Applicable December 27, 2023.

**FOR FURTHER INFORMATION CONTACT:** Jill Buckles or Walter Schaub, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6230 or (202) 482–0907, respectively.

## SUPPLEMENTARY INFORMATION:

### Background

Commerce and Mexican producers/exporters accounting for substantially all imports of sugar from Mexico signed the *AD Agreement* under section 734(c) of the Tariff Act of 1930, as amended (the Act), which suspended the underlying antidumping duty investigation, on December 19, 2014, and which was subsequently amended on January 15, 2020.<sup>1</sup>

On December 20, 2022, the American Sugar Coalition and its members (petitioners)<sup>2</sup> filed a timely request for an administrative review of the *AD Agreement*.<sup>3</sup> On February 2, 2023, Commerce initiated an administrative review for the period December 1, 2021, through November 30, 2022.

On March 31, 2023, Commerce selected two companies as mandatory respondents, listed in alphabetical order: *Compañía Industrial Azucarera S.A. de C.V.* and its affiliates and *Ingenio Presidente Benito Juárez S.A. de C.V.*

### Scope of the AD Agreement

The product covered by this *AD Agreement* is raw and refined sugar of all polarimeter readings derived from sugar cane or sugar beets. Merchandise covered by this *AD Agreement* is typically imported under the following headings of the HTSUS: 1701.12.1000, 1701.12.5000, 1701.13.1000, 1701.13.5000, 1701.14.1020, 1701.14.1040, 1701.14.5000, 1701.91.1000, 1701.91.3000,

<sup>1</sup> See *Sugar from Mexico: Suspension of Antidumping Investigation*, 79 FR 78039 (December 29, 2014); see also *Sugar from Mexico: Amendment to the Agreement Suspending the Antidumping Duty Investigation*, 85 FR 3620 (January 22, 2020) (collectively, *AD Agreement*).

<sup>2</sup> The members of the American Sugar Coalition are as follows: American Sugar Cane League, American Sugarbeet Growers Association, American Sugar Refining, Inc., Florida Sugar Cane League, Rio Grande Valley Sugar Growers, Inc., Sugar Cane Growers Cooperative of Florida, and the United States Beet Sugar Association.

<sup>3</sup> See Petitioners' Letter, "Request for Administrative Review," dated December 20, 2022.

1701.99.1015, 1701.99.1017, 1701.99.1025, 1701.99.1050, 1701.99.5015, 1701.99.5017, 1701.99.5025, 1701.99.5050, and 1702.90.4000.<sup>4</sup> The tariff classification is provided for convenience and customs purposes; however, the written description of the scope of this *AD Agreement* is dispositive.<sup>5</sup>

## Methodology and Preliminary Results

Commerce has conducted this review in accordance with section 751(a)(1)(C) of the Act, which specifies that Commerce shall "review the current status of, and compliance with, any agreement by reason of which an investigation was suspended." Pursuant to the *AD Agreement*, each signatory producer/exporter individually agrees that it will not sell subject merchandise at prices less than the reference prices established in Appendix I to the *AD Agreement*.<sup>6</sup> Each signatory producer/exporter also individually agrees that for each entry, the amount by which the estimated normal value exceeds the export price (or the constructed export price) will not exceed 15 percent of the weighted average amount by which the estimated normal value exceeded the export price (or constructed export price) for all less-than-fair-value entries of the producer/exporter examined during the course of the investigation.<sup>7</sup> The signatory producers/exporters also individually agree to provide documentation upon request from Commerce<sup>8</sup> and provide certifications each quarter<sup>9</sup> to allow Commerce to monitor the *AD Agreement*. In addition, the signatory producers/exporters agree to incorporate into their sales contracts with Intermediary Customers<sup>10</sup> the obligation that such customers will abide by the terms of the *AD Agreement*.<sup>11</sup> Lastly, the signatory producers/exporters agree to ensure that

<sup>4</sup> Prior to July 1, 2016, merchandise covered by the *AD Agreement* was also classified in the HTSUS under subheading 1701.99.1010. Prior to January 1, 2020, merchandise covered by the *AD Agreement* was also classified in the HTSUS under subheadings 1701.14.1000 and 1701.99.5010.

<sup>5</sup> For a complete description of the Scope of the *AD Agreement*, see Memorandum, "Decision Memorandum for the Preliminary Results of the 2021–2022 Administrative Review: Sugar from Mexico," dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

<sup>6</sup> See *AD Agreement* at Section VI and Appendix I.

<sup>7</sup> *Id.* at Section VI.

<sup>8</sup> *Id.* at Sections VII.B.1, VII.B.2, and VII.B.4.

<sup>9</sup> *Id.* at Section VII.C.4.

<sup>10</sup> "Intermediary Customer" is defined in Section II.N of the *AD Agreement*.

<sup>11</sup> See *AD Agreement* at Section VII.C.5.

Other Sugar<sup>12</sup> is tested for polarity by a laboratory approved by CBP upon entry into the United States and that the importers of record report the polarity test results for each entry to Commerce within 30 days of entry.<sup>13</sup>

After reviewing the information received from the respondent companies in their questionnaire and supplemental questionnaire responses, we preliminarily determine that the respondents adhered to the terms of the *AD Agreement* during the POR and that the *AD Agreement* is functioning as intended. Further, we preliminarily determine that the *AD Agreement* continued to meet the statutory requirements under sections 734(c) and (d) of the Act during the POR.

We were not able to complete our review of one respondent for one aspect of the *AD Agreement*, the requirement in Section VI to eliminate at least 85 percent of the dumping found in the investigation, and we therefore intend to address this issue in a post-preliminary analysis. We find that we require additional information in order to complete our examination. Therefore, we will continue our examination after the issuance of these preliminary results as to whether the respondents complied with the requirement to eliminate at least 85 percent of the dumping found in the investigation during the POR, and we intend to issue a post-preliminary analysis addressing the issue as soon as practicable.

For a full description of the methodology underlying our conclusions, see the Preliminary Decision Memorandum. 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>. Commerce also addresses certain issues, which require discussion of business proprietary information, in separate memoranda which we incorporate into the Preliminary Decision Memorandum.<sup>14</sup>

## Public Comment

Commerce intends to issue a post-preliminary analysis memorandum

subsequent to the publication of this notice with respect to the requirement to eliminate at least 85 percent of the dumping found in the investigation. Thus, Commerce will announce the briefing schedule to interested parties at a later date. Interested parties may submit case briefs on the deadline that Commerce will announce. 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.<sup>15</sup> 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.<sup>16</sup> 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 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.<sup>17</sup> 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 pertaining to the service of documents in 19 CFR 351.303(f).<sup>18</sup>

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 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 records system,

ACCESS, by 5 p.m. Eastern Time within 30 days after the date of publication of this notice.

Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act, unless extended.

## Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 20, 2023.

**James Maeder,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

## Appendix

### List of Topics Discussed in the Preliminary Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the Agreement
- IV. Preliminary Results of Review
- V. Recommendation

[FR Doc. 2023–28492 Filed 12–26–23; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[C–201–846]

### Agreement Suspending the Countervailing Duty Investigation on Sugar From Mexico; Preliminary Results of the 2022 Administrative Review

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The U.S. Department of Commerce (Commerce) preliminarily determines that the signatory, the Government of Mexico (GOM), and the respondent companies selected for individual examination, respectively, *Compañía Industrial Azucarera S.A. de C.V.* and its affiliates and *Ingenio Presidente Benito Juárez S.A. de C.V.*, were in compliance with the Agreement Suspending the Countervailing Duty Investigation on Sugar from Mexico, as amended (*CVD Agreement*) during the period of review (POR). Commerce also preliminarily determines that the *CVD Agreement* met the applicable statutory requirements during the POR.

**DATES:** Applicable December 27, 2023.

**FOR FURTHER INFORMATION CONTACT:** Jill Buckles or Walter Schaub, Enforcement & Compliance, International Trade

<sup>12</sup> "Other Sugar" is defined Section II.F of the *AD Agreement*.

<sup>13</sup> See *AD Agreement* at Section VII.C.6.

<sup>14</sup> See Preliminary Decision Memorandum at 6–8 and fn. 47 and 59.

<sup>15</sup> 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).

<sup>16</sup> See 19 CFR 351.309(c)(2) and (d)(2).

<sup>17</sup> We use the term "issue" here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

<sup>18</sup> See *Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings; Final Rule*, 88 FR 67069 (September 29, 2023).

Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–6230 or (202) 482–0907, respectively.

#### SUPPLEMENTARY INFORMATION:

##### Background

Commerce and the GOM signed the *CVD Agreement* under section 704(c) of the Tariff Act of 1930, as amended (the Act), which suspended the underlying countervailing duty investigation on sugar from Mexico, on December 19, 2014, and which was subsequently amended on January 15, 2020.<sup>1</sup>

On December 20, 2022, the American Sugar Coalition and its members (the petitioners)<sup>2</sup> filed a timely request for an administrative review of the *CVD Agreement*.<sup>3</sup> On February 2, 2023, Commerce initiated an administrative review for the period January 1, 2022, through December 31, 2022.<sup>4</sup>

On March 31, 2023, Commerce selected two companies as mandatory respondents, listed in alphabetic order: Compañía Industrial Azucarera S.A. de C.V. and its affiliates and Ingenio Presidente Benito Juárez S.A. de C.V.<sup>5</sup> In addition, the review covered the GOM, which is the signatory to the *CVD Agreement*.

##### Scope of the CVD Agreement

The product covered by this *CVD Agreement* is raw and refined sugar of all polarimeter readings derived from sugar cane or sugar beets. Merchandise covered by this *CVD Agreement* is typically imported under the following subheadings of the HTSUS:

1701.12.1000, 1701.12.5000, 1701.13.1000, 1701.13.5000, 1701.14.1020, 1701.14.1040, 1701.14.5000, 1701.91.1000, 1701.91.3000, 1701.99.1015, 1701.99.1017, 1701.99.1025, 1701.99.1050, 1701.99.5015, 1701.99.5017, 1701.99.5025,

1701.99.5050, and 1702.90.4000.<sup>6</sup> The tariff classification is provided for convenience and customs purposes; however, the written description of the scope of this *CVD Agreement* is dispositive.<sup>7</sup>

##### Methodology and Preliminary Results

Commerce has conducted this review in accordance with section 751(a)(1)(C) of the Act, which specifies that Commerce shall “review the current status of, and compliance with, any agreement by reason of which an investigation was suspended.” Pursuant to the *CVD Agreement*, the GOM agrees that subject merchandise is subject to export limits.<sup>8</sup> The GOM also agrees to other conditions including limits on exports of Refined Sugar<sup>9</sup> and restrictions on shipping patterns for exports.<sup>10</sup> The *CVD Agreement* also requires the GOM to issue contract-specific export licenses,<sup>11</sup> submit compliance monitoring reports to Commerce,<sup>12</sup> and institute penalties for non-compliance with certain key terms of the *CVD Agreement* and the companion Agreement Suspending the Antidumping Duty Investigation on Sugar from Mexico, as amended (*AD Agreement*).<sup>13</sup>

After reviewing the information received from the GOM and respondent companies in their questionnaire and supplemental questionnaire responses, we preliminarily determine that the GOM and respondent companies adhered to the terms of the *CVD Agreement* during the POR and that the *CVD Agreement* is functioning as intended. Further, we preliminarily determine that the *CVD Agreement* continued to meet the statutory requirements under sections 704(c) and (d) of the Act during the POR.

For a full description of the methodology underlying our

conclusions, see the Preliminary Decision Memorandum. A list of the topics discussed in the Preliminary Decision Memorandum is included as the appendix to this notice. 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>.

##### Public Comment

Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs to Commerce no later than 30 days from the publication of these preliminary results in the **Federal Register**. 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.<sup>14</sup> 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.<sup>15</sup>

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 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.<sup>16</sup> 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 pertaining to the service of documents in 19 CFR 351.303(f).<sup>17</sup>

<sup>1</sup> See *Agreement Suspending the Countervailing Duty Investigation of Sugar from Mexico*, 79 FR 78044 (December 29, 2014); see also *Sugar from Mexico: Amendment to the Agreement Suspending the Countervailing Duty Investigation*, 85 FR 3613 (January 22, 2020) (collectively, *CVD Agreement*).

<sup>2</sup> The members of the American Sugar Coalition are: American Sugar Cane League; American Sugarbeet Growers Association; American Sugar Refining, Inc.; Florida Sugar Cane League; Rio Grande Valley Sugar Growers, Inc.; Sugar Cane Growers Cooperative of Florida; and the United States Beet Sugar Association.

<sup>3</sup> See Petitioners’ Letter, “Request for Administrative Review,” dated December 20, 2022.

<sup>4</sup> See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 88 FR 7060 (February 2, 2023).

<sup>5</sup> See Memorandum, “Respondent Selection,” dated March 31, 2023.

<sup>6</sup> Prior to July 1, 2016, merchandise covered by the *AD Agreement* was also classified in the HTSUS under subheading 1701.99.1010. Prior to January 1, 2020, merchandise covered by the *AD Agreement* was also classified in the HTSUS under subheadings 1701.14.1000 and 1701.99.5010.

<sup>7</sup> For a complete description of the Scope of the *CVD Agreement*, see Memorandum, “Decision Memorandum for the Preliminary Results of the 2022 Administrative Review: Sugar from Mexico,” dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

<sup>8</sup> See *CVD Agreement* at Section V.

<sup>9</sup> “Refined Sugar” is defined in Section II.L of the *CVD Agreement*.

<sup>10</sup> *Id.* at Section V.C.

<sup>11</sup> *Id.* at Section VI and Appendix I.

<sup>12</sup> *Id.* at Section VIII.B.1 and Appendix II.

<sup>13</sup> *Id.* at Section VIII.B.4; see also *Sugar from Mexico: Suspension of Antidumping Investigation*, 79 FR 78039 (December 29, 2014); and *Sugar from Mexico: Amendment to the Agreement Suspending the Antidumping Duty Investigation*, 85 FR 3620 (January 22, 2020) (collectively, *AD Agreement*).

<sup>14</sup> 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 Final Service Rule*).

<sup>15</sup> See 19 CFR 351.309(c)(2) and (d)(2).

<sup>16</sup> We use the term “issue” here to describe an argument that Commerce would normally address in a comment of the Issues and Decision Memorandum.

<sup>17</sup> See *APO and Final Service Rule*.

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 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 records system, ACCESS, by 5 p.m. Eastern Time within 30 days after the date of publication of this notice.

Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act, unless extended.

#### Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 20, 2023.

**James Maeder,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

#### Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the Agreement
- IV. Preliminary Results of Review
- V. Recommendation

[FR Doc. 2023-28491 Filed 12-26-23; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-580-870]

#### Certain Oil Country Tubular Goods From the Republic of Korea: Notice of Court Decision Not in Harmony With the Results of Antidumping Duty Administrative Review; Notice of Amended Final Results

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** On December 18, 2023, the U.S. Court of International Trade (the Court or CIT) issued its final judgment in *Hyundai Steel Company v. United States*, Consol. Court No. 22-00138, Slip Op. 23-183, sustaining the U.S. Department of Commerce's (Commerce)

remand results pertaining to the administrative review of the antidumping duty (AD) order on certain oil country tubular goods (OCTG) from the Republic of Korea (Korea) covering the period September 1, 2019, through August 31, 2020. Commerce is notifying the public that the CIT's final judgment is not in harmony with Commerce's *Final Results* of the administrative review, and that Commerce is amending the *Final Results* with respect to the dumping margin assigned to AJU Besteel Co., Ltd. (AJU Besteel), Husteel Co., Ltd. (Husteel), Hyundai Steel Company (Hyundai Steel), and NEXTEEL Co., Ltd. (NEXTEEL).

**DATES:** Applicable December 18, 2023.

#### FOR FURTHER INFORMATION CONTACT:

Mike Heaney or Mark Flessner, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-4475 or (202) 482-6312, respectively.

#### SUPPLEMENTARY INFORMATION:

##### Background

On April 8, 2022, Commerce published its *Final Results* in the 2019–2020 AD administrative review of OCTG from Korea.<sup>1</sup> In this administrative review, Commerce selected two mandatory respondents for individual examination: Hyundai Steel and SeAH Steel Corporation (SeAH). Commerce calculated weighted-average dumping margins of 19.54 percent for Hyundai Steel, 3.85 percent for SeAH, and 11.70 percent for the non-examined companies in the *Final Results*.<sup>2</sup> Hyundai Steel, AJU Besteel, Husteel, and NEXTEEL challenged the *Final Results* on multiple grounds.<sup>3</sup>

In its *Remand Order*, the Court sustained Commerce's determination with respect to three issues: the use of proprietary third-country sales information pertaining to SeAH in calculations related to Hyundai Steel;<sup>4</sup> adjustments of reported general and administrative expenses of Hyundai Steel and its U.S. affiliate, Hyundai Steel USA, Inc.;<sup>5</sup> and the application of neutral facts available to adjust Hyundai

Steel's reported further manufacturing costs to account for yield loss.<sup>6</sup> However, the Court remanded three of Commerce's determinations for Commerce to reconsider the issues and reexamine the administrative record:

1. The calculation of Hyundai Steel's constructed export price (CEP) profit (for which Commerce requested a voluntary remand).<sup>7</sup>

2. The calculation of Hyundai Steel's constructed value (CV) profit and selling expenses.<sup>8</sup>

3. The calculation of Hyundai Steel's CV profit cap.<sup>9</sup>

In its final results of redetermination pursuant to the *Remand Order* issued on July 16, 2021, Commerce reconsidered the three determinations listed above.<sup>10</sup> In the Redetermination, Commerce:

1. Revised the methodology of calculation of CEP profit to rely on Hyundai Steel's actual sales data.<sup>11</sup>

2. Continued to use SeAH's third-country market sales to Kuwait in calculating the CV profit and selling expenses.<sup>12</sup>

3. Continued to use SeAH's third-country market sales to Kuwait in calculating the CV profit cap.<sup>13</sup>

As a result, Commerce recalculated the weighted-average dumping margin for Hyundai Steel, which changed from 19.54 percent to 9.63 percent.<sup>14</sup> Consequently, the dumping margin applicable to the non-examined companies AJU Besteel, Husteel, and NEXTEEL changed from 11.70 percent to 6.74 percent.<sup>15</sup>

On December 18, 2023, the CIT issued its final judgment in *Hyundai Steel Company v. United States*, Consol. Court No. 22-00138, Slip Op. 23-183, fully sustaining Commerce's Redetermination.<sup>16</sup>

#### Timken Notice

In its decision in *Timken*,<sup>17</sup> as clarified by *Diamond Sawblades*,<sup>18</sup> the

<sup>6</sup> *Id.* at 21–24.

<sup>7</sup> *Id.* at 16.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *Final Results of Redetermination Pursuant to Court Remand, Hyundai Steel Co. et al. v. United States*, Consolidated Court No. 22-00138, Slip Op. 23-87 (CIT June 9, 2023), dated August 15, 2023 (Redetermination).

<sup>11</sup> *Id.* at 7–10 and 20–21.

<sup>12</sup> *Id.* at 10–16 and 21–32.

<sup>13</sup> *Id.* at 17–19 and 33–40.

<sup>14</sup> *Id.* at 40.

<sup>15</sup> *Id.*

<sup>16</sup> See *Hyundai Steel Company v. United States*, Consol. Court No. 22-00138, Slip Op. 23-183 (CIT December 18, 2023).

<sup>17</sup> See *Timken Co. v. United States*, 893 F.2d 337, 341 (Fed. Cir. 1990) (*Timken*).

<sup>18</sup> See *Diamond Sawblades Mfrs. Coalition v. United States*, 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*).

<sup>1</sup> See *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2019–2020*, 87 FR 20815 (April 8, 2022) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM).

<sup>2</sup> *Id.*, 87 FR at 20816.

<sup>3</sup> See *Hyundai Steel Company v. United States*, 639 F. Supp. 3d 1325 (CIT 2023) (*Remand Order*).

<sup>4</sup> *Id.* at 11–14.

<sup>5</sup> *Id.* at 16–20.

U.S. Court of Appeals for the Federal Circuit held that, pursuant to section 516A(e) of the Tariff Act of 1930, as amended (the Act), Commerce must publish a notice of a court decision not “in harmony” with a Commerce determination and must suspend liquidation of entries pending a “conclusive” court decision. The Court’s December 18, 2023, judgment sustaining the Redetermination constitutes a final decision of the Court that is not in harmony with Commerce’s *Final Results*. This notice is published in fulfillment of the publication requirement of *Timken*.

#### Amended Final Results

Because there is now a final court decision, Commerce is amending the *Final Results* with respect to AJU Besteel, Husteel, Hyundai Steel, and NEXTEEL for the period September 1, 2019, through August 31, 2020. The revised dumping margins are as follows:

| Exporter or producer        | Weighted-average dumping margin (percent) |
|-----------------------------|-------------------------------------------|
| Hyundai Steel Company ..... | 9.63                                      |
| AJU Besteel Co., Ltd .....  | 6.74                                      |
| Husteel Co., Ltd .....      | 6.74                                      |
| NEXTEEL Co., Ltd .....      | 6.74                                      |

#### Cash Deposit Requirements

Because AJU Besteel, Husteel, Hyundai Steel, and NEXTEEL have each had a superseding cash deposit rate, *i.e.*, there have been final results published in a subsequent administrative review, we will not issue revised cash deposit instructions to U.S. Customs and Border Protection (CBP). This notice will not affect the current cash deposit rates.

#### Liquidation of Suspended Entries

At this time, Commerce remains enjoined by CIT order from liquidating entries that were produced and exported by AJU Besteel, Husteel, Hyundai Steel, or NEXTEEL, and were entered, or withdrawn from warehouse, for consumption during the period September 1, 2019, through August 31, 2020. Liquidation of these entries will remain enjoined pursuant to the terms of the injunction during the pendency of any appeals process.

In the event the CIT’s ruling is not appealed, or, if appealed, upheld by a final and conclusive court decision, Commerce intends to instruct CBP to assess ADs on unliquidated entries of subject merchandise produced and exported by AJU Besteel, Husteel, Hyundai Steel, or NEXTEEL, in accordance with 19 CFR 351.212(b). We

will instruct CBP to assess ADs on all appropriate entries covered by this review when the importer-specific *ad valorem* assessment rate is not zero or *de minimis*. Where an importer-specific *ad valorem* assessment rate is zero or *de minimis*,<sup>19</sup> we will instruct CBP to liquidate the appropriate entries without regard to ADs.

#### Notification to Interested Parties

This notice is issued and published in accordance with sections 516(A)(c) and (e) and 777(i)(1) of the Act.

Dated: December 21, 2023.

**James Maeder,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2023–28526 Filed 12–26–23; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

#### Visiting Committee on Advanced Technology

**AGENCY:** National Institute of Standards and Technology, Department of Commerce.

**ACTION:** Notice of open meeting.

**SUMMARY:** National Institute of Standards and Technology (NIST)’s Visiting Committee on Advanced Technology (VCAT or Committee) will meet on Wednesday, February 14, 2024, from 10 a.m. to 6 p.m. eastern time.

**DATES:** The VCAT will meet on Wednesday, February 14, 2024, from 10 a.m. to 6 p.m. eastern time.

**ADDRESSES:** The meeting will be a virtual meeting via a virtual meeting platform. Please note admittance instructions under the **SUPPLEMENTARY INFORMATION** section of this notice.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Shaw, VCAT, NIST, 100 Bureau Drive, Mail Stop 1060, Gaithersburg, Maryland 20899–1060, telephone number 240–446–6000. Ms. Shaw’s email address is [stephanie.shaw@nist.gov](mailto:stephanie.shaw@nist.gov).

#### SUPPLEMENTARY INFORMATION:

*Authority:* 15 U.S.C. 278, as amended, and the Federal Advisory Committee Act, as amended, 5 U.S.C. ch. 10.

Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. ch. 10, notice is hereby given that the VCAT will meet on Wednesday, February 14, 2024, from 10 a.m. to 6 p.m. eastern time. The meeting will be open to the public. The VCAT is

composed of not fewer than 9 members appointed by the NIST Director, eminent in such fields as business, research, new product development, engineering, labor, education, management consulting, environment, and international relations. The primary purpose of this meeting is for the VCAT to review and make recommendations regarding general policy for NIST, its organization, its budget, and its programs within the framework of applicable national policies as set forth by the President and the Congress. The agenda will include an update on major programs at NIST. The VCAT Subcommittee on U.S. International Standards Development Activity will present their recommendations to the full Committee. The Committee will also present its initial observations, findings, and recommendations for the 2023 VCAT Annual Report. The agenda may change to accommodate Committee business. The final agenda will be posted on the NIST website at <http://www.nist.gov/director/vcat/agenda.cfm>.

Individuals and representatives of organizations who would like to offer comments and suggestions related to the Committee’s business are invited to request a place on the agenda by no later than 5 p.m. eastern time, Thursday, February 1, 2024 by contacting Stephanie Shaw at [stephanie.shaw@nist.gov](mailto:stephanie.shaw@nist.gov). Approximately one-half hour will be reserved for public comments and speaking times will be assigned on a first-come, first-served basis. The amount of time per speaker will be determined by the number of requests received but is likely to be about 3 minutes each. The exact time and date for public comments will be included in the final agenda that will be posted on the NIST website at <http://www.nist.gov/director/vcat/agenda.cfm>. Questions from the public will not be considered during this period. Speakers who wish to expand upon their oral statements, those who had wished to speak but could not be accommodated on the agenda, and those who were unable to attend in person or via webinar are invited to submit written statements to Stephanie Shaw at [stephanie.shaw@nist.gov](mailto:stephanie.shaw@nist.gov).

All participants will be attending via a virtual meeting platform and must contact Ms. Shaw at [stephanie.shaw@nist.gov](mailto:stephanie.shaw@nist.gov) by 5:00 p.m. eastern time, Thursday, February 1, 2024, for detailed instructions on how to join the meeting via a virtual meeting platform.

**Tamiko Ford,**

*NIST Executive Secretariat.*

[FR Doc. 2023–28550 Filed 12–26–23; 8:45 am]

**BILLING CODE 3510–13–P**

<sup>19</sup> See 19 CFR 351.106(c)(2).

**DEPARTMENT OF COMMERCE****National Institute of Standards and Technology****Notice of Availability of Draft Programmatic Environmental Assessment for Modernization and Internal Expansion of Existing Semiconductor Fabrication Facilities Under the CHIPS Incentives Program**

**AGENCY:** National Institute of Standards and Technology, Department of Commerce.

**ACTION:** Notice; availability of a draft Programmatic Environmental Assessment; request for comments.

**SUMMARY:** The National Institute of Standards and Technology (NIST) announces the availability of the Draft Programmatic Environmental Assessment (PEA) for the modernization and internal expansion of existing semiconductor fabrication facilities under the CHIPS Incentives Program. The PEA addresses financial assistance for the modernization or internal expansion of existing current-generation and mature-node commercial facilities within their existing footprint throughout the U.S. (the “Proposed Action”). NIST is requesting comments on the Draft PEA.

**DATES:** Comments must be received on or before January 25, 2024.

**ADDRESSES:** The PEA will be available for download and review at <https://www.nist.gov/chips/national-environmental-policy-act-nepa> no later than December 26, 2023, under the heading “NEPA Public Involvement.”

You may submit comments on this document by the following methods:

**Electronic Submission:** Submit all electronic public comments via email to [ChipsNEPA@chips.gov](mailto:ChipsNEPA@chips.gov) citing “Modernization PEA” in the subject line. NIST will accept comments in attached Word or PDF formats or within the body of the email.

**By mail:** Comments can also be mailed to the CHIPS Incentives Program at: Department of Commerce; HCHB Room 7419; ATTN: CPO Environmental Division; 1401 Constitution Ave., Washington, DC 20230.

**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 NIST. All comments received are a part of the public record; commenters should not include personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information. NIST will accept

anonymous comments. The most helpful comments include a specific recommendation, explain the reason for any recommended change, and provide supporting information. NIST will consider all relevant comments received on or before the closing date.

**FOR FURTHER INFORMATION CONTACT:**

David Frenkel, NIST, telephone number 240–204–1960, email [David.Frenkel@chips.gov](mailto:David.Frenkel@chips.gov).

**SUPPLEMENTARY INFORMATION:** NIST has prepared the draft PEA in accordance with the National Environmental Policy Act (NEPA, 42 U.S.C. 4321 *et seq.*) and the Council on Environmental Quality’s NEPA (CEQ) implementing regulations (40 CFR parts 1500–1508). The PEA addresses financial assistance for the modernization or internal expansion of existing current-generation and mature-node commercial facilities within their existing footprint throughout the U.S. (the “Proposed Action”).

**Background**

The CHIPS Incentives Program (Program) was authorized by title XCIX—Creating Helpful Incentives to Produce Semiconductors for America of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283, as amended by the CHIPS Act of 2022 (Division A of Pub. L. 117–167) (the “CHIPS Act” or “Act”). The Program aims to boost American semiconductor research, development, and production. The Program is administered by the CHIPS Program Office (CPO) within NIST. The CHIPS Incentives Program Commercial Fabrication Facilities Notice of Funding Opportunity (NOFO) was originally published in February 2023 and amended in June 2023. The amended NOFO solicits applications for the construction, expansion, or modernization of commercial facilities for the front- and back-end fabrication of leading-edge, current-generation, and mature-node semiconductors; commercial facilities for wafer manufacturing; and commercial facilities for materials used to manufacture semiconductors and semiconductor manufacturing equipment, provided that the capital investment equals or exceeds \$300 million. The potential amount available under the NOFO is up to \$38.22 billion for direct funding and up to \$75 billion in direct loan or guaranteed principals. CPO is responsible for completion of the NEPA process before financial assistance can be provided.

**Draft PEA**

The purpose of the Proposed Action is to invest in U.S. production of strategically important semiconductor chips, and assure a sufficient, sustainable, and secure supply of older and current generation chips for national security purposes and for critical manufacturing industries. As part of this effort, CPO aims to increase semiconductor manufacturing capacity and strengthen the security of the U.S. supply chain via the modernization of semiconductor production within the current footprint of existing eligible current-generation and mature-node semiconductor fabrication facilities. Such projects include the replacement or upgrade of existing equipment, the addition of new semiconductor manufacturing equipment within existing spaces, and expansion of cleanroom space.

For proposed projects to be covered under the PEA, CPO will evaluate the project for consistency with the scope of the PEA using an inclusion analysis document (e.g., memo, form, or checklist). This analysis document will include the relevant information learned from a site-specific review and serves as the NEPA analysis documentation for the administrative record as applied to specific projects. If the project includes activities outside of the scope of the PEA, then an additional or tiered NEPA document may be required. The PEA can be used as a planning tool to support tiered, site-specific analyses by narrowing the spectrum of environmental impacts to focus on project-level reviews as needed. The following scenarios describe the possible application of the PEA to a project and whether additional environmental review under NEPA is required:

1. All proposed project activities are described in the PEA or the activities are similar enough to the activities analyzed in the PEA to support a conclusion that their impacts will not be different from those described in the PEA; therefore, no additional NEPA review required;

2. One or more proposed project activities are within the scope of the PEA and others are not; therefore, additional NEPA review would be required; and

3. None of the proposed project activities are within the scope of the PEA; therefore, additional NEPA review would be required.

**Authority:** This notice is provided pursuant to NEPA and CEQ’s NEPA

implementing regulations (40 CFR 1506.6).

**Tamiko Ford,**

*NIST Executive Secretariat.*

[FR Doc. 2023-28487 Filed 12-26-23; 8:45 am]

**BILLING CODE 3510-13-P**

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

#### National Conference on Weights and Measures 2024 Interim Meeting

**AGENCY:** National Institute of Standards and Technology, Commerce.

**ACTION:** Notice.

**SUMMARY:** The 2024 Interim Meeting of the National Conference on Weights and Measures (NCWM) will be held in-person at the Royal Sonesta New Orleans in New Orleans, Louisiana from Sunday, January 7, 2024, through Wednesday, January 10, 2024. This notice contains information about some, but not all, significant agenda items of the NCWM committees. As a result, the items are not consecutively numbered.

**DATES:** The 2024 NCWM Interim Meeting will be held from Sunday, January 7, 2024, through Wednesday, January 10, 2024. The meeting schedule will be available on the NCWM website at [www.ncwm.com](http://www.ncwm.com).

**ADDRESSES:** This meeting will be held at the Royal Sonesta New Orleans, with an address at 300 Bourbon Street, New Orleans, Louisiana 70130.

**FOR FURTHER INFORMATION CONTACT:** Dr. Katrice Lipka, NIST, Office of Weights and Measures, 100 Bureau Drive, Stop 2600, Gaithersburg, MD 20899-2600. You may also contact Dr. Lipka at (301) 975-3116 or by email at [katrice.lipka@nist.gov](mailto:katrice.lipka@nist.gov). The meeting is open to the public, but the payment of a registration fee is required. Please see the NCWM website ([www.ncwm.com](http://www.ncwm.com)) to view the meeting agendas, registration forms, and hotel reservation information.

#### SUPPLEMENTARY INFORMATION:

Publication of this notice on the NCWM's behalf is undertaken as a public service and does not itself constitute an endorsement by the National Institute of Standards and Technology (NIST) of the content of the notice. NIST participates in the NCWM as an NCWM member and pursuant to 15 U.S.C. 272(b)(10) and (c)(4) and in accordance with Federal policy (e.g., OMB Circular A-119 "Federal Participation in the Development and Use of Voluntary Consensus Standards").

The NCWM is an organization of weights and measures officials of the states, counties, and cities of the United States, and representatives from the private sector and federal agencies. These meetings bring together government officials and representatives of business, industry, trade associations, and consumer organizations on subjects related to the field of weights and measures technology, administration, and enforcement. NIST hosted the first meeting of the NCWM in 1905. Since then, the conference has provided a model of cooperation between Federal, State, and local governments and the private sector. NIST participates in the NCWM to provide technical insights and expertise and encourage cooperation between the private sector, federal agencies, and the states in the development of legal metrology requirements. NIST also promotes uniformity in state laws, regulations, and testing procedures used in the regulatory control of commercial weighing and measuring devices, packaged goods, and for other trade and commerce issues.

The NCWM has established multiple committees, task groups, and other working bodies to address legal metrology issues of interest to, *inter alia*, regulatory officials, industry representatives, and consumers. Comments will be taken by the various NCWM committees on agenda items during the open hearing portions of the conference identified in the meeting schedule. At this stage, the items are proposals. The open hearing sessions are accessible to all registered attendees of the conference, including both NCWM members and non-members. The conference also includes committee work sessions in which the committees may, *inter alia*, accept comments, withdraw or carryover agenda items that need additional maturation, and develop recommendations for the agenda items for consideration and possible adoption at the NCWM 109th Annual Meeting.

These notices are intended to make interested parties aware of significant agenda items and alert them to the committees' intentions to share reports on the status of each at the 2024 NCWM Interim Meeting. The notices are also presented to invite the participation of manufacturers, experts, consumers, users, and others who may be interested in these efforts.

The following are brief descriptions of some of the significant agenda items that will receive further consideration by the standing committees at the upcoming 2024 NCWM Interim Meeting. The full agenda of each

standing committee is provided in NCWM Publication 15 ([ncwm.com/publication-15](http://ncwm.com/publication-15)). Comments will be taken on recommendations intended to amend NIST Handbook 44, "Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices" (NIST HB 44), NIST Handbook 130, "Uniform Laws and Regulations in the Areas of Legal Metrology and Fuel Quality" (NIST HB 130), and NIST Handbook 133, "Checking the Net Contents of Packaged Goods" (NIST HB 133). The NIST Handbooks are regularly adopted by the states, either by reference or through administrative procedures.

#### NCWM S&T Committee

The NCWM Specifications and Tolerances Committee (S&T Committee) will consider proposed amendments to NIST HB 44, including those identified below. A detailed technical review of the S&T Committee agenda items will be made available prior to the 2024 NCWM Interim Meeting in the 2024 NIST OWM Interim Technical Analysis at <https://www.nist.gov/pml/owm/publications/owm-technical-analysis>.

#### SCL—Scales

SCL-23.3. Verification Scale Division e: Multiple Sections.

The S&T Committee will consider a proposal submitted by the NCWM Verification Scale Division e Task Group that has an Assigned Status and is intended to update NIST Handbook 44, Section 2.20 Scales to:

1. Clarify how error is determined in relation to the verification scale division (e) and the scale division (d)
2. Clarify which is the proper reference; the verification scale division (e) or the scale division (d) throughout this section
3. Ensure proper selection of a scale in reference to the verification scale division (e) and the scale division (d)
4. Clarify the relationship between the verification scale division (e) and the scale division (d).

#### WIM—Weigh-In-Motion Systems

WIM-23.1. 2.26 Weigh-in-Motion Systems Used for Vehicle Direct Enforcement.

The S&T Committee will consider a proposal submitted by New York City DOT, C2SMART, Kistler, and Maryland DOT that has an Informational Status. The proposal to include a new Section 2.26. Weigh-in-Motion Systems Used for Vehicle Direct Enforcement to NIST HB 44 is intended to provide a legal document that can be used by local and State agencies to certify Weigh-In-

Motion (WIM) systems used for automated weight enforcement.

#### EVF—Electric Vehicle Fueling Systems

EVF–24.1. S.1.3. Mobile Device as Indicating Element for AC Chargers.

The S&T Committee will consider a proposal submitted by Siemens Industry Inc.'s Smart Infrastructure eMobility; it is intended to clarify that use of a hand-held mobile device such as a mobile phone to provide the Indicating Elements for an EVSE is an acceptable alternative to having the Indicating Elements built into the EVSE. This option is already accepted by the National Type Evaluation Program for certification.

EVF–23.4. S.5.2. EVSE Identification and Marking Requirements, S.5.3. Abbreviations and Symbols, and N.5. Test of an EVSE System.

The S&T Committee will consider a proposal submitted by Power Measurements LLC that is intended to update the existing required tests in NIST HB 44 (Section 3.40. Electric Vehicle Fueling Systems) that are used to determine the accuracy of alternating current (AC) and direct current (DC) systems. The proposal has a Developing status and would expand the number of test points over a specific range of operating conditions for the test of an electric vehicle supply equipment (EVSE) system. The S&T Committee has requested that stakeholders present an alternate proposal by exploring the option of combining the test procedures in this proposal with the test procedures and related terminology under consideration in EVF–23.7, a proposal submitted by Electrify America.

EVF–23.6. S.5.2. EVSE Identification and Marking Requirements, and T.2. Tolerances. The S&T Committee will consider a proposal submitted by the Florida Department of Agriculture and Consumer Services, Electrify America, Tesla, EVGo, and Siemens. This proposal was revised by the S&T Committee after comments during the 2023 NCWM Interim and Annual Meetings, and it would amend NIST HB 44, Section 3.40, to allow DC systems placed in service prior to January 1, 2024, that are marked as a Class 5 device, to have an error of  $\pm 5\%$  through 2034. DC systems installed on or after January 1, 2024, would be required to comply with the current 1% (acceptance)/2% (maintenance) tolerance.

#### LPG—Liquefied Petroleum Gas and Anhydrous Ammonia Liquid-Measuring Devices

LPG–24.2. S.2.5. Zero-Set-Back Interlock.

The S&T Committee will consider a proposal submitted by the National Propane Gas Association; it is intended to address practical issues that propane retailers encounter when trying to comply with the zero setback requirements for propane stationary meters in NIST HB 44.

LPG–23.1. S.2.5. Zero-Set-Back Interlock.

The S&T Committee will consider a proposal submitted by the National Propane Gas Association and U-Haul International. The proposal has an Informational status and addresses issues that propane retailers encounter that do not have dispensers typically designed to be used to dispense retail motor fuel when trying to comply with zero-set-back interlock requirements in NIST HB 44 for electronic stationary and electronic vehicle-mounted propane meters and stationary retail motor-fuel devices used to dispense propane. The intent of the proposal is to exempt the required use of zero-set-back interlock mechanisms when a device is used in multiple applications to dispense liquefied petroleum gas as a vehicle motor-fuel and in filling containers/cylinders for other than motor-fuel applications.

#### OTH—Other Items

OTH 16.1. Electric Watthour Meters Tentative Code.

The S&T Committee will consider a proposal submitted by NIST, Office of Weights and Measures, which has an Informational status and is intended to make stakeholders aware of the work being done within the NIST U.S. National Work Group (USNWG) on Electric Vehicle Fueling and to develop proposed requirements for electric watthour meters used in submeter applications in residences and businesses (not intended to address utility metering under the authority of entities such as the local utility commission).

#### NCWM L&R Committee

The NCWM Laws and Regulations Committee (L&R Committee) will consider proposed amendments to NIST HB 133, including those identified below. A detailed technical review of the L&R Committee agenda items will be made available prior to the 2024 NCWM Interim Meeting in the 2024 NIST OWM Interim Analysis at <https://www.nist.gov/pml/owm/publications/owm-technical-analysis>.

#### NET—NIST Handbook 133

NET–24.1. Section 3.11. Ice Cream Novelties.

The L&R Committee will consider a proposal submitted by the County of Los Angeles Department of Agriculture Commissioner/Weights and Measures to modify NIST HB 133, Section 3.11. Ice Cream Novelties. The proposal would, *inter alia*, provide technical guidance on the preparation and maintenance of ice water at the required temperature to test ice cream novelties.

#### NET–24.2. Section 4.9. Procedure for Checking the Contents of Specific Agriculture Seed Packages Labeled by Count and Appendix D. AOSA Rules for Testing Seeds.

The L&R Committee will consider a proposal submitted by the Louisiana Department of Agriculture and Forestry to align NIST HB 133, Section 4.9. Procedure for Checking the Contents of Specific Agriculture Seed Packages Labeled by Count and Appendix D. AOSA Rules for Testing Seeds with recent changes to Association of Official Seed Analyst (AOSA) Rules. This proposal would provide a standardized mechanical seed counter calibration procedure for all models of mechanical seed counters being used across the United States, to determine the number of seeds per pound and/or for the purpose of packaging seeds by count.

**Tamiko Ford,**

*NIST Executive Secretariat.*

[FR Doc. 2023–28485 Filed 12–26–23; 8:45 am]

**BILLING CODE 3510–13–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648–XD604]

### North Pacific Fishery Management Council; Public Meeting

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

**ACTION:** Notice of web conference.

**SUMMARY:** The North Pacific Fishery Management Council (Council) Scientific and Statistical Committee Subgroup (SSC Subgroup) meeting will be held.

**DATES:** The meeting will be held on Thursday, January 11, 2024, from 11:30 a.m. to 2:30 p.m., Alaska time.

**ADDRESSES:** The meeting will be a web conference. Join online through the link at <https://meetings.npfmc.org/Meeting/Details/3026>.

*Council address:* North Pacific Fishery Management Council, 1007 W

3rd Ave., Suite 400, Anchorage, AK 99501–2252; telephone: (907) 271–2809. Instructions for attending the meeting via video conference are given under **SUPPLEMENTARY INFORMATION** below.

**FOR FURTHER INFORMATION CONTACT:**

Nicole Watson, Council staff; phone: (907) 271–2809; email: [Nicole.watson@noaa.gov](mailto:Nicole.watson@noaa.gov). For technical support, please contact our admin Council staff, email: [npfmc.admin@noaa.gov](mailto:npfmc.admin@noaa.gov).

**SUPPLEMENTARY INFORMATION:**

**Agenda**

Thursday, January 11, 2024

The SSC Research Priorities subgroup will be reviewing research priorities to provide recommendations to the SSC at the February 2024 meeting. Research priorities submitted through the new online process that do not clearly fit with expertise available from other NPFMC plan teams will be reviewed. The agenda is subject to change, and the latest version will be posted at <https://meetings.npfmc.org/Meeting/Details/3026> prior to the meeting, along with meeting materials.

**Connection Information**

You can attend the meeting online using a computer, tablet, or smart phone; or by phone only. Connection information will be posted online at: <https://meetings.npfmc.org/Meeting/Details/3026>.

**Public Comment**

Public comment letters will be accepted and should be submitted electronically to <https://meetings.npfmc.org/Meeting/Details/3026>.

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

Dated: December 21, 2023.

**Alyssa Lynn Weigers,**

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

[FR Doc. 2023–28520 Filed 12–26–23; 8:45 am]

**BILLING CODE 3510–22–P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

[RTID 0648–XD603]

**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 meeting of its Joint Herring Committee and Advisory Panel via webinar to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

**DATES:** This webinar will be held on Friday, January 12, 2024, at 1 p.m.

**ADDRESSES:** Webinar registration URL information: <https://attendee.gotowebinar.com/register/4255528249751434588>.

*Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

**FOR FURTHER INFORMATION CONTACT:** Cate O’Keefe, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

**SUPPLEMENTARY INFORMATION:**

**Agenda**

The Herring Committee and Advisory Panel will meet to discuss Amendment 10 (to minimize user conflicts related to the Atlantic herring fishery): review work from the Herring Plan Development Team including a draft scoping document, draft schedule for public hearings, and compiling the past public record relevant to this action. This action will also consider river herring and shad management measures (e.g., catch caps or time/area closures). They will also plan for the work ahead in Council Priorities for Herring for 2024 as well as make recommendations, as appropriate. 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, 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 21, 2023.

**Alyssa Lynn Weigers,**

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

[FR Doc. 2023–28522 Filed 12–26–23; 8:45 am]

**BILLING CODE 3510–22–P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

[RTID 0648–XD569]

**Fisheries of the Exclusive Economic Zone Off Alaska; North Pacific Observer Program Standard Ex-Vessel Prices**

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

**ACTION:** Notification of standard ex-vessel prices.

**SUMMARY:** NMFS publishes standard ex-vessel prices for groundfish and halibut for the calculation of the observer fee under the North Pacific Observer Program (Observer Program). This notice is intended to provide information to vessel owners, processors, registered buyers, and other Observer Program participants about the standard ex-vessel prices that will be used to calculate the observer fee for landings of groundfish and halibut made in 2024. NMFS will send invoices to processors and registered buyers subject to the fee by January 15, 2025. Fees are due to NMFS on or before February 15, 2025.

**DATES:** The standard prices are valid on January 1, 2024.

**FOR FURTHER INFORMATION CONTACT:** For general questions about the observer fee and standard ex-vessel prices, contact Amy Hadfield at (907) 586–7376. For questions about the fee billing process, contact Charmaine Weeks at (907) 586–7231. Additional information about the Observer Program is available on NMFS Alaska Region’s website at <https://www.fisheries.noaa.gov/alaska/fisheries-observers/north-pacific-observer-program>.

**SUPPLEMENTARY INFORMATION:**

**Background**

Regulations at 50 CFR part 679, subpart E, governing the Observer Program, require the deployment of NMFS-certified observers (observers) and electronic monitoring (EM) systems

to collect information necessary for the conservation and management of the Bering Sea and Aleutian Islands (BSAI) and Gulf of Alaska (GOA) groundfish and halibut fisheries. Fishery managers use information collected by observers and EM to monitor quotas, manage groundfish and prohibited species catch, and document and reduce fishery interactions with protected resources. Scientists use observer-collected information for stock assessments and marine ecosystem research.

The Observer Program includes two observer coverage categories: the partial coverage category and the full coverage category. All groundfish and halibut vessels and processors subject to observer coverage are included in one of these two categories. Defined at § 679.51, the partial coverage category includes vessels and processors that are not required to have an observer or EM at all times, and the full coverage category includes vessels and processors required to have all of their fishing and processing activity observed. Vessels and processors in the full coverage category arrange and pay for observer services from a permitted observer provider. Observer coverage and EM for the partial coverage category is funded through a system of fees based on the ex-vessel value of groundfish and halibut. Throughout this notice, the term “processor” refers to shoreside processors, stationary floating processors, and catcher/processors in the partial coverage category.

#### **Landings Subject to Observer Coverage Fee**

Pursuant to section 313 of the Magnuson-Stevens Act, NMFS is authorized to assess a fee on all landings accruing against a Federal total allowable catch (TAC) for groundfish or commercial halibut quota landings made by vessels that are subject to Federal regulations and not included in the full coverage category. A fee is only assessed on landings of groundfish from vessels designated on a Federal Fisheries Permit or from vessels landing individual fishing quota (IFQ) or community development quota (CDQ) halibut or IFQ sablefish. Within the subset of vessels subject to the observer fee, only landings accruing against an IFQ allocation or a Federal TAC for groundfish are included in the fee assessment. A table with additional information about which landings are subject to the observer fee is at § 679.55(c) and on page 2 of an informational bulletin titled “Observer Fee Collection” that can be downloaded from the NMFS Alaska Region website at <https://www.fisheries.noaa.gov/>

*resource/document/observer-fee-collection-north-pacific-groundfish-and-halibut-fisheries-observer.*

#### **Fee Determination**

A fee equal to 1.65 percent of the ex-vessel value is assessed on the landings of groundfish and halibut subject to the fee. Ex-vessel value is determined by multiplying the standard price for groundfish by the round weight equivalent for each species, gear, and port combination, and the standard price for halibut by the headed and gutted weight equivalent. Standard prices are determined by aggregating prices by species, gear, and area grouping to arrive at an average price per pound for each grouping. NMFS reviews each vessel landing report and determines whether the reported landing is subject to the observer fee and, if so, which groundfish species in the landing are subject to the observer fee. All IFQ or CDQ halibut in a landing subject to the observer fee will be included in the observer fee calculation. For any landed groundfish or halibut subject to the observer fee, NMFS will apply the appropriate standard ex-vessel prices for the species, gear type, and port and calculate the observer fee associated with the landing.

Processors and registered buyers can access the landing-specific, observer fee information through the NMFS Web Application (<https://alaskafisheries.noaa.gov/webapps/efish/login>) or eLandings (<https://elandings.alaska.gov/>). Observer fee information is either available immediately or within 24 hours after a landing report is submitted electronically. A time lag occurs for some landings because NMFS must process each landing report through the catch accounting system to determine which groundfish in a landing accrues against a Federal TAC and are subject to the observer fee.

Under the fee system, catcher vessel owners split the fee with the registered buyers or owners of shoreside or stationary floating processors. While the owners of catcher vessels and processors in the partial coverage category are each responsible for paying their portion of the fee, the owners of shoreside or stationary floating processors and registered buyers are responsible for collecting the fees from catcher vessels and remitting the full fee to NMFS. Owners of catcher/processors in the partial coverage category are responsible for remitting the full fee to NMFS.

NMFS sends invoices to processors and registered buyers by January 15 of each calendar year. The total fee amount

is determined by the sum of the fees reported for each landing at that processor or registered buyer in the prior calendar year. Processors and registered buyers must pay the fees to NMFS using eFISH. Payments are due by February 15 of each year. Processors and registered buyers have access to this system through a User ID and password issued by NMFS. Instructions for electronic payment are provided on the NMFS Alaska Region website at <https://www.fisheries.noaa.gov/alaska/commercial-fishing/observer-fee-collection-and-payment-north-pacific-groundfish-and-halibut> and on the observer fee invoice to be mailed to each processor and registered buyer.

#### **Standard Prices**

This notification provides the standard ex-vessel prices for groundfish and halibut species subject to the observer fee in 2024. Data sources for ex-vessel prices include the following:

- For groundfish other than sablefish IFQ and sablefish accruing against the fixed gear sablefish CDQ reserve, the State of Alaska’s Commercial Fishery Entry Commission’s (CFEC) gross revenue data, which are based on the Commercial Operator Annual Report (COAR) and Alaska Department of Fish and Game (ADF&G) fish tickets; and
- For halibut IFQ, halibut CDQ, sablefish IFQ, and sablefish accruing against the fixed gear sablefish CDQ reserve, the IFQ Buyer Report that is submitted to NMFS annually by each registered buyer that operates as a shoreside processor and receives and purchases IFQ landings of sablefish and halibut or CDQ landings of halibut under § 679.5(l)(7)(i).

The standard prices in this notification were calculated using the following procedures for protecting confidentiality of data submitted to or collected by NMFS. NMFS does not publish any price information that would permit the identification of an individual or business. For NMFS to publish a standard price for a particular species-gear-port combination, the price data used to calculate the standard price must represent landings from at least four different vessels delivered to at least three different processors in a port or port group. Price data that are confidential because fewer than four vessels or three processors contributed data to a particular species-gear-port combination have been aggregated.

#### **Groundfish Standard Ex-Vessel Prices**

Table 1 shows the groundfish species standard ex-vessel prices that will be used to calculate the fee for 2024. These prices are based on the CFEC gross

revenue data, which are based on landings data from ADF&G fish tickets and information from the COAR. The COAR contains statewide buying and production information and is considered the most complete routinely collected information to determine the ex-vessel value of groundfish harvested from waters off Alaska.

The standard ex-vessel prices for groundfish were calculated by adding ex-vessel value from the CFEC gross revenue files for 2020, 2021, and 2022 by species, port, and gear category, and adding the volume (round weight equivalent) from the CFEC gross revenue files for 2020, 2021, and 2022 by species, port, and gear category, and then dividing total ex-vessel value over the 3 year period in each category by total volume over the 3 year period in each category. This calculation results in an average ex-vessel price per pound by species, port, and gear category for the 3 year period. Three gear categories were used for the standard ex-vessel prices: (1) non-trawl gear, including hook-and-line, pot, jig, troll, and others (Non-Trawl); (2) non-pelagic trawl gear (NPT); and (3) pelagic trawl gear (PTR).

CFEC ex-vessel value and volume data are available in the fall of the year following the year the fishing occurred.

Thus, it is not possible to base ex-vessel fee liabilities on standard prices that are less than 2 years old. For the 2024 groundfish standard ex-vessel prices, the most recent ex-vessel value and volume data available are from 2022.

If a particular groundfish species is not listed in table 1, the standard ex-vessel price for a species group (if it exists in the management area) will be used. If price data for a particular species remained confidential once aggregated to the outside of Alaska (ALL) level, data are aggregated by species group (Flathead Sole; GOA Deep-water Flatfish; GOA Shallow-water Flatfish; GOA Skate, Other; and Other Rockfish). Standard prices for the groundfish species groups are shown in table 2.

If a port-level price does not meet the confidentiality requirements, the data are aggregated by port group. Port-group data for Southeast Alaska (SEAK) and the Eastern GOA excluding Southeast Alaska (EGOAxSE) also are presented separately when price data are available. Port-group data are aggregated by regulatory area in the GOA (Eastern GOA, Central GOA, and Western GOA) and by subarea in the BSAI (BS subarea and AI subarea). If confidentiality requirements are still not met by

aggregating prices across ports at these levels, the prices are aggregated at the level of BSAI or GOA, then statewide (AK) and ports outside of Alaska (OTAK), and finally all ports, including those outside of Alaska (ALL).

Standard prices are presented separately for non-pelagic trawl and pelagic trawl when non-confidential data are available. NMFS also calculated prices for a “Pelagic Trawl/Non-pelagic Trawl Combined” (PTR/NPT) category that can be used when combining trawl price data for landings of a species in a particular port or port group will not violate confidentiality requirements. Creating this standard price category allows NMFS to assess a fee on 2024 landings of some of the species with pelagic trawl gear based on a combined trawl gear price for the port or port group.

If no standard ex-vessel price is listed for a species or species group and gear category combination in table 1, table 2, or table 3, no fee will be assessed on that landing. Volume and value data for that species will be added to the standard ex-vessel prices in future years, if the data become available and display of a standard ex-vessel price meets confidentiality requirements.

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUNDFISH SPECIES FOR 2024 OBSERVER COVERAGE FEE

[Based on volume and value from 2020, 2021, and 2022]

| Species (species code) <sup>1 2</sup> | Port/area <sup>3 4</sup> | Non-trawl | NPT  | PTR  | PTR/NPT |
|---------------------------------------|--------------------------|-----------|------|------|---------|
| Arrowtooth Flounder (121) .....       | Kodiak .....             | —         | 0.06 | 0.07 | —       |
| Arrowtooth Flounder (121) .....       | CGOA .....               | —         | 0.06 | 0.07 | —       |
| Arrowtooth Flounder (121) .....       | GOA .....                | —         | 0.06 | 0.07 | —       |
| Arrowtooth Flounder (121) .....       | AK .....                 | —         | 0.06 | 0.07 | —       |
| Arrowtooth Flounder (121) .....       | ALL .....                | —         | 0.06 | 0.07 | —       |
| Black Rockfish (142) .....            | AK .....                 | 0.81      | 0.19 | —    | 0.19    |
| Bocaccio Rockfish (137) .....         | Sitka .....              | 0.43      | —    | —    | —       |
| Bocaccio Rockfish (137) .....         | SEAK .....               | 0.44      | —    | —    | —       |
| Bocaccio Rockfish (137) .....         | EGOA .....               | 0.39      | —    | —    | —       |
| Bocaccio Rockfish (137) .....         | GOA .....                | 0.39      | —    | —    | —       |
| Bocaccio Rockfish (137) .....         | AK .....                 | 0.39      | —    | —    | —       |
| Bocaccio Rockfish (137) .....         | ALL .....                | 0.36      | —    | —    | —       |
| Butter Sole (126) .....               | Kodiak .....             | —         | 0.11 | —    | 0.11    |
| Butter Sole (126) .....               | CGOA .....               | —         | 0.11 | —    | 0.11    |
| Butter Sole (126) .....               | GOA .....                | —         | 0.11 | —    | 0.11    |
| Butter Sole (126) .....               | AK .....                 | —         | 0.11 | —    | 0.11    |
| Butter Sole (126) .....               | ALL .....                | —         | 0.11 | —    | 0.11    |
| Canary Rockfish (146) .....           | Juneau .....             | 0.34      | —    | —    | —       |
| Canary Rockfish (146) .....           | Petersburg .....         | 0.26      | —    | —    | —       |
| Canary Rockfish (146) .....           | Sitka .....              | 0.42      | —    | —    | —       |
| Canary Rockfish (146) .....           | SEAK .....               | 0.44      | —    | —    | —       |
| Canary Rockfish (146) .....           | EGOAxSE .....            | 0.36      | —    | —    | —       |
| Canary Rockfish (146) .....           | Seward .....             | 0.34      | —    | —    | —       |
| Canary Rockfish (146) .....           | CGOA .....               | 0.35      | —    | —    | —       |
| Canary Rockfish (146) .....           | GOA .....                | 0.40      | —    | —    | —       |
| Canary Rockfish (146) .....           | AK .....                 | 0.40      | —    | —    | —       |
| Canary Rockfish (146) .....           | ALL .....                | 0.40      | —    | —    | —       |
| China Rockfish (149) .....            | Juneau .....             | 0.24      | —    | —    | —       |
| China Rockfish (149) .....            | SEAK .....               | 0.50      | —    | —    | —       |
| China Rockfish (149) .....            | Cordova .....            | 0.38      | —    | —    | —       |
| China Rockfish (149) .....            | EGOAxSE .....            | 0.36      | —    | —    | —       |
| China Rockfish (149) .....            | Homer .....              | 0.37      | —    | —    | —       |
| China Rockfish (149) .....            | Seward .....             | 0.22      | —    | —    | —       |

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUND FISH SPECIES FOR 2024 OBSERVER COVERAGE FEE—Continued  
 [Based on volume and value from 2020, 2021, and 2022]

| Species (species code) <sup>1 2</sup> | Port/area <sup>3 4</sup> | Non-trawl | NPT  | PTR  | PTR/NPT |
|---------------------------------------|--------------------------|-----------|------|------|---------|
| China Rockfish (149) .....            | CGOA .....               | 0.30      | —    | —    | —       |
| China Rockfish (149) .....            | GOA .....                | 0.38      | —    | —    | —       |
| China Rockfish (149) .....            | AK .....                 | 0.38      | —    | —    | —       |
| China Rockfish (149) .....            | ALL .....                | 0.38      | —    | —    | —       |
| Copper Rockfish (138) .....           | Sitka .....              | 0.38      | —    | —    | —       |
| Copper Rockfish (138) .....           | SEAK .....               | 0.38      | —    | —    | —       |
| Copper Rockfish (138) .....           | Cordova .....            | 0.43      | —    | —    | —       |
| Copper Rockfish (138) .....           | EGOAxSE .....            | 0.42      | —    | —    | —       |
| Copper Rockfish (138) .....           | CGOA .....               | 0.52      | —    | —    | —       |
| Copper Rockfish (138) .....           | GOA .....                | 0.41      | —    | —    | —       |
| Copper Rockfish (138) .....           | AK .....                 | 0.41      | —    | —    | —       |
| Copper Rockfish (138) .....           | ALL .....                | 0.41      | —    | —    | —       |
| Darkblotched Rockfish (159) .....     | ALL .....                | 0.16      | —    | —    | —       |
| Dover Sole (124) .....                | Kodiak .....             | —         | 0.06 | —    | 0.06    |
| Dover Sole (124) .....                | CGOA .....               | —         | 0.06 | —    | 0.06    |
| Dover Sole (124) .....                | GOA .....                | —         | 0.06 | —    | 0.06    |
| Dover Sole (124) .....                | AK .....                 | —         | 0.06 | —    | 0.06    |
| Dover Sole (124) .....                | ALL .....                | —         | 0.06 | —    | 0.06    |
| Dusky Rockfish (172) .....            | Juneau .....             | 0.15      | —    | —    | —       |
| Dusky Rockfish (172) .....            | Sitka .....              | 0.67      | —    | —    | —       |
| Dusky Rockfish (172) .....            | Petersburg .....         | 0.52      | —    | —    | —       |
| Dusky Rockfish (172) .....            | SEAK .....               | 0.33      | —    | —    | —       |
| Dusky Rockfish (172) .....            | Cordova .....            | 0.46      | —    | —    | —       |
| Dusky Rockfish (172) .....            | EGOAxSE .....            | 0.35      | —    | —    | —       |
| Dusky Rockfish (172) .....            | Homer .....              | 0.32      | —    | —    | —       |
| Dusky Rockfish (172) .....            | Kodiak .....             | 0.82      | 0.13 | 0.12 | —       |
| Dusky Rockfish (172) .....            | Seward .....             | 0.27      | —    | —    | —       |
| Dusky Rockfish (172) .....            | CGOA .....               | 0.68      | 0.13 | 0.12 | —       |
| Dusky Rockfish (172) .....            | GOA .....                | 0.65      | 0.13 | 0.12 | —       |
| Dusky Rockfish (172) .....            | AK .....                 | 0.65      | 0.13 | 0.12 | —       |
| Dusky Rockfish (172) .....            | ALL .....                | 0.65      | 0.13 | 0.12 | —       |
| English Sole (128) .....              | Kodiak .....             | —         | 0.11 | —    | 0.11    |
| English Sole (128) .....              | CGOA .....               | —         | 0.11 | —    | 0.11    |
| English Sole (128) .....              | GOA .....                | —         | 0.11 | —    | 0.11    |
| English Sole (128) .....              | AK .....                 | —         | 0.11 | —    | 0.11    |
| English Sole (128) .....              | ALL .....                | —         | 0.11 | —    | 0.11    |
| Flathead Sole (122) .....             | Kodiak .....             | —         | 0.11 | 0.09 | —       |
| Flathead Sole (122) .....             | CGOA .....               | —         | 0.11 | 0.09 | —       |
| Flathead Sole (122) .....             | GOA .....                | —         | 0.11 | 0.09 | —       |
| Flathead Sole (122) .....             | AK .....                 | —         | 0.11 | 0.09 | —       |
| Flathead Sole (122) .....             | ALL .....                | —         | 0.11 | 0.09 | —       |
| Northern Rockfish (136) .....         | Kodiak .....             | —         | 0.13 | —    | 0.13    |
| Northern Rockfish (136) .....         | CGOA .....               | —         | 0.13 | —    | 0.13    |
| Northern Rockfish (136) .....         | GOA .....                | —         | 0.13 | —    | 0.13    |
| Northern Rockfish (136) .....         | AK .....                 | —         | 0.13 | —    | 0.13    |
| Northern Rockfish (136) .....         | ALL .....                | —         | 0.13 | —    | 0.13    |
| Octopus (870) .....                   | Kodiak .....             | 0.45      | 0.57 | —    | 0.57    |
| Octopus (870) .....                   | CGOA .....               | 0.45      | 0.57 | —    | 0.57    |
| Octopus (870) .....                   | GOA .....                | 0.72      | 0.57 | —    | 0.57    |
| Octopus (870) .....                   | BS .....                 | 0.58      | —    | —    | —       |
| Octopus (870) .....                   | BSAI .....               | 0.55      | —    | —    | —       |
| Octopus (870) .....                   | AK .....                 | 0.60      | 0.57 | —    | 0.57    |
| Octopus (870) .....                   | ALL .....                | 0.60      | 0.57 | —    | 0.57    |
| Pacific Cod (110) .....               | Craig .....              | 0.25      | —    | —    | —       |
| Pacific Cod (110) .....               | Juneau .....             | 0.67      | —    | —    | —       |
| Pacific Cod (110) .....               | Ketchikan .....          | 0.37      | —    | —    | —       |
| Pacific Cod (110) .....               | Petersburg .....         | 0.62      | —    | —    | —       |
| Pacific Cod (110) .....               | Sitka .....              | 0.66      | —    | —    | —       |
| Pacific Cod (110) .....               | SEAK .....               | 0.64      | —    | —    | —       |
| Pacific Cod (110) .....               | Cordova .....            | 0.50      | —    | —    | —       |
| Pacific Cod (110) .....               | Whittier .....           | 0.43      | —    | —    | —       |
| Pacific Cod (110) .....               | EGOAxSE .....            | 0.44      | —    | —    | —       |
| Pacific Cod (110) .....               | Homer .....              | 0.37      | —    | —    | —       |
| Pacific Cod (110) .....               | Kodiak .....             | 0.44      | 0.39 | 0.37 | —       |
| Pacific Cod (110) .....               | Seward .....             | 0.38      | —    | —    | —       |
| Pacific Cod (110) .....               | CGOA .....               | 0.43      | 0.39 | 0.37 | —       |
| Pacific Cod (110) .....               | King Cove .....          | 0.45      | —    | —    | —       |
| Pacific Cod (110) .....               | WGOA .....               | 0.44      | 0.42 | 0.22 | —       |
| Pacific Cod (110) .....               | GOA .....                | —         | 0.41 | 0.30 | —       |
| Pacific Cod (110) .....               | Dillingham .....         | —         | —    | —    | —       |
| Pacific Cod (110) .....               | Dutch Harbor .....       | 0.44      | 0.42 | —    | 0.42    |

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUND FISH SPECIES FOR 2024 OBSERVER COVERAGE FEE—Continued  
 [Based on volume and value from 2020, 2021, and 2022]

| Species (species code) <sup>1 2</sup> | Port/area <sup>3 4</sup>            | Non-trawl | NPT  | PTR  | PTR/NPT |
|---------------------------------------|-------------------------------------|-----------|------|------|---------|
| Pacific Cod (110) .....               | BS .....                            | 0.44      | 0.42 | 0.23 | —       |
| Pacific Cod (110) .....               | BSAI .....                          | 0.44      | 0.42 | 0.23 | —       |
| Pacific Cod (110) .....               | Stationary Floating Processor ..... | 0.39      | —    | —    | —       |
| Pacific Cod (110) .....               | AK .....                            | 0.43      | 0.41 | 0.30 | —       |
| Pacific Cod (110) .....               | Outside AK .....                    | 0.36      | —    | —    | —       |
| Pacific Cod (110) .....               | ALL .....                           | 0.43      | 0.41 | 0.30 | —       |
| Pacific Ocean Perch (141) .....       | EGOA .....                          | 0.22      | —    | —    | —       |
| Pacific Ocean Perch (141) .....       | Kodiak .....                        | —         | 0.13 | 0.14 | —       |
| Pacific Ocean Perch (141) .....       | CGOA .....                          | —         | 0.13 | 0.14 | —       |
| Pacific Ocean Perch (141) .....       | GOA .....                           | 0.18      | 0.13 | 0.14 | —       |
| Pacific Ocean Perch (141) .....       | BSAI .....                          | —         | —    | —    | —       |
| Pacific Ocean Perch (141) .....       | AK .....                            | 0.18      | 0.13 | 0.14 | —       |
| Pacific Ocean Perch (141) .....       | ALL .....                           | 0.18      | 0.13 | 0.14 | —       |
| Pollock (270) .....                   | Kodiak .....                        | 0.10      | 0.11 | 0.14 | —       |
| Pollock (270) .....                   | Homer .....                         | 0.70      | —    | —    | —       |
| Pollock (270) .....                   | CGOA .....                          | 0.13      | 0.11 | 0.14 | —       |
| Pollock (270) .....                   | WGOA .....                          | —         | —    | 0.14 | 0.14    |
| Pollock (270) .....                   | GOA .....                           | 0.13      | 0.11 | 0.14 | —       |
| Pollock (270) .....                   | Dutch Harbor .....                  | —         | —    | 0.16 | 0.16    |
| Pollock (270) .....                   | BS .....                            | —         | —    | 0.17 | 0.17    |
| Pollock (270) .....                   | BSAI .....                          | —         | —    | 0.17 | 0.17    |
| Pollock (270) .....                   | AK .....                            | 0.13      | 0.11 | 0.14 | —       |
| Pollock (270) .....                   | ALL .....                           | 0.13      | 0.11 | 0.14 | —       |
| Quillback Rockfish (147) .....        | Craig .....                         | 0.49      | —    | —    | —       |
| Quillback Rockfish (147) .....        | Juneau .....                        | 0.38      | —    | —    | —       |
| Quillback Rockfish (147) .....        | Ketchikan .....                     | 0.41      | —    | —    | —       |
| Quillback Rockfish (147) .....        | Petersburg .....                    | 0.36      | —    | —    | —       |
| Quillback Rockfish (147) .....        | Sitka .....                         | 0.46      | —    | —    | —       |
| Quillback Rockfish (147) .....        | SEAK .....                          | 0.44      | —    | —    | —       |
| Quillback Rockfish (147) .....        | Cordova .....                       | 0.42      | —    | —    | —       |
| Quillback Rockfish (147) .....        | EGOAxSE .....                       | 0.40      | —    | —    | —       |
| Quillback Rockfish (147) .....        | Homer .....                         | 0.34      | —    | —    | —       |
| Quillback Rockfish (147) .....        | Kodiak .....                        | 0.56      | —    | —    | —       |
| Quillback Rockfish (147) .....        | Seward .....                        | 0.28      | —    | —    | —       |
| Quillback Rockfish (147) .....        | CGOA .....                          | 0.28      | —    | —    | —       |
| Quillback Rockfish (147) .....        | GOA .....                           | 0.35      | —    | —    | —       |
| Quillback Rockfish (147) .....        | AK .....                            | 0.35      | —    | —    | —       |
| Quillback Rockfish (147) .....        | ALL .....                           | 0.35      | —    | —    | —       |
| Redbanded Rockfish (153) .....        | Juneau .....                        | 0.33      | —    | —    | —       |
| Redbanded Rockfish (153) .....        | Ketchikan .....                     | 0.51      | —    | —    | —       |
| Redbanded Rockfish (153) .....        | Petersburg .....                    | 0.23      | —    | —    | —       |
| Redbanded Rockfish (153) .....        | Sitka .....                         | 0.42      | —    | —    | —       |
| Redbanded Rockfish (153) .....        | SEAK .....                          | 0.36      | —    | —    | —       |
| Redbanded Rockfish (153) .....        | Cordova .....                       | 0.38      | —    | —    | —       |
| Redbanded Rockfish (153) .....        | EGOAxSE .....                       | 0.26      | —    | —    | —       |
| Redbanded Rockfish (153) .....        | Homer .....                         | 0.23      | —    | —    | —       |
| Redbanded Rockfish (153) .....        | Kodiak .....                        | 0.18      | —    | —    | —       |
| Redbanded Rockfish (153) .....        | Seward .....                        | 0.29      | —    | —    | —       |
| Redbanded Rockfish (153) .....        | CGOA .....                          | 0.24      | —    | —    | —       |
| Redbanded Rockfish (153) .....        | GOA .....                           | 0.34      | —    | —    | —       |
| Redbanded Rockfish (153) .....        | AK .....                            | 0.43      | —    | —    | —       |
| Redbanded Rockfish (153) .....        | ALL .....                           | 0.33      | —    | —    | —       |
| Redstripe Rockfish (158) .....        | EGOA .....                          | 0.43      | —    | —    | —       |
| Redstripe Rockfish (158) .....        | Seward .....                        | 0.18      | —    | —    | —       |
| Redstripe Rockfish (158) .....        | CGOA .....                          | 0.18      | —    | —    | —       |
| Redstripe Rockfish (158) .....        | GOA .....                           | 0.23      | —    | —    | —       |
| Redstripe Rockfish (158) .....        | AK .....                            | 0.23      | —    | —    | —       |
| Redstripe Rockfish (158) .....        | ALL .....                           | 0.23      | —    | —    | —       |
| Rex Sole (125) .....                  | Kodiak .....                        | —         | 0.27 | —    | 0.27    |
| Rex Sole (125) .....                  | CGOA .....                          | —         | 0.27 | —    | 0.27    |
| Rex Sole (125) .....                  | GOA .....                           | —         | 0.27 | —    | 0.27    |
| Rex Sole (125) .....                  | AK .....                            | —         | 0.27 | 0.12 | —       |
| Rex Sole (125) .....                  | ALL .....                           | —         | 0.27 | 0.12 | —       |
| Rock Sole (123) .....                 | Kodiak .....                        | —         | 0.16 | 0.13 | —       |
| Rock Sole (123) .....                 | CGOA .....                          | —         | 0.16 | 0.13 | —       |
| Rock Sole (123) .....                 | GOA .....                           | —         | 0.16 | 0.13 | —       |
| Rock Sole (123) .....                 | AK .....                            | —         | 0.16 | 0.13 | —       |
| Rock Sole (123) .....                 | ALL .....                           | —         | 0.16 | 0.13 | —       |
| Rosethorn Rockfish (150) .....        | SEAK .....                          | 0.49      | —    | —    | —       |
| Rosethorn Rockfish (150) .....        | EGOA .....                          | 0.49      | —    | —    | —       |
| Rosethorn Rockfish (150) .....        | Seward .....                        | 0.31      | —    | —    | —       |

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUND FISH SPECIES FOR 2024 OBSERVER COVERAGE FEE—Continued  
 [Based on volume and value from 2020, 2021, and 2022]

| Species (species code) <sup>1 2</sup> | Port/area <sup>3 4</sup> | Non-trawl        | NPT  | PTR  | PTR/NPT |
|---------------------------------------|--------------------------|------------------|------|------|---------|
| Rosethorn Rockfish (150) .....        | CGOA .....               | 0.31             | —    | —    | —       |
| Rosethorn Rockfish (150) .....        | GOA .....                | 0.45             | —    | —    | —       |
| Rosethorn Rockfish (150) .....        | AK .....                 | 0.45             | —    | —    | —       |
| Rosethorn Rockfish (150) .....        | ALL .....                | 0.45             | —    | —    | —       |
| Rougheye Rockfish (151) .....         | Juneau .....             | 0.31             | —    | —    | —       |
| Rougheye Rockfish (151) .....         | Ketchikan .....          | 0.59             | —    | —    | —       |
| Rougheye Rockfish (151) .....         | Petersburg .....         | 0.29             | —    | —    | —       |
| Rougheye Rockfish (151) .....         | Sitka .....              | 0.41             | —    | —    | —       |
| Rougheye Rockfish (151) .....         | SEAK .....               | 0.38             | —    | —    | —       |
| Rougheye Rockfish (151) .....         | Cordova .....            | 0.42             | —    | —    | —       |
| Rougheye Rockfish (151) .....         | Whittier .....           | 0.23             | —    | —    | —       |
| Rougheye Rockfish (151) .....         | EGOAxSE .....            | 0.28             | —    | —    | —       |
| Rougheye Rockfish (151) .....         | Homer .....              | 0.31             | —    | —    | —       |
| Rougheye Rockfish (151) .....         | Kodiak .....             | 0.27             | 0.25 | 0.18 | —       |
| Rougheye Rockfish (151) .....         | Seward .....             | 0.33             | —    | —    | —       |
| Rougheye Rockfish (151) .....         | CGOA .....               | 0.31             | 0.25 | 0.18 | —       |
| Rougheye Rockfish (151) .....         | WGOA .....               | 0.30             | —    | —    | —       |
| Rougheye Rockfish (151) .....         | GOA .....                | —                | 0.25 | 0.18 | —       |
| Rougheye Rockfish (151) .....         | BSAI .....               | 0.22             | —    | —    | —       |
| Rougheye Rockfish (151) .....         | AK .....                 | 0.34             | 0.25 | 0.18 | —       |
| Rougheye Rockfish (151) .....         | Bellingham .....         | 0.16             | —    | —    | —       |
| Rougheye Rockfish (151) .....         | OTAK .....               | 0.16             | —    | —    | —       |
| Rougheye Rockfish (151) .....         | ALL .....                | 0.34             | 0.25 | 0.18 | —       |
| Sablefish (blackcod) (710) .....      | Kodiak .....             | <sup>5</sup> n/a | 0.95 | 1.71 | —       |
| Sablefish (blackcod) (710) .....      | CGOA .....               | <sup>5</sup> n/a | 0.95 | 1.71 | —       |
| Sablefish (blackcod) (710) .....      | GOA .....                | <sup>5</sup> n/a | 0.95 | 1.71 | —       |
| Sablefish (blackcod) (710) .....      | AK .....                 | <sup>5</sup> n/a | 0.96 | 1.71 | —       |
| Sablefish (blackcod) (710) .....      | ALL .....                | <sup>5</sup> n/a | 0.96 | 1.71 | —       |
| Shortraker Rockfish (152) .....       | Juneau .....             | 0.36             | —    | —    | —       |
| Shortraker Rockfish (152) .....       | Ketchikan .....          | 0.53             | —    | —    | —       |
| Shortraker Rockfish (152) .....       | Petersburg .....         | 0.29             | —    | —    | —       |
| Shortraker Rockfish (152) .....       | Sitka .....              | 0.41             | —    | —    | —       |
| Shortraker Rockfish (152) .....       | SEAK .....               | 0.40             | —    | —    | —       |
| Shortraker Rockfish (152) .....       | Cordova .....            | 0.40             | —    | —    | —       |
| Shortraker Rockfish (152) .....       | Whittier .....           | 0.18             | —    | —    | —       |
| Shortraker Rockfish (152) .....       | EGOAxSE .....            | 0.24             | —    | —    | —       |
| Shortraker Rockfish (152) .....       | Homer .....              | 0.17             | —    | —    | —       |
| Shortraker Rockfish (152) .....       | Kodiak .....             | 0.26             | 0.16 | 0.18 | —       |
| Shortraker Rockfish (152) .....       | Seward .....             | 0.35             | —    | —    | —       |
| Shortraker Rockfish (152) .....       | CGOA .....               | 0.32             | 0.16 | 0.18 | —       |
| Shortraker Rockfish (152) .....       | GOA .....                | 0.36             | 0.16 | 0.18 | —       |
| Shortraker Rockfish (152) .....       | AK .....                 | 0.36             | 0.16 | 0.18 | —       |
| Shortraker Rockfish (152) .....       | Outside AK .....         | 0.15             | —    | —    | —       |
| Shortraker Rockfish (152) .....       | ALL .....                | 0.35             | 0.16 | 0.18 | —       |
| Silvergray Rockfish (157) .....       | Juneau .....             | 0.33             | —    | —    | —       |
| Silvergray Rockfish (157) .....       | Petersburg .....         | 0.22             | —    | —    | —       |
| Silvergray Rockfish (157) .....       | Sitka .....              | 0.41             | —    | —    | —       |
| Silvergray Rockfish (157) .....       | SEAK .....               | 0.38             | —    | —    | —       |
| Silvergray Rockfish (157) .....       | Cordova .....            | 0.33             | —    | —    | —       |
| Silvergray Rockfish (157) .....       | EGOAxSE .....            | 0.33             | —    | —    | —       |
| Silvergray Rockfish (157) .....       | Homer .....              | 0.20             | —    | —    | —       |
| Silvergray Rockfish (157) .....       | Kodiak .....             | 0.20             | 0.12 | —    | 0.12    |
| Silvergray Rockfish (157) .....       | Seward .....             | 0.32             | —    | —    | —       |
| Silvergray Rockfish (157) .....       | CGOA .....               | 0.30             | 0.12 | —    | 0.12    |
| Silvergray Rockfish (157) .....       | GOA .....                | 0.34             | 0.12 | —    | 0.12    |
| Silvergray Rockfish (157) .....       | AK .....                 | 0.34             | 0.12 | —    | 0.12    |
| Silvergray Rockfish (157) .....       | ALL .....                | 0.34             | 0.12 | —    | 0.12    |
| Skate, Big (702) .....                | Kodiak .....             | 0.45             | 0.43 | 0.45 | —       |
| Skate, Big (702) .....                | Seward .....             | 0.31             | —    | —    | —       |
| Skate, Big (702) .....                | CGOA .....               | 0.41             | 0.43 | 0.45 | —       |
| Skate, Big (702) .....                | GOA .....                | 0.41             | 0.43 | 0.45 | —       |
| Skate, Big (702) .....                | AK .....                 | 0.41             | 0.43 | 0.45 | —       |
| Skate, Big (702) .....                | ALL .....                | 0.41             | 0.43 | 0.45 | —       |
| Skate, Longnose (701) .....           | EGOA .....               | 0.34             | —    | —    | —       |
| Skate, Longnose (701) .....           | Homer .....              | 0.13             | —    | —    | —       |
| Skate, Longnose (701) .....           | Kodiak .....             | 0.43             | 0.45 | 0.45 | —       |
| Skate, Longnose (701) .....           | Seward .....             | 0.38             | —    | —    | —       |
| Skate, Longnose (701) .....           | CGOA .....               | 0.38             | 0.45 | 0.45 | —       |
| Skate, Longnose (701) .....           | GOA .....                | 0.38             | 0.45 | 0.45 | —       |
| Skate, Longnose (701) .....           | AK .....                 | 0.38             | 0.45 | 0.45 | —       |
| Skate, Longnose (701) .....           | ALL .....                | 0.36             | 0.45 | 0.45 | —       |

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUND FISH SPECIES FOR 2024 OBSERVER COVERAGE FEE—Continued  
 [Based on volume and value from 2020, 2021, and 2022]

| Species (species code) <sup>1 2</sup> | Port/area <sup>3 4</sup> | Non-trawl | NPT  | PTR  | PTR/NPT |
|---------------------------------------|--------------------------|-----------|------|------|---------|
| Skate, Other (700) .....              | GOA .....                | 0.17      | —    | —    | —       |
| Skate, Other (700) .....              | AK .....                 | 0.17      | —    | —    | —       |
| Skate, Other (700) .....              | ALL .....                | 0.17      | —    | —    | —       |
| Thornyhead Rockfish (143) .....       | Juneau .....             | 0.89      | —    | —    | —       |
| Thornyhead Rockfish (143) .....       | Ketchikan .....          | 0.94      | —    | —    | —       |
| Thornyhead Rockfish (143) .....       | Petersburg .....         | 0.88      | —    | —    | —       |
| Thornyhead Rockfish (143) .....       | Sitka .....              | 0.78      | —    | —    | —       |
| Thornyhead Rockfish (143) .....       | SEAK .....               | 0.81      | —    | —    | —       |
| Thornyhead Rockfish (143) .....       | Cordova .....            | 0.58      | —    | —    | —       |
| Thornyhead Rockfish (143) .....       | Whittier .....           | 0.19      | —    | —    | —       |
| Thornyhead Rockfish (143) .....       | EGOAxSE .....            | 0.53      | —    | —    | —       |
| Thornyhead Rockfish (143) .....       | Homer .....              | 0.53      | —    | —    | —       |
| Thornyhead Rockfish (143) .....       | Kodiak .....             | 0.48      | 0.22 | —    | 0.22    |
| Thornyhead Rockfish (143) .....       | Seward .....             | 0.76      | —    | —    | —       |
| Thornyhead Rockfish (143) .....       | CGOA .....               | 0.66      | 0.22 | —    | 0.22    |
| Thornyhead Rockfish (143) .....       | GOA .....                | —         | 0.22 | —    | 0.24    |
| Thornyhead Rockfish (143) .....       | WGOA .....               | 0.82      | —    | —    | —       |
| Thornyhead Rockfish (143) .....       | BS .....                 | 0.61      | —    | —    | —       |
| Thornyhead Rockfish (143) .....       | BSAI .....               | 0.60      | —    | —    | —       |
| Thornyhead Rockfish (143) .....       | AK .....                 | 0.74      | 0.22 | —    | 0.24    |
| Thornyhead Rockfish (143) .....       | OTAK .....               | 0.34      | —    | —    | —       |
| Thornyhead Rockfish (143) .....       | ALL .....                | 0.74      | 0.22 | —    | 0.24    |
| Tiger Rockfish (148) .....            | Juneau .....             | 0.31      | —    | —    | —       |
| Tiger Rockfish (148) .....            | Sitka .....              | 0.38      | —    | —    | —       |
| Tiger Rockfish (148) .....            | SEAK .....               | 0.50      | —    | —    | —       |
| Tiger Rockfish (148) .....            | Cordova .....            | 0.35      | —    | —    | —       |
| Tiger Rockfish (148) .....            | EGOAxSE .....            | 0.34      | —    | —    | —       |
| Tiger Rockfish (148) .....            | Homer .....              | 0.15      | —    | —    | —       |
| Tiger Rockfish (148) .....            | Seward .....             | 0.30      | —    | —    | —       |
| Tiger Rockfish (148) .....            | CGOA .....               | 0.24      | —    | —    | —       |
| Tiger Rockfish (148) .....            | GOA .....                | 0.32      | —    | —    | —       |
| Tiger Rockfish (148) .....            | AK .....                 | 0.32      | —    | —    | —       |
| Tiger Rockfish (148) .....            | ALL .....                | 0.32      | —    | —    | —       |
| Vermilion Rockfish (184) .....        | SEAK .....               | 0.66      | —    | —    | —       |
| Vermilion Rockfish (184) .....        | EGOA .....               | 0.66      | —    | —    | —       |
| Vermilion Rockfish (184) .....        | GOA .....                | 0.66      | —    | —    | —       |
| Vermilion Rockfish (184) .....        | AK .....                 | 0.66      | —    | —    | —       |
| Vermilion Rockfish (184) .....        | ALL .....                | 0.66      | —    | —    | —       |
| Yelloweye Rockfish (145) .....        | Craig .....              | 1.37      | —    | —    | —       |
| Yelloweye Rockfish (145) .....        | Juneau .....             | 0.94      | —    | —    | —       |
| Yelloweye Rockfish (145) .....        | Ketchikan .....          | 1.11      | —    | —    | —       |
| Yelloweye Rockfish (145) .....        | Petersburg .....         | 1.02      | —    | —    | —       |
| Yelloweye Rockfish (145) .....        | Sitka .....              | 1.38      | —    | —    | —       |
| Yelloweye Rockfish (145) .....        | Wrangell .....           | 0.83      | —    | —    | —       |
| Yelloweye Rockfish (145) .....        | SEAK .....               | 1.18      | —    | —    | —       |
| Yelloweye Rockfish (145) .....        | Cordova .....            | 0.47      | —    | —    | —       |
| Yelloweye Rockfish (145) .....        | EGOAxSE .....            | 0.41      | —    | —    | —       |
| Yelloweye Rockfish (145) .....        | Homer .....              | 0.66      | —    | —    | —       |
| Yelloweye Rockfish (145) .....        | Kodiak .....             | 0.33      | 0.29 | 0.24 | —       |
| Yelloweye Rockfish (145) .....        | Seward .....             | 0.69      | —    | —    | —       |
| Yelloweye Rockfish (145) .....        | CGOA .....               | 0.62      | 0.29 | 0.24 | —       |
| Yelloweye Rockfish (145) .....        | WGOA .....               | 0.36      | —    | —    | —       |
| Yelloweye Rockfish (145) .....        | GOA .....                | —         | 0.29 | 0.24 | —       |
| Yelloweye Rockfish (145) .....        | AK .....                 | 0.94      | 0.29 | 0.24 | —       |
| Yelloweye Rockfish (145) .....        | ALL .....                | 0.92      | 0.29 | 0.24 | —       |
| Yellowtail Rockfish (155) .....       | Sitka .....              | 0.64      | —    | —    | —       |
| Yellowtail Rockfish (155) .....       | SEAK .....               | 0.65      | —    | —    | —       |
| Yellowtail Rockfish (155) .....       | EGOA .....               | 0.65      | —    | —    | —       |
| Yellowtail Rockfish (155) .....       | CGOA .....               | 0.62      | —    | —    | —       |
| Yellowtail Rockfish (155) .....       | GOA .....                | 0.63      | —    | —    | —       |
| Yellowtail Rockfish (155) .....       | AK .....                 | 0.63      | —    | —    | —       |
| Yellowtail Rockfish (155) .....       | ALL .....                | 0.53      | —    | —    | —       |

— = no landings in last 3 years or the data is confidential.

<sup>1</sup> If species is not listed, use price for the species group in table 2 if it exists in the management area. If no price is available for the species or species group in table 1, table 2, or table 3, no fee will be assessed on that landing. That species will come into standard ex-vessel prices in future years.

<sup>2</sup> For species codes, see table 2a to 50 CFR part 679.

<sup>3</sup> Regulatory areas are defined at § 679.2. (AI = Aleutian Islands subarea; AK = Alaska; ALL = all ports including those outside Alaska; BS = Bering Sea subarea; BSAI = Bering Sea/Aleutian Islands; CGOA = Central Gulf of Alaska; EGOA = Eastern Gulf of Alaska; EGOAxSE = Eastern Gulf of Alaska except Southeast Alaska; GOA = Gulf of Alaska; SEAK = Southeast Alaska; WGOA = Western Gulf of Alaska).

<sup>4</sup> If a price is listed for the species, port, and gear type combination, that price will be applied to the round weight equivalent for groundfish landings. If no price is listed for the port and gear type combination, use port group and gear type combination, or see table 2 or table 3.

<sup>5</sup> n/a = ex-vessel prices for sablefish landed with hook-and-line, pot, or jig gear are listed in table 3 with the prices for IFQ and CDQ landings.

TABLE 2—STANDARD EX-VESSEL PRICES FOR GROUNDFISH SPECIES GROUPS FOR 2024 OBSERVER COVERAGE FEE  
[Based on volume and value from 2020, 2021, and 2022]

|                                                       |                  |        |        |        |      |
|-------------------------------------------------------|------------------|--------|--------|--------|------|
| BSAI Skate and GOA Skate, Other (USKT <sup>4</sup> ). | GOA .....        | \$0.17 | —      | —      | —    |
| BSAI Skate and GOA Skate, Other (USKT <sup>4</sup> ). | AK .....         | 0.17   | —      | —      | —    |
| Flathead Sole (FSOL <sup>5</sup> ) .....              | Kodiak .....     | —      | \$0.11 | \$0.09 | —    |
| Flathead Sole (FSOL <sup>5</sup> ) .....              | CGOA .....       | —      | 0.11   | 0.09   | —    |
| Flathead Sole (FSOL <sup>5</sup> ) .....              | GOA .....        | —      | 0.11   | 0.09   | —    |
| Flathead Sole (FSOL <sup>5</sup> ) .....              | AK .....         | —      | 0.11   | 0.09   | —    |
| GOA Deep Water Flatfish (DFL <sup>6</sup> ) .....     | Kodiak .....     | —      | 0.06   | —      | 0.06 |
| GOA Deep Water Flatfish (DFL <sup>6</sup> ) .....     | CGOA .....       | —      | 0.06   | —      | 0.06 |
| GOA Deep Water Flatfish (DFL <sup>6</sup> ) .....     | GOA .....        | —      | 0.06   | —      | 0.06 |
| GOA Shallow Water Flatfish (SFL <sup>7</sup> ) .....  | Kodiak .....     | —      | 0.14   | 0.13   | —    |
| GOA Shallow Water Flatfish (SFL <sup>7</sup> ) .....  | CGOA .....       | —      | 0.14   | 0.13   | —    |
| GOA Shallow Water Flatfish (SFL <sup>7</sup> ) .....  | GOA .....        | —      | 0.14   | 0.13   | —    |
| Other Rockfish (ROCK <sup>8</sup> ) .....             | Craig .....      | 0.30   | —      | —      | —    |
| Other Rockfish (ROCK <sup>8</sup> ) .....             | Juneau .....     | 0.43   | —      | —      | —    |
| Other Rockfish (ROCK <sup>8</sup> ) .....             | Ketchikan .....  | 0.53   | —      | —      | —    |
| Other Rockfish (ROCK <sup>8</sup> ) .....             | Petersburg ..... | 0.27   | —      | —      | —    |
| Other Rockfish (ROCK <sup>8</sup> ) .....             | Sitka .....      | 0.43   | —      | —      | —    |
| Other Rockfish (ROCK <sup>8</sup> ) .....             | SEAK .....       | 0.41   | —      | —      | —    |
| Other Rockfish (ROCK <sup>8</sup> ) .....             | Cordova .....    | 0.45   | —      | —      | —    |
| Other Rockfish (ROCK <sup>8</sup> ) .....             | Whittier .....   | 0.30   | —      | —      | —    |
| Other Rockfish (ROCK <sup>8</sup> ) .....             | EGOAxSE .....    | 0.38   | —      | —      | —    |
| Other Rockfish (ROCK <sup>8</sup> ) .....             | Homer .....      | 0.61   | —      | —      | —    |
| Other Rockfish (ROCK <sup>8</sup> ) .....             | Kodiak .....     | 0.32   | 0.19   | 0.24   | —    |
| Other Rockfish (ROCK <sup>8</sup> ) .....             | Seward .....     | 0.56   | —      | —      | —    |
| Other Rockfish (ROCK <sup>8</sup> ) .....             | CGOA .....       | 0.54   | 0.19   | 0.24   | —    |
| Other Rockfish (ROCK <sup>8</sup> ) .....             | WGOA .....       | 0.38   | —      | —      | —    |
| Other Rockfish (ROCK <sup>8</sup> ) .....             | GOA .....        | —      | 0.19   | 0.24   | —    |
| Other Rockfish (ROCK <sup>9</sup> ) .....             | BS .....         | 0.55   | —      | —      | —    |
| Other Rockfish (ROCK <sup>9</sup> ) .....             | BSAI .....       | 0.55   | —      | —      | —    |
| Other Rockfish (ROCK <sup>9</sup> ) .....             | AK .....         | —      | 0.19   | 0.24   | —    |

— = no landings in last 3 years or the data is confidential.

<sup>1</sup> If groundfish species is not listed in table 1, use price for the species group if it exists in the management area. If no price is available for the species or species group in table 1, table 2, or table 3, no fee will be assessed on that landing. That species will come into standard ex-vessel prices in future years.

<sup>2</sup> Regulatory areas are defined at § 679.2. (AI = Aleutian Islands subarea; AK = Alaska; BS = Bering Sea subarea; CGOA = Central Gulf of Alaska; EGOA = Eastern Gulf of Alaska; EGOAxSE = Eastern Gulf of Alaska except Southeast Alaska; GOA = Gulf of Alaska; SEAK = Southeast Alaska)

<sup>3</sup> If a price is listed for the species, port, and gear type combination, that price will be applied to the round weight equivalent for groundfish landings. If no price is listed for the port and gear type combination, use port group and gear type combination.

<sup>4</sup> “BSAI Skate and GOA Skate, Other” means all skates with the exception of *Raja binoculata* (Big), *R. rhina* (Longnose), *Bathyrhaja aleutica* (Aleutian) and *B. parmifera* (Alaska)

<sup>5</sup> “Flathead sole” includes *Hippoglossoides elassodon* (flathead sole) and *H. robustus* (Bering flounder).

<sup>6</sup> “Deep-water flatfish” in the GOA means Dover sole, Greenland turbot, Kamchatka flounder, and deepsea sole.

<sup>7</sup> “Shallow-water flatfish” in the GOA means flatfish not including “deep-water flatfish”, flathead sole, rex sole, or arrowtooth flounder.

<sup>8</sup> In the GOA:

“Other rockfish (slope rockfish)” means *Sebastes aurora* (aurora), *S. melanostomus* (blackgill), *S. paucispinis* (bocaccio), *S. goodei* (chili pepper), *S. crameri* (darkblotch), *S. elongatus* (greenstriped), *S. variegatus* (harlequin), *S. wilsoni* (pygmy), *S. babcocki* (redbanded), *S. proriger* (redstripe), *S. zacentrus* (sharpchin), *S. jordani* (shortbelly), *S. brevispinis* (silvergray), *S. diploproa* (splitnose), *S. saxicola* (stripetail), *S. miniatus* (vermillion), *S. reedi* (yellowmouth), *S. entomelas* (widow), and *S. flavidus* (yellowtail).

“Demersal shelf rockfish” means *Sebastes pinniger* (canary), *S. nebulosus* (china), *S. caurinus* (copper), *S. maliger* (quillback), *S. helvomaculatus* (rosethorn), *S. nigrocinctus* (tiger), and *S. ruberrimus* (yelloweye).

“Other rockfish” in the Western and Central Regulatory Areas means “other rockfish (slope rockfish)” and demersal shelf rockfish.

“Other rockfish” in the West Yakutat District of the EGOA means “other rockfish (slope rockfish),” northern rockfish, *S. polyspinus*, and demersal shelf rockfish.

“Other rockfish” in the SEO District of the GOA (and SEAK for Table 2) means “other rockfish (slope rockfish) and northern rockfish, *S. polyspinus*.”

<sup>9</sup> “Other rockfish” in the BSAI includes all *Sebastes* and *Sebastolobus* species except for Pacific ocean perch, northern, shorttraker, and rougheye rockfish.

#### Halibut and Sablefish IFQ and CDQ Standard Ex-Vessel Prices

Table 3 shows the observer fee standard ex-vessel prices for halibut and sablefish. These standard prices are

calculated as a single annual average price, by species and port or port group. Volume and ex-vessel value data collected on the 2023 IFQ Buyer Report for landings made from October 15, 2022 through September 30, 2023 were

used to calculate the standard ex-vessel prices for the 2024 observer fee for halibut IFQ, halibut CDQ, sablefish IFQ, and sablefish landings that accrue against the fixed gear sablefish CDQ reserve.

TABLE 3—STANDARD EX-VESSEL PRICES FOR HALIBUT IFQ, HALIBUT CDQ, SABLEFISH IFQ, AND SABLEFISH ACCRUING AGAINST THE FIXED GEAR SABLEFISH CDQ RESERVE FOR THE 2024 OBSERVER FEE

[Based on 2023 IFQ buyer reports]

| Species         | Port/area <sup>1</sup> | Price <sup>2</sup> |
|-----------------|------------------------|--------------------|
| Halibut (200)   | Craig                  | \$6.16             |
| Halibut (200)   | Ketchikan              | 6.60               |
| Halibut (200)   | Petersburg             | 5.97               |
| Halibut (200)   | SEAK                   | 6.05               |
| Halibut (200)   | EGOAxSE                | 5.75               |
| Halibut (200)   | Homer                  | 5.73               |
| Halibut (200)   | Kodiak                 | 5.34               |
| Halibut (200)   | Seward                 | 5.89               |
| Halibut (200)   | CGOA                   | 5.62               |
| Halibut (200)   | GOA                    | 5.81               |
| Halibut (200)   | BS                     | 5.25               |
| Halibut (200)   | BSAI                   | 5.25               |
| Halibut (200)   | AK                     | 5.73               |
| Halibut (200)   | ALL                    | 5.73               |
| Sablefish (710) | SEAK                   | 2.36               |
| Sablefish (710) | EGOAxSE                | 1.81               |
| Sablefish (710) | Homer                  | 2.44               |
| Sablefish (710) | Kodiak                 | 1.62               |
| Sablefish (710) | Seward                 | 1.55               |
| Sablefish (710) | CGOA                   | 1.61               |
| Sablefish (710) | GOA                    | 1.87               |
| Sablefish (710) | AK                     | 1.78               |
| Sablefish (710) | ALL                    | 1.78               |

<sup>1</sup> Regulatory areas are defined at § 679.2. (AK = Alaska; ALL = all ports including those outside Alaska; BS = Bering Sea subarea; CGOA = Central Gulf of Alaska; EGOAxSE = Eastern Gulf of Alaska except Southeast Alaska; SEAK = Southeast Alaska; WGOA = Western Gulf of Alaska)

<sup>2</sup> If a price is listed for the species and port combination, that price will be applied to the round weight equivalent for sablefish landings and the headed and gutted weight equivalent for halibut landings. If no price is listed for the port, use port group.

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

Dated: December 21, 2023.

Everett Wayne Baxter,

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

[FR Doc. 2023–28567 Filed 12–26–23; 8:45 am]

BILLING CODE 3510–22–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; NOAA Financial Assistance Performance Progress Reports

**AGENCY:** National Oceanic & Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of information collection, request for comment.

**SUMMARY:** The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection

requirements and minimize the public's reporting burden. This notice pertains to a revision and extension of the approved collection of information for NOAA Financial Assistance Performance Progress Reports. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

**DATES:** To ensure consideration, comments regarding this proposed information collection must be received on or before February 26, 2024.

**ADDRESSES:** Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at [NOAA.PRA@noaa.gov](mailto:NOAA.PRA@noaa.gov). Please reference OMB Control Number 0648–0718 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or specific questions related to collection activities should be directed to Tom Barry, Federal Program Officer, NOAA Marine Debris Program, 1305 East-West Highway, Office of Response and Restoration, SSMC4, Rm. 10239, N/ ORR5, Silver Spring, MD 20910, (202) 870–2863, and [tom.barry@noaa.gov](mailto:tom.barry@noaa.gov).

**SUPPLEMENTARY INFORMATION:**

## I. Abstract

This is a request for revision and extension to an approved collection of information under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and implementing regulations at 5 CFR part 1320. This previously-approved information collection assists NOAA in the administration and evaluation of financial assistance awards made by the NOAA Marine Debris Program (MDP), NOAA Coral Reef Conservation Program (CRCP), and the NOAA Restoration Center (RC).

The revision, which is described in more detail below, is only applicable for the NOAA MDP financial assistance awards, and previous information collections for NOAA Coral Reef Conservation Program (CRCP) and NOAA Restoration Center (RC) remain unchanged. There are no changes to the NOAA CRCP or NOAA RC forms that were previously approved, including the RC Progress Reports (Initial, Semi-Annual, and Final), RC Administrative Progress Reports (Initial, Semi-Annual, and Final), and CRCP Semi-Annual Reports. However, the extension applies to the entire previously-approved information collection.

Every year, the NOAA MDP, the NOAA CRCP, and the NOAA RC each support a variety of initiatives specific to their individual authorizations and

programmatic mandates. This support is made substantially through grants and cooperative agreements, the terms and conditions of which require regular progress reporting and communication of project accomplishments to the agency. This information collection identifies what is to be provided in these reports, and aims to assist recipients in fulfilling their responsibilities in meeting interim and final progress report requirements. This information is also necessary for NOAA to effectively oversee the expenditure of public funds awarded through these programs, to ensure both cost-effectiveness and programmatic goals are met.

The NOAA RC provides technical and financial assistance to identify, develop, implement, and evaluate community-driven habitat restoration projects. Awards are made as grants or cooperative agreements under the authority of the Magnuson-Stevens Fishery Conservation and Management Act of 2006, 16 U.S.C. 1891a and the Fish and Wildlife Coordination Act, 16 U.S.C. 661, as amended by the Reorganization Plan No. 4 of 1970.

The NOAA CRCP operates under authorization from the Coral Reef Conservation Act of 2000, 16 U.S.C. 6401 *et seq.* This act authorizes the NOAA CRCP to conserve and restore the condition of United States coral reef ecosystems; to promote the science-based management and sustainable use of coral reef ecosystems to benefit local communities and the Nation; to develop sound scientific information on the condition of coral reef ecosystems and the threats to such ecosystems; to assist in the preservation of coral reefs by supporting science-based, consensus-driven, and community-based coral reef management; to provide financial resources, technical assistance, and scientific expertise; to establish a formal mechanism for the collecting and allocating of monetary donations from the private sector to be used for coral reef conservation projects; to support rapid response to exigent circumstances that pose immediate and long-term threats to coral reefs; and to serve as a model for advancing international efforts to monitor, conserve, and restore coral reef ecosystems.

The NOAA MDP supports national and international efforts to research, prevent, and reduce the impacts of marine debris. The NOAA MDP is a centralized office within NOAA that coordinates and supports activities, both within the bureau and with other federal agencies that address marine debris and its impacts. In addition to inter-agency coordination, NOAA MDP

uses partnerships with state and local agencies, tribes, non-governmental organizations, academia, and industry to investigate and solve the problems that stem from marine debris through removal, research, prevention, and assessment activities, in order to protect and conserve our nation's marine environment and coastal economies, and to ensure navigation safety. In large part, these partnerships are made through grants, cooperative agreements, contracts, MOUs or are simply informal technical assistance arrangements.

The Marine Debris Research, Prevention, and Reduction Act authorizes NOAA MDP to enter into cooperative agreements and contracts and provide financial assistance in the form of grants to carry out the purposes of the Act—namely to identify, determine sources of, assess, reduce, and prevent marine debris and its adverse impacts on the marine environment and navigation safety. 33 U.S.C. 1951, 1952. To date, both competitive and non-competitive funding opportunities have been implemented by NOAA MDP to provide federal funding to non-federal applicants for activities to carry out the purposes of the Act.

The terms and conditions of MDP grants and cooperative agreements require regular progress reporting and communication of project accomplishments to the agency. Grant reporting is necessary for NOAA to effectively oversee the expenditure of public funds, and to ensure both the cost-effectiveness of funded projects and that programmatic goals are met.

This information collection revision clarifies agency reporting requirements, and aims to assist recipients in fulfilling their federal grant responsibilities. NOAA MDP proposes to revise and clarify grant performance progress report (PPR) instructions and add a table to the PPR that will be used for recipients whose activities span multiple states. NOAA MDP proposes to add the collection of performance measure information in a spreadsheet that captures required project metrics at a finer geographic resolution than would otherwise be possible using the PPR. NOAA MDP also proposes collection of additional metrics related to certain activities from large marine debris removals and pre- and post-removal habitat monitoring for grantees who perform these activities as part of their NOAA MDP award. The additional collection of project-level data, including project-level location and implementation data, aligns with the guidance provided in Memorandum M-22-12, Advancing Effective Stewardship

of Taxpayer Resources and Outcomes in the Implementation of the Infrastructure Investment and Jobs Act (IIJA) in order to ensure robust and transparent reporting of IIJA investments.

## II. Method of Collection

The information will be collected electronically.

## III. Data

*OMB Control Number:* 0648–0718.

*Form Number(s):* None.

*Type of Review:* Regular submission. Revision and extension of a currently approved information collection.

*Affected Public:* Individuals or households; Business or other for-profit organizations; Not-for-profit institutions; State, Local, or Tribal government.

*Estimated Number of Respondents:* 645.

*Estimated Time per Response:* MDP Performance Progress Report: 8 hours; MDP Performance Progress Report Table: 0.25 hours; MDP Companion Tracker: 1 hour; MDP Additional Metrics Trackers: 3 hours; CRCP Semi-Annual Reports: 10 hours; RC Progress Report: Initial—9.5 hours; Semi-Annual—5.5 hours; and Final—9.75 hours; RC Administrative Progress Reports: Initial—6 hours; Semi-Annual—2.75 hours; and Final—5.5 hours.

*Estimated Total Annual Burden Hours:* 4,800.

*Estimated Total Annual Cost to Public:* 0.

*Respondent's Obligation:* Required to Obtain or Retain Benefits.

*Legal Authority:* The Marine Debris Research, Prevention, and Reduction Act (33 U.S.C. 1951 *et seq.*) as amended by the Marine Debris Act Amendments of 2012 (Pub. L. 112–213, Title VI, Sec. 603, 126 Stat. 1576, December 20, 2012), Save Our Seas Act of 2018 (Pub. L. 115–265), and Save Our Seas 2.0 Act of 2020 (Pub. L. 116–224); Magnuson-Stevens Fishery Conservation and Management Act of 2006, 16 U.S.C. 1891a and the Fish and Wildlife Coordination Act, 16 U.S.C. 661, as amended by the Reorganization Plan No. 4 of 1970; Coral Reef Conservation Act of 2000 (16 U.S.C. 6401 *et seq.*).

## IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) 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; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. 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 may 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.

**Sheleen Dumas,**

*Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.*

[FR Doc. 2023–28503 Filed 12–26–23; 8:45 am]

BILLING CODE 3510–JS–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648–XD605]

#### Notice of Availability of Draft Environmental Assessment on the Effects of Permitting Translocation of Sturgeon for Scientific Research and Enhancement Under the of the Endangered Species Act

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

**ACTION:** Notice of availability of a draft environmental assessment; request for comments.

**SUMMARY:** NOAA has prepared a draft programmatic environmental assessment (PEA) under the National Environmental Policy Act of 1969 (NEPA) analyzing the environmental impacts of the NMFS, Office of Protected Resources' proposal to authorize directed take under the sturgeon Endangered Species Act (ESA) permitting program for the translocation of shortnose (*Acipenser brevirostrum*) and Atlantic (*A. oxyrinchus oxyrinchus*) sturgeon needed to achieve recovery objectives. We are making the draft PEA

available to the public for review and comment.

**DATES:** Written comments must be submitted on or before January 26, 2024.

**ADDRESSES:** The draft PEA may be downloaded or viewed at: <https://www.fisheries.noaa.gov/action/draft-environmental-assessment-permitting-translocation-sturgeon-scientific-research-and>. Please submit public comments via email to [NMFS.Pr1Comments@noaa.gov](mailto:NMFS.Pr1Comments@noaa.gov) with the subject line "Public Comment on Draft PEA for Permitting Sturgeon Translocation". No business proprietary information, copyrighted information, or personally identifiable information should be submitted in response to this request. Please be aware that comments submitted may be posted on a Federal website or otherwise released publicly. Clearly indicate which section, page number, and line number, if applicable, submitted comments pertain to. All comments must be provided in English. Please note that the U.S. Government will not pay for response preparation, or for the use of any information contained in the response.

**FOR FURTHER INFORMATION CONTACT:** Erin Markin, Ph.D., [erin.markin@noaa.gov](mailto:erin.markin@noaa.gov), (301) 427–8416; Malcolm Mohead, [malcolm.mohead@noaa.gov](mailto:malcolm.mohead@noaa.gov), (301) 427–8427.

**SUPPLEMENTARY INFORMATION:** This draft PEA serves as a framework to analyze the potential impacts on the natural and human environments for the authorization of directed take of sturgeon by translocation, in scientific research or enhancement permits under section 10(a)(1)(A) of the ESA, to achieve recovery objectives. For the purposes of the sturgeon permitting program, translocation is the intentional capture, holding, handling, transport, and release of individuals within a river system (e.g., translocation of fish across a dam or fish passage) or between river systems within the U.S. historical range of Atlantic and shortnose sturgeon (*i.e.*, Maine to Florida). NMFS proposes to authorize directed take for the translocation of ESA-listed Atlantic and shortnose sturgeon as a research or enhancement activity to support sturgeon conservation management and recovery objectives. NMFS proposes to authorize translocation concurrent with additional research or enhancement activities, if the research or enhancement activity's objectives are (1) stated as a term and condition to implement reasonable and prudent measures of an active biological opinion, (2) an identified objective in a NMFS recovery outline or recovery plan for the species, or (3) determined

necessary by NMFS Regional Offices and the NMFS Office of Protected Resources (OPR) to recover the species. Programmatic NEPA reviews add value and efficiency to the decision making process when they inform the scope of decisions and subsequent tiered NEPA reviews. Therefore, NMFS decided that completing a PEA for the proposed action was appropriate.

This document has been prepared in compliance with NEPA (42 U.S.C. 4321, *et seq.*), the 2020 Council on Environmental Quality (CEQ) Regulations (40 CFR 1500–1508) as modified by the Phase 1 2022 revisions, and NOAA policy and procedures (NOAA Administrative Order 216–6A (NAO 216–6A and its Companion Manual).

Dated: December 21, 2023.

**Amy Sloan,**

*Acting Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 2023–28505 Filed 12–26–23; 8:45 am]

BILLING CODE 3510–22–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648–XD544]

#### Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Parallel Thimble Shoal Tunnel Project, Virginia Beach, Virginia

**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 the Chesapeake Tunnel Joint Venture (CTJV) for authorization to take marine mammals incidental to the Parallel Thimble Shoal Tunnel Project (PTST) in Virginia Beach, Virginia. 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 26, 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.pauline@noaa.gov](mailto:ITP.pauline@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> without change. 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:** Robert Pauline, 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 July 28, 2023, NMFS received a request from CTJV for an IHA to take marine mammals incidental to in-water construction activities associated with the PTST project near Virginia Beach, VA. Following NMFS’ review of the initial application, CTJV submitted several revised versions of the application based on NMFS’ comments. The final version was submitted on November 7, 2023, and was deemed adequate and complete on November

13, 2023. CTJV’s request is for take of 5 species by Level B harassment and, for a subset of three of these species, by Level A harassment. Neither CTJV nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

NMFS most recently issued an IHA to CTJV for similar work on November 8, 2022, (87 FR 68462; November 15, 2022). CTJV complied with all the requirements (*e.g.*, mitigation, monitoring, and reporting) of the previous IHA, and information regarding their monitoring results may be found in the Estimated Take section.

This proposed IHA would cover 1 year of a larger project for which CTJV obtained IHAs for similar work (83 FR 36522, July 30, 2018; 85 FR 16061, March 20, 2020; 86 FR 14606, March 17, 2021; 86 FR 67024, November 24, 2021; and 87 FR 68462, November 15, 2022). The larger multi-year PTST project consists of the construction of a two-lane parallel tunnel to the west of the existing Thimble Shoal Tunnel, connecting Portal Island Nos. 1 and 2 as part of the 23-mile Chesapeake Bay Bridge-Tunnel (CBBT) facility.

##### **Description of Proposed Activity**

###### *Overview*

The purpose of the project is to build an additional two lane vehicle tunnel under the navigation channel as part of the CBBT. The PTST project will address existing constraints to regional mobility based on current traffic volume, improve safety, improve the ability to conduct necessary maintenance with minimal impact to traffic flow, and ensure reliable hurricane evacuation routes. In-water construction work would include the removal of a total of 158 36-inch steel piles on the temporary dock and trestle on Portal Islands Nos. 1 and 2 as well as the removal of steel mooring piles on both Portal Islands (97 total on Portal Island No.1); the removal of 36” steel piles on the trestle (34 total on Portal Island No. 2); and the removal of 36” steel mooring piles on both Island 1 (9 piles) and Island No. 2 (18 piles). All steel piles are hollow pipe piles. The proposed impact and vibratory pile removal activities can introduce sound into the water environment which can result in take of marine mammals by behavioral harassment and, for some species, by auditory injury. Proposed construction activities are expected to be completed from January–April as well as in December 2024. Note that the term “pile driving” is only used to refer to pile removal activities. No pile

installation activities are planned by CTJV.

#### *Dates and Duration*

The proposed in-water removal of a total of 158 piles would occur over 80 days. Removal will begin on Portal Island No. 1 in January through April 2024 for 54 days then will resume on Portal Island No. 2 in December 2024 for 26 days. No pile removal work will take

place in the interim. The project schedule is shown in table 1.

#### *Specific Geographic Region*

The PTST project is located between Portal Islands No.1 and No. 2 of the CBBT as shown in Figure 1. A 6,525 lineal foot (ft) (1,989 meters(m)) tunnel will be bored underneath the Thimble Shoal Channel connecting the Portal Islands located near the mouth of the

Chesapeake Bay. The CBBT is a 23-mile (37 km) long facility that connects the Hampton Roads area of Virginia to the Eastern Shore of Virginia. Water depths within the PTST construction area range from 0 to 60 ft (18.2 m) below Mean Lower Low Water (MLLW). The Thimble Shoal Channel is 1,000 ft (305 m) wide and is maintained at a depth of 50 ft (15.2 m) MLLW.

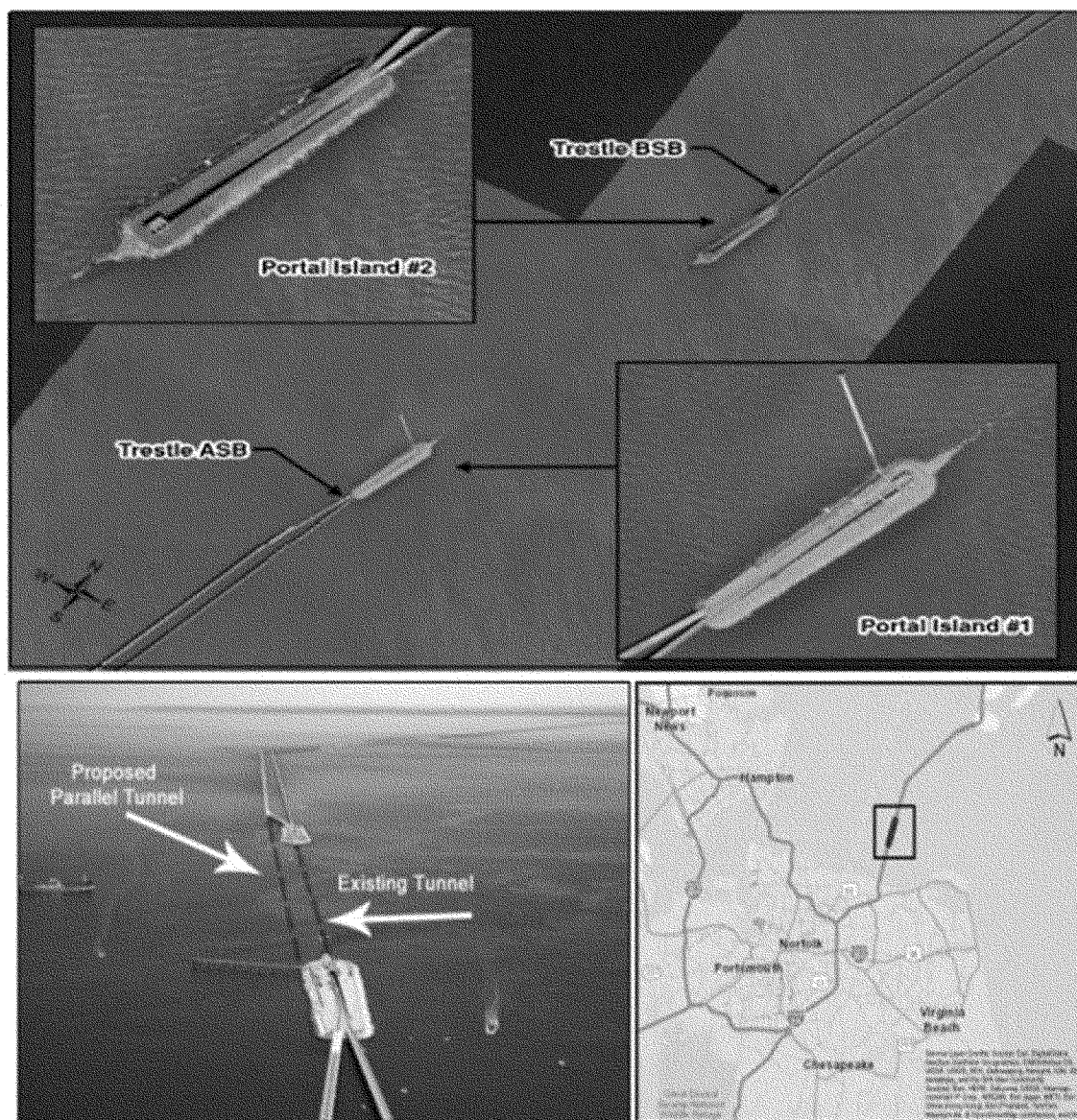


**Figure 1—Map of Proposed Project Area Near Virginia Beach, Virginia**

#### *Detailed Description of the Specified Activity*

The PTST project consists of the construction of a two lane tunnel parallel and to the west of the existing tunnel, connecting Portal Islands No. 1

and No. 2. A tunnel boring machine (TBM) will both excavate material and construct the tunnel as it progresses from Portal Island No. 1 to Portal Island No. 2. Precast concrete tunnel segments will be transported to the TBM for installation. The TBM will assemble the tunnel segments in-place as the tunnel is bored. After the tunnel structure is

completed, final upland work for the PTST Project will include installation of the final roadway, lighting, finishes, mechanical systems, and other required internal systems for tunnel use and function. In addition, the existing fishing pier will be repaired and refurbished.

Descriptions of additional upland activities may be found in the application but such actions will not affect marine mammals and are not described here.

Proposed in-water activities during this IHA include the removal of 36-inch steel piles on the temporary dock and trestle (97 total on Portal Island No.1) and the removal of 36-inch steel piles

on the trestle (34 total on Portal Island No.2) as well as the removal of 36-inch steel mooring piles on both Portal Islands (9 piles on Portal Island No. 1 and 18 total on Portal Island No. 2). A total of 158 piles will be removed over 80 in-water work days. Pile driving activities will be conducted by initially using an impact hammer, if necessary, to break the friction on the previously

installed piles. If an impact hammer is not required to initially break friction, then a vibratory hammer will be used for extraction. If the pile cannot be removed with this method, the pile will then be cut off a minimum of three feet below the stabilized, post construction sediment-water interface. There will be no concurrent pile driving activity.

TABLE 1—ANTICIPATED PILE INSTALLATION SCHEDULE  
[January 2024–December 2024]

| Pile location           | Pile function            | Pile type                                      | Installation/removal method   | Bubble curtain (yes/no) | Number of piles | Number of days per activity (total) | Number of piles/days per activity (per hammer type) | Anticipated installation date       |
|-------------------------|--------------------------|------------------------------------------------|-------------------------------|-------------------------|-----------------|-------------------------------------|-----------------------------------------------------|-------------------------------------|
| Portal Island No. 1 ... | Mooring dolphins ..      | 36-inch Diameter Steel Pipe Pile.              | Impact (if needed) ....       | Yes .....               | 9               | 5                                   | (2 Piles/Day)                                       | 1 January through 28 February 2024. |
| Portal Island No. 1 ... | Temporary Dock/ Trestle. | 36-inch Diameter Steel Interlocked Pipe Piles. | Vibratory (Removal) Yes ..... | Yes .....               | 97              | 5                                   | (2 Piles/Day)                                       | 1 January through 30 April 2024.    |
| Portal Island No. 2 ... | Mooring dolphins ..      | 36-inch Diameter Steel Pipe Pile.              | Impact (if needed) ....       | Yes .....               | 18              | 49                                  | (2 Piles/Day)                                       |                                     |
| Portal Island No. 2 ... | Omega Trestle .....      | 36-inch Diameter Steel Interlocked Pipe Piles. | Vibratory (Removal) Yes ..... | Yes .....               | 34              | 49                                  | (2 Piles/Day)                                       |                                     |
|                         |                          |                                                | Impact (if needed) ....       | Yes .....               |                 | 9                                   | (2 Piles/Day)                                       | December 1–31, 2024.                |
|                         |                          |                                                | Vibratory (Removal) Yes ..... | Yes .....               |                 | 9                                   | (2 Piles/Day)                                       | December 1–31, 2024.                |
|                         |                          |                                                | Impact (if needed) ....       | Yes .....               |                 | 17                                  | (2 Piles/Day)                                       |                                     |
|                         |                          |                                                | Vibratory (Removal) Yes ..... | Yes .....               |                 | 17                                  | (2 Piles/Day)                                       |                                     |

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. Atlantic and Gulf of Mexico SARs (Hayes *et al.* 2023). 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—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES

| Common name                                                                | Scientific name                 | Stock               | ESA/MMPA status; Strategic (Y/N) <sup>1</sup> | Stock abundance (CV, N <sub>min</sub> , most recent abundance survey) <sup>2</sup> | PBR | Annual M/SI <sup>3</sup> |
|----------------------------------------------------------------------------|---------------------------------|---------------------|-----------------------------------------------|------------------------------------------------------------------------------------|-----|--------------------------|
| <b>Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)</b> |                                 |                     |                                               |                                                                                    |     |                          |
| Family Balaenopteridae (rorquals):<br>Humpback whale.                      | <i>Megaptera novaeangliae</i> . | Gulf of Maine ..... | -,; N .....                                   | 1,393 (0; 1,375, 2016)                                                             | 22  | 12.15                    |
| <b>Superfamily Odontoceti (toothed whales, dolphins, and porpoises)</b>    |                                 |                     |                                               |                                                                                    |     |                          |
| Family Delphinidae:                                                        |                                 |                     |                                               |                                                                                    |     |                          |

TABLE 2—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES—Continued

| Common name                                           | Scientific name             | Stock                                     | ESA/MMPA status; Strategic (Y/N) <sup>1</sup> | Stock abundance (CV, N <sub>min</sub> , most recent abundance survey) <sup>2</sup> | PBR   | Annual M/SI <sup>3</sup> |
|-------------------------------------------------------|-----------------------------|-------------------------------------------|-----------------------------------------------|------------------------------------------------------------------------------------|-------|--------------------------|
| Bottlenose dolphin.                                   | <i>Tursiops truncatus</i>   | WNA Coastal, Northern Migratory.          | -; Y .....                                    | 6,639 (0.41; 4,759; 2016)                                                          | 48    | 12.2–21.5                |
|                                                       |                             | WNA Coastal, Southern Migratory.          | -; Y .....                                    | 3,751 (0.06; 2,353; 2016)                                                          | 24    | 0–18.3                   |
|                                                       |                             | Northern North Carolina Estuarine System. | -; Y .....                                    | 823 (0.06; 782; 2017)                                                              | 7.8   | 7.2–30                   |
| Family Phocoenidae (porpoises):<br>Harbor porpoise    | <i>Phocoena phocoena</i>    | Gulf of Maine/Bay of Fundy.               | -; N .....                                    | 95,543 (0.31; 74,034; 2016)                                                        | 851   | 164                      |
| <b>Order Carnivora—Superfamily Pinnipedia</b>         |                             |                                           |                                               |                                                                                    |       |                          |
| Family Phocidae (earless seals):<br>Harbor seal ..... | <i>Phoca vitulina</i> ..... | WNA .....                                 | -; N .....                                    | 61,336 (0.08, 57,637, 2018)                                                        | 1,729 | 339                      |
| Gray seal <sup>4</sup> .....                          | <i>Halichoerus grypus</i>   | WNA .....                                 | -; N .....                                    | 27,300 (0.22, 22,785, 2016)                                                        | 1,458 | 4,453                    |

<sup>1</sup> 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.

<sup>2</sup> NMFS marine mammal stock assessment reports online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports>. CV is coefficient of variation; N<sub>min</sub> is the minimum estimate of stock abundance.

<sup>3</sup> 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 Mortality/Serious Injury (M/SI) often cannot be determined precisely and is in some cases presented as a minimum value or range.

<sup>4</sup> The NMFS stock abundance estimate applies to U.S. population only, however the actual stock abundance is approximately 505,000. The PBR value is estimated for the U.S. population, while the M/SI estimate is provided for the entire gray seal stock (including animals in Canada).

As indicated above, all five species (with seven managed stocks) in table 2 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur. While North Atlantic right whale and fin whale could potentially occur in the area, occurrence of these species is very rare, the species are readily observed, and the applicant would shut down pile driving activity if they enter the project area. Thus take is not expected to occur, and they are not discussed further.

#### Humpback Whale

The humpback whale is found worldwide in all oceans. In winter, humpback whales from waters off New England, Canada, Greenland, Iceland, and Norway migrate to mate and calve primarily in the West Indies, where spatial and genetic mixing among these groups occurs. For the humpback whale, NMFS defines a stock on the basis of feeding location, i.e., Gulf of Maine. However, our reference to humpback whales in this document refers to any individuals of the species that are found in the specific geographic region. These individuals may be from the same breeding population (e.g., West Indies breeding population of humpback whales) but visit different feeding areas.

Based on photo-identification only 39 percent of individual humpback whales observed along the mid- and south Atlantic U.S. coast are from the Gulf of

Maine stock (Barco *et al.*, 2002).

Therefore, the SAR abundance estimate underrepresents the relevant population, i.e., the West Indies breeding population.

Prior to 2016, humpback whales were listed under the ESA as an endangered species worldwide. Following a 2015 global status review (Bettridge *et al.*, 2015), NMFS established 14 Distinct Population Segments (DPSs) with different listing statuses (81 FR 62259, September 8, 2016) pursuant to the ESA. The West Indies DPS, which consists of the whales whose breeding range includes the Atlantic margin of the Antilles from Cuba to northern Venezuela, and whose feeding range primarily includes the Gulf of Maine, eastern Canada, and western Greenland, was delisted. As described in Bettridge *et al.* (2015), the West Indies DPS has a substantial population size (i.e., approximately 10,000; Stevick *et al.*, 2003; Smith *et al.*, 1999; Bettridge *et al.*, 2015), and appears to be experiencing consistent growth.

Humpback whales are the only large cetaceans that are likely to occur in the project area and could be found there at any time of the year. There has been a decline in whale sightings in the peak months since 2016/17; the distribution of whale sightings occur most frequently in the month of January through March (Aschettino *et al.*, 2021).

There have been 33 humpback whale strandings recorded in Virginia between 1988 and 2013. Most of these strandings were reported from ocean facing beaches, but 11 were also within the Chesapeake Bay (Barco and Swingle, 2014). Strandings occurred in all seasons, but were most common in the spring. Since January 2016, elevated humpback whale mortalities have occurred along the Atlantic coast from Maine through Florida. The event has been declared an Unusual Mortality Event (UME) with 209 strandings recorded, 7 of which occurred in or near the mouth of the Chesapeake Bay. More detailed information is available at: <https://www.fisheries.noaa.gov/national/marine-life-distress/2016-2023-humpback-whale-unusual-mortality-event-along-atlantic-coast>. Three previous UMEs involving humpback whales have occurred since 2000, in 2003, 2005, and 2006.

Humpback whales use the mid-Atlantic as a migratory pathway to and from the calving/mating grounds, but it may also be an important winter feeding area for juveniles. Since 1989, observations of juvenile humpbacks in the mid-Atlantic have been increasing during the winter months, peaking from January through March. Biologists theorize that non-reproductive animals may be establishing a winter feeding range in the mid-Atlantic since they are not participating in reproductive

behavior in the Caribbean (Swingle *et al.*, 1993).

#### *Bottlenose Dolphin*

The bottlenose dolphin occurs in temperate and tropical oceans throughout the world (Blaylock 1985). In the western Atlantic Ocean there are two distinct morphotypes of bottlenose dolphins, an offshore type that occurs along the edge of the continental shelf as well as an inshore type. The inshore morphotype can be found along the entire United States coast from New York to the Gulf of Mexico, and typically occurs in waters less than 20 m deep (Hayes *et al.*, 2021). Bottlenose dolphins found in Virginia are representative primarily of either the northern migratory coastal stock, southern migratory coastal stock, or the Northern North Carolina Estuarine System Stock (NNCES).

The northern migratory coastal stock is best defined by its distribution during warm water months when the stock occupies coastal waters from the shoreline to approximately the 20 m isobath between Assateague, Virginia, and Long Island, New York (Garrison *et al.*, 2017). The stock migrates in late summer and fall and, during cold water months (best described by January and February), occupies coastal waters from approximately Cape Lookout, North Carolina, to the North Carolina/Virginia border. Historically, common bottlenose dolphins have been rarely observed during cold water months in coastal waters north of the North Carolina/Virginia border, and their northern distribution in winter appears to be limited by water temperatures. Overlap with the southern migratory coastal stock in coastal waters of northern North Carolina and Virginia is possible during spring and fall migratory periods, but the degree of overlap is unknown and it may vary depending on annual water temperature (Garrison *et al.*, 2016). When the stock has migrated in cold water months to coastal waters from just north of Cape Hatteras, North Carolina, to just south of Cape Lookout, North Carolina, it overlaps spatially with the NNCES stock (Garrison *et al.*, 2017).

The southern migratory coastal stock migrates seasonally along the coast between North Carolina and northern Florida (Garrison *et al.*, 2017). During January–March, the southern migratory coastal stock appears to move as far south as northern Florida. During April–June, the stock moves back north past Cape Hatteras, North Carolina, where it overlaps, in coastal waters, with the NNCES stock (in waters  $\leq 1$  km from shore). During the warm water months

of July–August, the stock is presumed to occupy coastal waters north of Cape Lookout, North Carolina, to Assateague, Virginia, including the Chesapeake Bay.

The NNCES stock is best defined as animals that occupy primarily waters of the Pamlico Sound estuarine system (which also includes Core, Roanoke, and Albemarle sounds, and the Neuse River) during warm water months (July–August). Members of this stock also use coastal waters ( $\leq 1$  km from shore) of North Carolina from Beaufort north to Virginia Beach, Virginia, including the lower Chesapeake Bay. A community of NNCES dolphins are likely year-round Bay residents (Eric Patterson, pers. communication).

#### *Harbor Porpoise*

The harbor porpoise is typically found in colder waters in the northern hemisphere. In the western North Atlantic Ocean, harbor porpoises range from Greenland to as far south as North Carolina (Barco and Swingle, 2014). They are commonly found in bays, estuaries, and harbors less than 200 m deep (Hayes *et al.*, 2022). Harbor porpoises in the United States are made up of the Gulf of Maine/Bay of Fundy stock. Gulf of Maine/Bay of Fundy stocks are concentrated in the Gulf of Maine in the summer, but are widely dispersed from Maine to New Jersey in the winter. South of New Jersey, harbor porpoises occur at lower densities. Migrations to and from the Gulf of Maine do not follow a defined route (Hayes *et al.*, 2022).

Harbor porpoise occur seasonally in the winter and spring in small numbers near the project area. Strandings occur primarily on ocean facing beaches, but they occasionally travel into the Chesapeake Bay to forage and could occur in the project area (Barco and Swingle, 2014). Since 1999, stranding incidents have ranged widely from a high of 40 in 1999 to 2 in 2011, 2012, and 2016 (Barco *et al.*, 2017). In most areas, harbor porpoise occur in small groups of just a few individuals.

#### *Harbor Seal*

The harbor seal occurs in arctic and temperate coastal waters throughout the northern hemisphere, including on both the east and west coasts of the United States. On the east coast, harbor seals can be found from the Canadian Arctic down to Georgia (Blaylock, 1985). Harbor seals occur year-round in Canada and Maine and seasonally (September–May) from southern New England to New Jersey (Hayes *et al.*, 2022). The range of harbor seals appears to be shifting as they are regularly reported further south than they were

historically. In recent years, they have established haulout sites in the Chesapeake Bay including on the portal islands of the CBBT (Rees *et al.*, 2016, Jones *et al.*, 2018).

Harbor seals are the most common seal in Virginia (Barco and Swingle, 2014). They can be seen resting on the rocks around the portal islands of the CBBT from December through April. They are primarily concentrated north of the project area at Portal Island No. 3. Over 8 field seasons (2014–2015 through 2021–2022), 79.1 percent of seals were recorded at Portal Island No. 3; 17.4 percent were recorded at Portal Island No. 4; and 3.5 percent were recorded at Portal Island No. 1 and No. 2 combined (Jones and Rees 2023).

Harbor seals are central-place foragers (Orians and Pearson, 1979) and tend to exhibit strong site fidelity within season and across years, generally forage close to haulout sites, and repeatedly visit specific foraging areas (Suryan and Harvey, 1998; Thompson *et al.*, 1998). Harbor seals tend to forage at night and haul out during the day with a peak in the afternoon between 1 p.m. and 4 p.m. (London *et al.*, 2001).

#### *Gray Seal*

The gray seal occurs on both coasts of the Northern Atlantic Ocean and are divided into three major populations. The western north Atlantic stock occurs in eastern Canada and the northeastern United States, occasionally as far south as North Carolina. Gray seals inhabit rocky coasts and islands, sandbars, ice shelves and icebergs. In the United States, gray seals congregate in the summer to give birth at four established colonies in Massachusetts and Maine (Hayes *et al.*, 2022). From September through May, they disperse and can be abundant as far south as New Jersey. The range of gray seals appears to be shifting as they are regularly being reported further south than they were historically (Rees *et al.* 2016).

Gray seals are uncommon in Virginia and the Chesapeake Bay. Only 15 gray seal strandings were documented in Virginia from 1988 through 2013 (Barco and Swingle, 2014). They are rarely found resting on the rocks around the portal islands of the CBBT from December through April alongside harbor seals. Seal observation surveys conducted at the CBBT recorded one gray seal in each of the 2014/2015 and 2015/2016 seasons while no gray seals were reported during the 2016/2017 and 2017/2018 seasons (Rees *et al.* 2016, Jones *et al.* 2018).

*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 *et al.* 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.

Acoustic effects on marine mammals during the specified activity can occur

from impact and vibratory pile driving activities. The effects of underwater noise from CTJV's proposed activities have the potential to result in Level A harassment and Level B harassment of marine mammals.

#### 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 (American National Standards Institute 1995). 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.

Two types of hammers would be used on this project. Impact hammers operate by repeatedly dropping and/or pushing a heavy piston onto a pile to drive the pile into the substrate. Sound generated by impact hammers is characterized by rapid rise times and high peak levels, a potentially injurious combination (Hastings and Popper, 2005). 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).

The likely or possible impacts of CTJV's proposed activities on marine mammals could be generated from both non-acoustic and acoustic stressors. Potential non-acoustic stressors include the physical presence of the equipment, vessels, and personnel; however, any impacts to marine mammals are expected to primarily be acoustic in nature. Acoustic stressors include effects of heavy equipment operation during pile driving activities.

#### Acoustic Impacts

The introduction of anthropogenic noise into the aquatic environment from pile driving activities is the primary means by which marine mammals may be harassed from CTJV's specified activities. In general, animals exposed to natural or anthropogenic sound may experience behavioral, physiological, and/or physical effects, ranging in magnitude from none to severe (Southall *et al.*, 2007). Generally, exposure to pile driving activities has the potential to result in behavioral reactions (e.g., avoidance, temporary cessation of foraging and vocalizing, changes in dive behavior) and, in limited cases, auditory threshold shifts. 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 activities 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. mother 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.*, 2003; Southall *et al.*, 2007). Here we discuss physical auditory effects (threshold shifts) followed by behavioral effects and potential impacts on habitat.

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 (2018), 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).

**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). 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; Henderson *et al.*, 2008). PTS levels for marine mammals are estimates, because there are limited empirical data measuring PTS in marine mammals (e.g., Kastak *et al.*, 2008), 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), 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). As described in Finneran (2016), marine mammal studies have shown the amount of TTS increases with cumulative sound exposure level ( $SEL_{cum}$ ) 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. Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin, beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocaena asiaeorientalis*) and five species of pinnipeds exposed to a limited number of sound sources (i.e., mostly tones and octave-band noise) in laboratory settings (Finneran, 2015). TTS was not observed in trained spotted (*Phoca largha*) and ringed (*Pusa hispida*) seals exposed to impulsive noise at levels matching previous predictions of TTS onset (Reichmuth *et al.*, 2016). In general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species (Finneran, 2015). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. No data are available on noise-induced hearing loss for mysticetes. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007), Finneran and Jenkins (2012), Finneran (2015), and table 5 in NMFS (2018).

Activities for this project include impact and vibratory pile driving. There would likely be pauses in activities producing the sound during each day. Given these pauses and the fact that many marine mammals are likely moving through the project areas and not remaining for extended periods of time, the potential for threshold shift declines.

**Behavioral harassment**—Exposure to noise from pile driving activities 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; National Research Council (NRC), 2005).

The following subsections provide examples of behavioral responses that provide an idea of the variability in behavioral responses that would be expected given the differential sensitivities of marine mammal species to sound and the wide range of potential acoustic sources to which a marine mammal may be exposed. Behavioral responses that could occur for a given sound exposure should be determined from the literature that is available for each species, or extrapolated from closely related species when no information exists, along with contextual factors. 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. There are broad categories of potential response, which we describe in greater detail here, that include alteration of dive behavior, alteration of foraging behavior, effects to respiration, interference with or alteration of vocalization, avoidance, and flight.

Pinnipeds may increase their haul out time, possibly to avoid in-water disturbance (Thorson and Reyff, 2006). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.*, 2012), 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.

**Alteration of Feeding Behavior**—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). In addition, behavioral state of the animal plays a role in the type and severity of a behavioral response, such as disruption to foraging (e.g., Silve *et al.*, 2016; Wensveen *et al.*, 2017). An evaluation of whether foraging disruptions would be likely to incur fitness consequences considers temporal and spatial scale of the activity in the context of the available foraging habitat and, in more severe cases may necessitate consideration of 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. Goldbogen *et al.* (2013) indicate that disruption of feeding and displacement could impact individual fitness and health. However, for this to be true, we would have to assume that an individual could not compensate for this lost feeding opportunity by either immediately feeding at another location, by feeding shortly after cessation of acoustic exposure, or by feeding at a later time. There is no indication this is the case here, particularly since prey would likely still be available in the environment in most cases following the cessation of acoustic exposure.

**Stress responses**—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (e.g., Seyle, 1950; Moberg, 2000). In many cases, an animal's first and sometimes most economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness. Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-

induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (e.g., Moberg, 1987; Blecha, 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.*, 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and "distress" is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well-studied through controlled experiments and for both laboratory and free-ranging animals (e.g., Holberton *et al.*, 1996; Hood *et al.*, 1998; Jessop *et al.*, 2003; Krausman *et al.*, 2004; Lankford *et al.*, 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker, 2000; Romano *et al.*, 2002b) and, more rarely, studied in wild populations (e.g., Romano *et al.*, 2002a). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as "distress." In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003), however distress is an unlikely result of these projects based on observations of marine mammals during previous, similar projects.

**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). 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.*, pile driving, 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. The mouth of the Chesapeake Bay contains active military and commercial shipping, as well as numerous recreational and other commercial vessel and background sound levels in the area are already elevated.

**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 or hauled out near the project site within the range of noise levels elevated above the acoustic criteria. 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 hauled out 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 likely previously have been 'taken' because of exposure to underwater sound above the behavioral harassment thresholds, which are generally 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 additional incidental take resulting from airborne sound for pinnipeds is warranted, and airborne sound is not discussed further.

#### *Marine Mammal Habitat Effects*

CTJV's proposed construction activities could have localized, temporary impacts on marine mammal habitat, including prey, by increasing in-water sound pressure levels and slightly decreasing water quality. Increased noise levels may affect acoustic habitat (see *Auditory Masking* discussion above) and adversely affect marine mammal prey in the vicinity of the project areas (see discussion below). Elevated levels of underwater noise would ensonify the project areas where both fishes and mammals occur and could affect foraging success. Additionally, marine mammals may avoid the area during construction; however, displacement due to noise is expected to be temporary and is not expected to result in long-term effects to the individuals or populations.

**In-water Construction Effects on Potential Prey**—Construction activities would produce continuous (*i.e.*, vibratory pile driving) and intermittent (*i.e.*, impact pile driving) sounds. Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.*, crustaceans, cephalopods, fish, zooplankton). Marine mammal prey varies by species, season, and location. Here, we describe studies regarding the effects of noise on known marine mammal prey.

Fish utilize the soundscape and components of sound in their environment to perform important functions such as foraging, predator avoidance, mating, and spawning (*e.g.*, Zelick and Mann, 1999; Fay, 2009). Depending on their hearing anatomy and peripheral sensory structures, which vary among species, fishes hear sounds using pressure and particle motion sensitivity capabilities and detect the motion of surrounding water (Fay *et al.*, 2008). The potential effects of noise on fishes depends on the overlapping frequency range, distance from the sound source, water depth of

exposure, and species-specific hearing sensitivity, anatomy, and physiology. Key impacts to fishes may include behavioral responses, hearing damage, barotrauma (pressure-related injuries), and mortality.

Fish react to sounds that are especially strong and/or intermittent low-frequency sounds, and behavioral responses such as flight or avoidance are the most likely effects. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to noise depends on the physiological state of the fish, past exposures, motivation (*e.g.*, feeding, spawning, migration), and other environmental factors. 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; 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). Several studies have demonstrated that impulse sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.*, Fewtrell and McCauley, 2012; Pearson *et al.*, 1992; Skalski *et al.*, 1992; Santulli *et al.*, 1999; Paxton *et al.*, 2017). However, some studies have shown no or slight reaction to impulse sounds (*e.g.*, Pena *et al.*, 2013; Wardle *et al.*, 2001; Jorgenson and Gyselman, 2009).

SPLs of sufficient strength have been known to cause injury to fish and fish mortality. However, in most fish species, hair cells in the ear continuously regenerate and loss of auditory function likely is restored when damaged cells are replaced with new cells. Halvorsen *et al.* (2012a) showed that a TTS of 4 to 6 dB was recoverable within 24 hours for one species. Impacts would be most severe when the individual fish is close to the source and when the duration of exposure is long. Injury caused by barotrauma can range from slight to severe and can cause death, and is most likely for fish with swim bladders. Barotrauma injuries have been documented during controlled exposure to impact pile driving (Halvorsen *et al.*, 2012b; Casper *et al.*, 2013).

The most likely impact to fishes from pile driving activities at the project area would be temporary behavioral avoidance of the area. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment,

distribution, and behavior is anticipated.

Construction activities have the potential to have adverse impacts on forage fish in the project area in the form of increased turbidity. Forage fish form a significant prey base for many marine mammal species that occur in the project area. Turbidity within the water column has the potential to reduce the level of oxygen in the water and irritate the gills of prey fish in the proposed project area. However, fish in the proposed project area would be able to move away from and avoid the areas where increase turbidity may occur. Given the limited area affected and ability of fish to move to other areas, any effects on forage fish are expected to be minor or negligible.

In summary, given the short daily duration of sound associated with individual pile driving events and the relatively small areas being affected, pile driving activities associated with the proposed actions are not likely to have a permanent, adverse effect on any fish habitat, or populations of fish species. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity. Thus, we conclude that impacts of the specified activities 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 primarily be by Level B harassment, as use of the

acoustic sources (*i.e.*, impact and vibratory driving) has the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result, primarily for high frequency species and phocids because predicted auditory injury zones are larger than for mid-frequency species. Auditory injury is unlikely to occur for mid-frequency species. The proposed mitigation and monitoring measures are expected to minimize the severity of the taking to the extent practicable.

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  $\mu$ Pa)) for continuous (*e.g.*, vibratory pile driving, drilling) and above RMS SPL 160 dB re 1  $\mu$ 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. CTJV's proposed activities include the use of continuous (vibratory pile driving) and impulsive (impact pile driving) sources, and therefore the RMS SPL thresholds of 120 and 160 dB re 1  $\mu$ Pa are applicable.

**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). CTJV's proposed pile driving activities includes the use of impulsive (impact pile driving) and non-impulsive (vibratory pile driving) sources.

These thresholds are provided in table 4 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 Acoustic Thresholds *<br>(Received level)           |                                   |
|-------------------------------------------|---------------------------------------------------------------|-----------------------------------|
|                                           | Impulsive                                                     | Non-impulsive                     |
| Low-Frequency (LF) Cetaceans .....        | Cell 1: $L_{pk,flat}$ : 219 dB; $L_{E,LF,24h}$ : 183 dB ..... | Cell 2: $L_{E,LF,24h}$ : 199 dB.  |
| Mid-Frequency (MF) Cetaceans .....        | Cell 3: $L_{pk,flat}$ : 230 dB; $L_{E,MF,24h}$ : 185 dB ..... | Cell 4: $L_{E,MF,24h}$ : 198 dB.  |
| High-Frequency (HF) Cetaceans .....       | Cell 5: $L_{pk,flat}$ : 202 dB; $L_{E,HF,24h}$ : 155 dB ..... | Cell 6: $L_{E,HF,24h}$ : 173 dB.  |
| Phocid Pinnipeds (PW) (Underwater) .....  | Cell 7: $L_{pk,flat}$ : 218 dB; $L_{E,PW,24h}$ : 185 dB ..... | Cell 8: $L_{E,PW,24h}$ : 201 dB.  |
| Otariid Pinnipeds (OW) (Underwater) ..... | Cell 9: $L_{pk,flat}$ : 232 dB; $L_{E,OW,24h}$ : 203 dB ..... | Cell 10: $L_{E,OW,24h}$ : 219 dB. |

\* Dual metric acoustic 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 should also be considered.

**Note:** Peak sound pressure ( $L_{pk}$ ) has a reference value of 1  $\mu$ Pa, and cumulative sound exposure level ( $L_E$ ) has a reference value of 1  $\mu$ Pa<sup>2</sup>s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. 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 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 acoustic 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., pile driving).

The project includes vibratory and impact pile driving. Source levels for these activities are based on reviews of measurements of the same or similar types and dimensions of piles available

in the literature. Source levels for each pile size and activity are presented in table 5. Source levels for vibratory pile removal and installation of piles of the same diameter are assumed to be the same. Note that CTJV will employ a bubble curtain during all impact and vibratory driving activities which NMFS assumes will reduce source levels by 5 dB.

TABLE 5—ESTIMATES OF MEAN UNDERWATER SOUND LEVELS GENERATED DURING VIBRATORY AND IMPACT PILE DRIVING

| Pile type              | Hammer type                             | Peak      | RMS       | SSsel     | Source               |
|------------------------|-----------------------------------------|-----------|-----------|-----------|----------------------|
| 36-in steel pipe ..... | Impact/(with 5 dB bubble curtain).      | 210/(205) | 193/(188) | 183/(178) | Caltrans 2015, 2020. |
|                        | Vibratory/(with – 5 dB bubble curtain). | 180/(175) | 170/(165) | .....     | Caltrans 2015.       |

**Note:** CTJV will incorporate bubble curtain with a 5 dB reduction for all pile driving activities.

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:

$$TL = B * \log_{10} (R1/R2),$$

where

$TL$  = transmission loss in dB

$B$  = transmission loss coefficient

$R1$  = the distance of the modeled SPL from the driven pile, and

$R2$  = the distance from the driven pile of the initial measurement

Absent site-specific acoustical monitoring with differing measured

transmission loss, a practical spreading value of 15 is used as the transmission loss coefficient in the above formula. Site-specific transmission loss data for the PTST project area are not available; therefore, the default coefficient of 15 is used to determine the distances to the Level A harassment and Level B harassment thresholds.

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 are shown in table 6, and the resulting estimated isopleths are shown in table 7, as reported below.

TABLE 6—USER SPREADSHEET INPUTS

|                                                    | 36-inch steel piles |         |
|----------------------------------------------------|---------------------|---------|
|                                                    | Vibratory           | Impact  |
| Source Level (SPL) .....                           | 170 RMS             | 183 SEL |
| Transmission Loss Coefficient .....                | 15                  | 15      |
| Weighting Factor Adjustment (kHz) .....            | 2.5                 | 2       |
| Activity Duration per day (minutes) .....          | 30                  |         |
| Number of strikes per pile .....                   |                     | 240     |
| Number of piles per day .....                      | 2                   | 2       |
| Distance of sound pressure level measurement ..... | 10                  | 10      |

TABLE 7—CALCULATED LEVEL A AND LEVEL B HARASSMENT ISOPLETHS  
[Meters]

| Scenario                               | Level A harassment zones |                    |                    |                    | Level B harassment zones |
|----------------------------------------|--------------------------|--------------------|--------------------|--------------------|--------------------------|
|                                        | LF                       | MF                 | HF                 | Phocid pinnipeds   |                          |
| Driving Type:                          |                          |                    |                    |                    |                          |
| Pile Type .....                        | Island 1 & 2 .....       | Island 1 & 2 ..... | Island 1 & 2 ..... | Island 1 & 2 ..... | Island 1 & 2.            |
| 36-in Impact (with Bubble Curtain):    |                          |                    |                    |                    |                          |
| 36-in. Steel .....                     | 285 .....                | 10 .....           | 338 .....          | 152 .....          | 736.                     |
| 36-in Vibratory (with Bubble Curtain): |                          |                    |                    |                    |                          |
| 36-in. Steel .....                     | 8 .....                  | 1 .....            | 12 .....           | 5 .....            | 10,000.                  |

#### 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 as well as how the information provided is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and proposed for authorization. Several approaches were utilized to estimate take for affected species depending on the best data that was available. For some species, survey or observational data was used to estimate take (e.g., harbor seal, gray seal). If density data was available, it was employed to develop the take estimate (i.e., bottlenose dolphin). In cases where the best available information consisted only of very low density values, NMFS assumed the average group to arrive at an estimate (i.e., humpback whale, harbor porpoise).

#### Humpback Whale

Humpback whales are rare in the Chesapeake Bay. Density data for this species within the project vicinity were not available. Habitat-based density models produced by the Duke University Marine Geospatial Ecology Laboratory (Roberts *et al.* 2016) represent the best available information regarding marine mammal densities offshore near the mouth of the Chesapeake Bay. At the closest point to the PTST project area, humpback densities showed a maximum monthly

density of 0.107/100 km<sup>2</sup> in March. Because humpback whale occurrence is low, as mentioned above, the CTJV estimated, and NMFS concurred, that there will be a single humpback sighting every two months for the duration of in-water pile driving activities. There are 5 months of planned in-water construction. Using an average group size of two animals Kraus *et al.* (2016) and 5 months of active in-water pile driving work (Jan, Feb, Mar, Apr, Dec) provides an estimate of four takes during the January–April period. NMFS conservatively assumed that there would be an additional sighting of 2 humpback whales in December. Because it is expected that a full shutdown can occur before the mammal can reach the full extent of the Level A harassment zone, no takes by Level A harassment were requested or are expected. Therefore, NMFS proposes to authorize six takes of humpback whale by Level B harassment.

#### Bottlenose Dolphin

There was insufficient monitoring data available from previous PTST IHAs to estimate dolphin take. Therefore, the expected number of bottlenose dolphins was estimated using a 2016 report on the occurrence, distribution, and density of marine mammals near Naval Station Norfolk and Virginia Beach, Virginia (Engelhaupt *et al.* 2016). This report provides seasonal densities of bottlenose dolphins for inshore areas in the vicinity of the project and along the coast of Virginia Beach. Like most wildlife, bottlenose dolphins do not use

habitat uniformly. The heterogeneity in available habitat, dietary items and protection likely results in some individuals preferring ocean and others estuary (Ballance 1992; Gannon and Waples 2004). Dolphins clearly have the ability to move between these habitat types. Gannon and Waples (2004) suggest individuals prefer one habitat over the other based on gut contents of dietary items. Therefore, a subset of survey data from Engelhaupt *et al.* (2016) was used to determine seasonal dolphin densities within the project area. A spatially refined approach was used by plotting dolphin sightings within a 12 km radius of the proposed project location. Densities were determined following methodology outlined in Engelhaupt *et al.* 2016 and Miller *et al.* 2019 using the package DISTANCE in R statistical software (R. Core Team 2018). Calculated densities by season are provided in table 8.

TABLE 8—DENSITIES (INDIVIDUAL/km<sup>2</sup>) OF BOTTLENOSE DOLPHIN FROM INSHORE AREAS OF VIRGINIA

| Season       | 12 km distance around PTST project area |
|--------------|-----------------------------------------|
| Spring ..... | 1.00                                    |
| Winter ..... | 0.63                                    |

This information was then used to calculate the monthly takes based on the number of pile driving days per month. These were broken out by month as

shown in table 9. The Level B harassment area for each pile and driving type was multiplied by the appropriate seasonal density and the anticipated number of days per activity

per month to derive the total number of takes for each activity. Given this information, NMFS is proposing to authorize a total of 12,256 Level B harassment exposures for bottlenose

dolphins. No take by Level A harassment is proposed by NMFS since the shutdown zone is 30 m and should be readily visible to PSOs.

**TABLE 9—ESTIMATED TAKES OF BOTTLENOSE DOLPHIN BY LEVEL B HARASSMENT BY MONTH, LOCATION, AND DRIVING ACTIVITY**

| Month                                                             | Jan   | Feb   | Mar   | Apr   | Dec   | Totals |
|-------------------------------------------------------------------|-------|-------|-------|-------|-------|--------|
| Dolphin Density (/km <sup>2</sup> ) .....                         | 0.63  | 0.63  | 1     | 1     | 0.63  | .....  |
| <b>Impact: Portal Island 1 Mooring Dolphins (9 Piles)</b>         |       |       |       |       |       |        |
| Refined Area (/km <sup>2</sup> ) .....                            | 1.38  | 1.38  | 1.38  | 1.38  | 1.38  | .....  |
| Driving Days .....                                                | 2     | 3     | 0     | 0     | 0     | .....  |
| Dolphin Harassments .....                                         | 2     | 3     | 0     | 0     | 0     | 5      |
| <b>Vibratory: Portal Island 1 Mooring Dolphins (9 Piles)</b>      |       |       |       |       |       |        |
| Refined Area (/km <sup>2</sup> ) .....                            | 212   | 212   | 212   | 212   | 212   | .....  |
| Driving Days .....                                                | 2     | 3     | 0     | 0     | 0     | .....  |
| Dolphin Harassments .....                                         | 268   | 401   | 0     | 0     | 0     | 669    |
| <b>Impact: Portal Island 2 Mooring Dolphins (18 Piles)</b>        |       |       |       |       |       |        |
| Refined Area (/km <sup>2</sup> ) .....                            | 1.32  | 1.32  | 1.32  | 1.32  | 1.32  | .....  |
| Driving Days .....                                                | 0     | 0     | 0     | 0     | 9     | .....  |
| Dolphin Harassments .....                                         | 0     | 0     | 0     | 0     | 8     | 8      |
| <b>Vibratory: Portal Island 2 Mooring Dolphins (18 Piles)</b>     |       |       |       |       |       |        |
| Refined Area (/km <sup>2</sup> ) .....                            | 202   | 202   | 202   | 202   | 202   | .....  |
| Driving Days .....                                                | 0     | 0     | 0     | 0     | 9     | .....  |
| Dolphin Harassments .....                                         | 0     | 0     | 0     | 0     | 1146  | 1146   |
| <b>Impact: Portal Island 1 Trestle/Dock Removal (97 Piles)</b>    |       |       |       |       |       |        |
| Refined Area (/km <sup>2</sup> ) .....                            | 1.38  | 1.38  | 1.38  | 1.38  | 1.38  | .....  |
| Driving Days .....                                                | 13    | 15    | 13    | 8     | 0     | .....  |
| Dolphin Harassments .....                                         | 12    | 14    | 18    | 12    | 0     | 56     |
| <b>Vibratory: Portal Island 1 Trestle/Dock Removal (97 Piles)</b> |       |       |       |       |       |        |
| Refined Area (/km <sup>2</sup> ) .....                            | 212   | 212   | 212   | 212   | 212   | .....  |
| Driving Days .....                                                | 13    | 15    | 13    | 8     | 0     | .....  |
| Dolphin Harassments .....                                         | 1737  | 2004  | 2756  | 1696  | 0     | 8193   |
| <b>Impact: Portal Island 2 Trestle Removal (34 Piles)</b>         |       |       |       |       |       |        |
| Refined Area (/km <sup>2</sup> ) .....                            | 1.32  | 1.32  | 1.32  | 1.32  | 1.32  | .....  |
| Driving Days .....                                                | 0     | 0     | 0     | 0     | 17    | .....  |
| Dolphin Harassments .....                                         | 0     | 0     | 0     | 0     | 15    | 15     |
| <b>Vibratory: Portal Island 2 Trestle Removal (34 Piles)</b>      |       |       |       |       |       |        |
| Refined Area (/km <sup>2</sup> ) .....                            | 202   | 202   | 202   | 202   | 202   | .....  |
| Driving Days .....                                                | 0     | 0     | 0     | 0     | 17    | .....  |
| Dolphin Harassments .....                                         | 0     | 0     | 0     | 0     | 2164  | 2164   |
| Total .....                                                       | ..... | ..... | ..... | ..... | ..... | 12,256 |

The total number of bottlenose dolphin Level B harassment events will be split between three bottlenose dolphin stocks: Western North Atlantic Southern Migratory Coastal; Western North Atlantic Northern Migratory Coastal; and NNCES. There is insufficient information to apportion the requested takes precisely to each of these three stocks present in the project

area. Given that most of the NNCES stock are found in the Pamlico Sound estuarine system, it is assumed that no greater than 200 of the takes will be from this stock. Since members of the Western North Atlantic Northern Migratory Coastal and Western North Atlantic Southern Migratory Coastal stocks are thought to occur in or near the project area in greater numbers, we

conservatively assume that no more than half of the remaining animals will belong to either of these stocks. Additionally, a subset of these takes would likely be comprised of Chesapeake Bay resident dolphins, although the size of that population is unknown. It is assumed that an animal will be taken once over a 24-hour period; however, the same individual

may be taken multiple times over the duration of the project. Therefore, the number of takes for each stock is assumed to overestimate the actual number of individuals that may be affected.

#### Harbor Porpoise

Harbor porpoises are known to occur in the coastal waters near Virginia Beach (Hayes *et al.* 2019), and although they have been reported on rare occasions in the Chesapeake Bay near the project area, they have not been seen by the Protected Species Observers in the PTST project area during the construction. Density data for this species within the project vicinity do not exist or were not calculated because sample sizes were too small to produce reliable estimates of density. Additionally, harbor porpoise sighting data collected by the U.S. Navy near Naval Station Norfolk and Virginia

Beach from 2012 to 2015 (Engelhaupt *et al.* 2014, 2015, 2016) did not produce high enough sample sizes to calculate densities.

One group of two harbor porpoises was seen during spring 2015 (Engelhaupt *et al.* 2016). Therefore, it is assumed that there are two harbor porpoises exposed to noise exceeding harassment levels each month during the spring (March–April) for a total of four harbor porpoises (*i.e.*, 1 group of 2 individuals per month  $\times$  2 months per year = 4 harbor porpoises). Harbor porpoises are not expected to be present in the summer, fall or winter. Harbor porpoises are members of the high-frequency hearing group which would have Level A harassment isopleths as large as 338 m during impact driving of 36" steel pile, while the Level B harassment zone is 736 m. Given the relatively large Level A harassment

zones for HF cetaceans during impact driving and a required shutdown zone of 200 m, NMFS will assume that 30 percent of porpoises are taken by Level A harassment. Therefore, NMFS proposes to authorize take of three porpoises by Level B harassment and one porpoise by Level A harassment.

#### Harbor Seal

The expected number of harbor seals in the project area was estimated using systematic, land and vessel-based survey data for in-water and hauled-out seals collected by the U.S. Navy at the CBBT rock armor and Portal Islands from November 2014 through April 2022 (Rees *et al.* 2016; Jones *et al.* 2018; Jones and Rees 2020; Jones and Rees 2021; Jones and Rees 2022; Jones and Rees 2023) and shown in table 10. The number of harbor seals sighted by month ranged from 0 to 170 individuals.

TABLE 10—SUMMARY OF HISTORICAL HARBOR SEAL SIGHTINGS BY MONTH FROM 2014 TO 2022 AT THE CHESAPEAKE BAY BRIDGE TUNNEL

| Month          | 2014  | 2015  | 2016 | 2017 | 2018 | 2019 | 2020 | 2021 | 2022 | Monthly average |
|----------------|-------|-------|------|------|------|------|------|------|------|-----------------|
| January .....  | ..... | ..... | 33   | 120  | 170  | 7    | 18   | 49   | 34   | 61.6            |
| February ..... | ..... | 39    | 80   | 106  | 159  | 21   | 0    | 43   | 14   | 57.7            |
| March .....    | ..... | 55    | 61   | 41   | 0    | 18   | 6    | 26   | 37   | 30.5            |
| April .....    | ..... | 10    | 1    | 3    | 3    | 4    | 0    | 6    | 1    | 3.5             |
| December ..... | 4     | 9     | 24   | 8    | 29   | 0    | 4    | 11   | 11   | 12.5            |

**Note:** Seal counts began in November 2014 and were collected for 9 field seasons (2014/2015, 2015/2016, 2016/2017, 2017/2018, 2018/2019, 2019/2020, 2020/2021, 2021/2022) ending in 2022. In January 2015, no surveys were conducted.

Seal density data are in the format of seal per unit time; therefore, seal take requests were calculated as total number of potential seals per pile driving day (8 hours) multiplied by the number of driving days per month. For example, in December seal density data is reported at 14.3 seals per day  $\times$  26 workdays in December, resulting in the potential of 372 instances of take for that month (table 11). The anticipated number of take events were summed across the months during which in-water pile

driving is planned. The largest Level A harassment isopleth for phocid species is 153 m which would occur when piles were being removed via impact hammer with a bubble curtain. The smallest Level A harassment zone is 1 m which would occur when piles are removed via vibratory hammer with a bubble curtain. NMFS is proposing to require a shutdown zone for harbor seals of 160 m during impact driving which would theoretically result in no take by Level A harassment. However, a small number

of harbor seals could enter into the shutdown zone unseen by a PSO and remain for sufficient duration to incur PTS. Given that harbor seals are common in the project area, NMFS assumed that a single harbor seal would experience Level A harassment during each in-water work day (80). Therefore, NMFS proposes to authorize the take of 80 harbor seals by Level A harassment and 2,634 harbor seals by Level B harassment for a total of 2,714 takes (table 11).

TABLE 11—CALCULATION OF THE NUMBER OF HARBOR SEAL TAKES

| Month               | Estimated seals per work day | Total pile driving days per month | Total number of requested takes |
|---------------------|------------------------------|-----------------------------------|---------------------------------|
| January 2024 .....  | 61.6                         | 15                                | 924                             |
| February 2024 ..... | 57.8                         | 18                                | 1,040                           |
| March 2024 .....    | 30.5                         | 13                                | 396.5                           |
| April 2024 .....    | 3.5                          | 8                                 | 28                              |
| December 2024 ..... | 12.5                         | 26                                | 325                             |
|                     |                              |                                   | 2,714                           |

#### Gray Seal

The number of gray seals expected to be present at the PTST project area was

estimated using the same methodology as was used for the harbor seal. Survey data collected by the U.S. Navy at the portal islands from 2015 through 2022

was utilized (Rees *et al.* 2016; Jones *et al.* 2018; Jones and Rees 2023). A maximum of 1 gray seal was seen during the months of February 2015, 2016, and

2022. Given this information NMFS assumed that a single gray seal would be taken per work day in February 2024. The anticipated numbers of monthly takes were calculated following the same approach as for harbor seals, and the monthly takes were then

summed (table 12). Although the project has not recorded any gray seal sightings to date, NMFS assumed that, over the duration of the project, a single gray seal could enter into the Level A harassment zone unseen by a PSO and remain for sufficient duration to incur PTS.

Therefore, NMFS is proposing to authorize the take of 1 gray seal by Level A harassment and 17 gray seals by Level B harassment for a total of 18 proposed takes.

TABLE 12—CALCULATION OF THE NUMBER OF GRAY SEAL TAKES

| Month               | Estimated seals per work day | Total pile driving days per month | Total number of requested takes |
|---------------------|------------------------------|-----------------------------------|---------------------------------|
| January 2024 .....  | 0                            | 15                                | 0                               |
| February 2024 ..... | 1                            | 18                                | 18                              |
| March 2024 .....    | 0                            | 13                                | 0                               |
| April 2024 .....    | 0                            | 8                                 | 0                               |
| December 2024 ..... | 0                            | 26                                | 0                               |
| Total .....         | .....                        | .....                             | 18                              |

Table 13 shows the take numbers proposed for authorization by NMFS as well as the percentage of each stock affected.

TABLE 13—PROPOSED TAKE BY STOCK AND HARASSMENT TYPE AS A PERCENTAGE OF STOCK ABUNDANCE

| Species                  | Stock                               | Level A harassment | Level B harassment | Total | Percent of stock |
|--------------------------|-------------------------------------|--------------------|--------------------|-------|------------------|
| Humpback Whale .....     | Gulf of Maine .....                 | 0                  | 6                  | 6     | 0.4              |
| Harbor Porpoise .....    | Gulf of Maine/Bay of Fundy .....    | 1                  | 3                  | 4     | <0.01            |
| Bottlenose Dolphin ..... | WNA Coastal, Northern Migratory ... | 0                  | 6,028              | 6,028 | 90.8             |
|                          | WNA Coastal, Southern Migratory ... | 0                  | 6,028              | 6,028 | 160.1            |
|                          | NNCES .....                         | 0                  | 200                | 200   | 24.3             |
| Harbor Seal .....        | Western North Atlantic .....        | 80                 | 2,634              | 2,714 | 4.4              |
| Gray Seal .....          | Western North Atlantic .....        | 1                  | 17                 | 18    | <0.01            |

The monitoring results from work conducted in 2020 and 2021 are found in table 14. The results demonstrate significantly fewer takes by harassment than were authorized, and it is

important to note that estimates in the previous IHAs as well as in this proposed IHA are based on conservative assumptions, including the size of identified harassment zones and the

abundance of marine mammals. However, we note that these assumptions represent the best available information in this case.

TABLE 14—MARINE MAMMAL MONITORING RESULTS FROM IHAS ISSUED IN 2020 AND 2021

| Species             | Stock                            | Level A harassments authorized in 2020 IHA | Level B harassments authorized in 2020 IHA | Observations in level A harassment zones under 2020 IHA | Observations in level B harassment zones under 2020 IHA | Level A harassments authorized in 2021 IHA | Level B harassments authorized in 2021 IHA | Observations in level A harassment zones under 2021 IHA | Observations in level B harassment zones under 2021 IHA |
|---------------------|----------------------------------|--------------------------------------------|--------------------------------------------|---------------------------------------------------------|---------------------------------------------------------|--------------------------------------------|--------------------------------------------|---------------------------------------------------------|---------------------------------------------------------|
| Humpback Whale.     | Gulf of Maine .....              | .....                                      | 12                                         | .....                                                   | .....                                                   | .....                                      | 12                                         | .....                                                   | .....                                                   |
| Harbor Porpoise     | Gulf of Maine/Bay of Fundy.      | 5                                          | 7                                          | .....                                                   | .....                                                   | 5                                          | 7                                          | .....                                                   | .....                                                   |
| Bottlenose Dolphin. | WNA Coastal, Northern Migratory. | 142                                        | 14,095                                     | .....                                                   | 5                                                       | .....                                      | 43,203                                     | .....                                                   | 394                                                     |
|                     | WNA Coastal, Southern Migratory. | 142                                        | 14,095                                     | .....                                                   | .....                                                   | .....                                      | 43,203                                     | .....                                                   | .....                                                   |
|                     | NNCES .....                      | 2                                          | 198                                        | .....                                                   | .....                                                   | .....                                      | 250                                        | .....                                                   | .....                                                   |
| Harbor Seal .....   | Western North Atlantic.          | 1,296                                      | 2,124                                      | .....                                                   | .....                                                   | 1,154                                      | 1,730                                      | .....                                                   | .....                                                   |
| Gray Seal .....     | Western North Atlantic.          | 1                                          | 3                                          | .....                                                   | .....                                                   | 16                                         | 24                                         | .....                                                   | .....                                                   |

### 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 (latter not applicable for this action). 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. 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.

CTJV must conduct training between construction supervisors, crews, marine mammal monitoring team, and relevant CTJV staff prior to the start of all pile driving activities and when new personnel join the work, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood.

Construction supervisors and crews, PSOs, and relevant CTJV staff must avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 10 m of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions, as necessary to avoid direct physical interaction. If an activity is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been

visually confirmed beyond the shutdown zone indicated in table 15 or 15 minutes have passed without re-detection of the animal.

Construction activities must be halted upon observation of a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met entering or within the harassment zone.

**Shutdown Zones**—For all pile driving activities, CTJV would implement shutdowns within designated zones. 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 mammal (or in anticipation of an animal entering the defined area). Shutdown zones vary based on the activity type and marine mammal hearing group (table 7). In most cases, the shutdown zones are based on the estimated Level A harassment isopleth distances for each hearing group. However, in cases where it would be challenging to detect marine mammals at the Level A harassment isopleth, (e.g., for high frequency cetaceans and phocids during impact driving activities), smaller shutdown zones have been proposed (table 15).

TABLE 15—SHUTDOWN AND MONITORING ZONES  
[Meters]

| Method and piles                            | LF cetaceans | MFcetaceans | HF cetaceans | Phocids | Monitoring zone |
|---------------------------------------------|--------------|-------------|--------------|---------|-----------------|
| 36-in Impact (with bubble Curtain) .....    | 285          | 20          | 200          | 160     | 736             |
| 36-in Vibratory (with bubble curtain) ..... | 10           | 10          | 15           | 10      | 10,000          |

**Protected Species Observers**—The number and placement of PSOs during all construction activities (described in the Proposed Monitoring and Reporting section as well as the Marine Mammal Monitoring Plan) would ensure that the entire shutdown zone is visible. A minimum of one PSO must be employed for all driving activities and placed at a location providing, at a minimum, adequate views of the established shutdown zones.

**Monitoring for Level B Harassment**—PSOs would monitor the shutdown zones and beyond to the extent that PSOs can see. Monitoring beyond the shutdown zones 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. If a marine mammal enters the Level B harassment zone (or Level A harassment zone if larger than

the Level B harassment zone), PSOs will document the marine mammal's presence and behavior.

**Pre and Post-Activity Monitoring**—Prior to the start of daily in-water construction activity, or whenever a break in pile driving of 30 minutes or longer occurs, PSOs will observe the shutdown, Level A harassment, and Level B harassment zones for a period of 30 minutes. Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine that the shutdown zones are clear of marine mammals. If the shutdown zone is obscured by fog or poor lighting conditions, in-water construction activity will not be initiated until the entire shutdown zone is visible. Pile driving activities may commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals. If a marine mammal is

observed entering or within shutdown zones, pile driving activities must be delayed or halted. If pile driving is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or 15 minutes have passed for all other species without re-detection of the animal.

**Soft Start**—The use of soft-start procedures are believed to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, contractors would be required to provide an initial set of three strikes from the hammer at reduced energy, with each strike followed by a 30-second waiting period. This procedure would be conducted a total of three times before impact pile driving

begins. Soft start would be implemented at the start of each day's impact pile driving activities and at any time following cessation of impact pile driving activities for a period of 30 minutes or longer. Soft start is not required during vibratory pile driving activities.

**Bubble Curtain**—Use of a bubble curtain during impact and vibratory pile driving in water depths greater than 3 m (10 ft) would be required. It must be operated as necessary to achieve optimal performance, and there can be no reduction in performance attributable to faulty deployment. At a minimum, CTJV must adhere to the following performance standards: 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 substrate for the full circumference of the ring, and the weights attached to the bottom ring shall ensure 100 percent substrate contact. No parts of the ring or other objects shall prevent full substrate contact. Air flow to the bubblers 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**—Marine mammal monitoring must be conducted in accordance with the Marine Mammal Monitoring and Mitigation Plan. Marine mammal monitoring during pile driving activities must be conducted by NMFS-approved PSOs in a manner consistent with the following:

- PSOs must be independent of the activity contractor (for example, employed by a subcontractor), and have no other assigned tasks during monitoring periods;

- At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization;

- Other PSOs may substitute other relevant experience, education (degree in biological science or related field) or training for experience performing the duties of a PSO during construction activities pursuant to a NMFS-issued incidental take authorization.

- PSOs must be approved by NMFS prior to beginning any activity subject to this IHA.

PSOs should also have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including 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, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); 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.

Visual monitoring will be conducted by a minimum of one trained PSO positioned at a suitable vantage point that will allow coverage of the identified harassment zones. The Portal Islands and associated berms would constrain the ensonified area to only one side (*i.e.*, east or west) of the bridge tunnel structure. Additionally, CTJV expressed concern that since they will only be using one drill for about two hours per week, it will be difficult to secure multiple observers willing to commit to the PTST project.

Monitoring will be conducted 30 minutes before, during, and 30 minutes after all in water construction activities. In addition, PSOs will record all incidents of marine mammal occurrence, regardless of distance from activity, and will document any behavioral reactions in concert with distance from piles being removed. Pile driving activities include the time to 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.

### Reporting

CTJV will submit a draft marine mammal monitoring report to NMFS within 90 days after the completion of pile driving activities, or 60 days prior to a requested date of issuance of any future IHAs for the project, or other projects at the same location, whichever comes first. The marine mammal monitoring report will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report will include:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period, including: (1) The number and type of piles that were removed (e.g., impact,

vibratory); and (2) Total duration of driving time for each pile (vibratory) and number of strikes for each pile (impact);

- 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: (1) Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; (2) Time of sighting; (3) 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; (4) Distance and location of each observed marine mammal relative to the pile being removed for each sighting; (5) Estimated number of animals (min/max/best estimate); (6) Estimated number of animals by cohort (adults, juveniles, neonates, group composition, *etc.*); (7) Animal's closest point of approach and estimated time spent within the harassment zone; (8) 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; and,

- Detailed information about implementation of any mitigation (*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. The Holder must submit all PSO data electronically in a format that can be queried such as a spreadsheet or database (*i.e.*, digital images of data sheets are not sufficient).

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Holder must report the incident to the Office of Protected Resources (OPR),

NMFS (*PR.ITP.MonitoringReports@noaa.gov* and *ITP.pauline@noaa.gov*) and to the Greater Atlantic Regional Stranding Coordinator (978–282–8478) as soon as feasible. If the death or injury was clearly caused by the specified activity, the Holder must immediately cease the activities until NMFS OPR is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of this IHA. The Holder must not resume their activities until notified by NMFS. The report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

#### 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 majority of our analysis applies to all the species listed in table 13, given that many of the anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. Where there are meaningful differences between species or stocks, or groups of species, in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, they are described independently in the analysis below.

Impact and vibratory pile driving have the potential to disturb or displace marine mammals. Specifically, the project activities may result in take, in the form of Level A and Level B harassment from underwater sounds generated from pile driving.

The takes from Level A and Level B harassment would be due to potential behavioral disturbance, TTS, and PTS. No serious injury or mortality is anticipated given the nature of the activity and measures designed to minimize the possibility of injury to marine mammals. The potential for harassment is minimized through the construction method and the implementation of the planned mitigation measures (see Proposed Mitigation section).

We anticipate that harbor porpoises, harbor seals and gray seals may sustain some limited Level A harassment in the form of auditory injury. However, animals in these locations that experience PTS would likely only receive slight PTS, *i.e.*, minor degradation of hearing capabilities within regions of hearing that align most completely with the energy produced by pile driving, *i.e.*, the low-frequency region below 2 kHz, not severe hearing impairment or impairment in the regions of greatest hearing sensitivity. If hearing impairment occurs, it is most likely that the affected animal would lose a few decibels in its hearing sensitivity, which in most cases is not likely to meaningfully affect its ability to forage and communicate with conspecifics. Impacts to individual fitness, reproduction, or survival are unlikely. As described above, we expect that marine mammals would be likely to move away from a sound source that represents an aversive stimulus, especially at levels that would be expected to result in PTS, given

sufficient notice through use of soft start.

Behavioral responses of marine mammals to pile driving at the project site, if any, are expected to be mild and temporary. Marine mammals within the Level B harassment zone may not show any visual cues they are disturbed by activities or could become alert, avoid the area, leave the area, or display other mild responses that are not observable such as changes in vocalization patterns. Given the short duration of noise-generating activities per day, any harassment would be temporary. There are no other areas or times of known biological importance for any of the affected species.

We acknowledge the existence and concern about the ongoing humpback whale UME. We have no evidence that this project is likely to result in vessel strikes (a major correlate of the UME) and marine construction projects in general involve the use of slow-moving vessels, such as tugs towing or pushing barges, or smaller work boats maneuvering in the vicinity of the construction project. These vessel types are not typically associated with vessel strikes resulting in injury or mortality. More generally, the UME does not yet provide cause for concern regarding population-level impacts for humpback whales. Despite the UME, the West Indies breeding population or DPS, remains healthy.

For all species and stocks, take would occur within a limited, confined area (adjacent to the CBBT) of the stock's range and the amount of take proposed to be authorized is extremely small when compared to stock abundance. In addition, it is unlikely that minor noise effects in a small, localized area of habitat would have any effect on the stocks' ability to recover. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities will have only minor, short-term effects on individuals. The specified activities are not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

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 the species or stock through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or authorized;
- Authorized Level A harassment would be very small amounts and of low degree;

- No important habitat areas have been identified within the project area;
- For all species, the specified project area in Chesapeake Bay is a very small and peripheral part of their range;
- CTJV would implement mitigation measures such as bubble curtains, soft-starts, and shut downs; and
- Monitoring reports from similar work in Chesapeake Bay have documented little to no effect on individuals of the same species impacted by the specified activities.

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 less 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.

The amount of take NMFS proposes to authorize is below one third of the estimated stock abundance for humpback whale, harbor porpoise, gray seal, and harbor seal (in fact, take is no more than 6 percent of the abundance of the affected stocks, see table 13). This is likely a conservative estimate because they assume all takes are of different individual animals which is likely not the case. Some individuals may return multiple times in a day, but PSOs would count them as separate takes if they cannot be individually identified.

There are three bottlenose dolphin stocks that could occur in the project area. Therefore, the estimated 12,256 dolphin takes by Level B harassment would likely be split among the western North Atlantic northern migratory

coastal stock, western North Atlantic southern migratory coastal stock, and NNCES stock. Based on the stocks' respective occurrence in the area, NMFS estimated that there would be no more than 200 takes from the NNCES stock, representing 24.3 percent of that population, with the remaining takes split evenly between the northern and southern migratory coastal stocks. Based on consideration of various factors described below, we have determined the numbers of individuals taken would comprise less than one-third of the best available population abundance estimate of either coastal migratory stock. Detailed descriptions of the stocks' ranges have been provided in Description of Marine Mammals in the Area of Specified Activities.

Both the northern migratory coastal and southern migratory coastal stocks have expansive ranges and they are the only dolphin stocks thought to make broad-scale, seasonal migrations in coastal waters of the western North Atlantic. Given the large ranges associated with these two stocks it is unlikely that large segments of either stock would approach the project area and enter into the Chesapeake Bay. The majority of both stocks are likely to be found widely dispersed across their respective habitat ranges and unlikely to be concentrated in or near the Chesapeake Bay.

Furthermore, the Chesapeake Bay and nearby offshore waters represent the boundaries of the ranges of each of the two coastal stocks during migration. The northern migratory coastal stock is found during warm water months from coastal Virginia, including the Chesapeake Bay and Long Island, New York. The stock migrates south in late summer and fall. During cold water months dolphins may be found in coastal waters from Cape Lookout, North Carolina, to the North Carolina/Virginia. During January–March, the southern migratory coastal stock appears to move as far south as northern Florida. From April to June, the stock moves back north to North Carolina. During the warm water months of July–August, the stock is presumed to occupy coastal waters north of Cape Lookout, North Carolina, to Assateague, Virginia, including the Chesapeake Bay. There is likely some overlap between the northern and southern migratory stocks during spring and fall migrations, but the extent of overlap is unknown.

The Bay and waters offshore of the mouth are located on the periphery of the migratory ranges of both coastal stocks (although during different seasons). Additionally, each of the migratory coastal stocks are likely to be

located in the vicinity of the Bay for relatively short timeframes. Given the limited number of animals from each migratory coastal stock likely to be found at the seasonal migratory boundaries of their respective ranges, in combination with the short time periods (~2 months) animals might remain at these boundaries, it is reasonable to assume that takes are likely to occur only within some small portion of either of the migratory coastal stocks.

Both migratory coastal stocks likely overlap with the NNCES stock at various times during their seasonal migrations. The NNCES stock is defined as animals that primarily occupy waters of the Pamlico Sound estuarine system (which also includes Core, Roanoke, and Albemarle sounds, and the Neuse River) during warm water months (July–August). Members of this stock also use coastal waters ( $\leq 1$  km from shore) of North Carolina from Beaufort north to Virginia Beach, Virginia, including the lower Chesapeake Bay. Comparison of dolphin photo-identification data confirmed that limited numbers of individual dolphins observed in Roanoke Sound have also been sighted in the Chesapeake Bay (Young, 2018). Like the migratory coastal dolphin stocks, the NNCES stock covers a large range. The spatial extent of most small and resident bottlenose dolphin populations is on the order of 500 km<sup>2</sup>, while the NNCES stock occupies over 8,000 km<sup>2</sup> (LeBrecque *et al.*, 2015). Given this large range, it is again unlikely that a preponderance of animals from the NNCES stock would depart the North Carolina estuarine system and travel to the northern extent of the stock's range and enter into the Bay. However, recent evidence suggests that there is likely a small resident community of NNCES dolphins of indeterminate size that inhabits the Chesapeake Bay year-round (Eric Patterson, Personal Communication).

Many of the dolphin observations in the Bay are likely repeated sightings of the same individuals. The Potomac-Chesapeake Dolphin Project has observed over 1,200 unique animals since observations began in 2015. Re-sightings of the same individual can be highly variable. Some dolphins are observed once per year, while others are highly regular with greater than 10 sightings per year (Mann, Personal Communication). Similarly, using available photo-identification data, Engelhaupt *et al.* (2016) determined that specific individuals were often observed in close proximity to their original sighting locations and were observed multiple times in the same season or same year. Ninety-one percent of re-

sighted individuals (100 of 110) in the study area were recorded less than 30 km from the initial sighting location. Multiple sightings of the same individual would considerably reduce the number of individual animals that are taken by harassment. Furthermore, the existence of a resident dolphin population in the Bay would increase the percentage of dolphin takes that are actually re-sightings of the same individuals.

In summary and as described above, the following factors primarily support our preliminary determination regarding the incidental take of small numbers of a species or stock:

- The take of marine mammal stocks authorized for take comprises less than 10 percent of any stock abundance (with the exception of bottlenose dolphin stocks);
- Potential bottlenose dolphin takes in the project area are likely to be allocated among three distinct stocks;
- Bottlenose dolphin stocks in the project area have extensive ranges and it would be unlikely to find a high percentage of any one stock concentrated in a relatively small area such as the project area or the Bay;
- The Bay represents the migratory boundary for each of the specified dolphin stocks and it would be unlikely to find a high percentage of any stock concentrated at such boundaries;
- Many of the takes would be repeats of the same animal and it is likely that a number of individual animals could be taken 10 or more times.

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

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

#### 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.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

#### Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to CTJV for conducting construction activities as part of the PTST project near Virginia Beach, VA from January through December 2024 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 activities associated with the PTST 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 21, 2023.

**Kimberly Damon-Randall,**

*Director, Office of Protected Resources,  
National Marine Fisheries Service.*

[FR Doc. 2023-28514 Filed 12-26-23; 8:45 am]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### Draft Revised Management Plan for the Apalachicola National Estuarine Research Reserve

**AGENCY:** Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

**ACTION:** Request for comments.

**SUMMARY:** The National Oceanic and Atmospheric Administration (NOAA) is soliciting comments from the public regarding a proposed revision of the management plan for the Apalachicola National Estuarine Research Reserve. A management plan provides a framework for the direction and timing of a reserve's programs; allows reserve managers to assess a reserve's success in meeting its goals and to identify any necessary changes in direction; and is used to guide programmatic evaluations of the reserve. Plan revisions are required of each reserve in the National Estuarine Research Reserve System at least every five years. This revised plan

is intended to replace the plan approved in 2015.

**DATES:** Comments must be received at the appropriate address (see **ADDRESSES**) on or before January 26, 2024.

**ADDRESSES:** The draft revised management plan can be downloaded or viewed at: <https://floridadep.gov/ANERR>. The document is also available by sending a written request to the point of contact identified below (see **FOR FURTHER INFORMATION CONTACT**).

You may submit comments by any of the following methods:

**Electronic Submission:** Submit all electronic public comments by email to [matt.chasse@noaa.gov](mailto:matt.chasse@noaa.gov). Include "Comments on draft Apalachicola Management Plan" in the message's subject line. NOAA will accept anonymous comments, however, the written comments NOAA receives are considered part of the public record, and the entirety of the comment, including the name of the commenter, email address, attachments, and other supporting materials, will be publicly accessible. Sensitive personally identifiable information, such as account numbers and Social Security numbers, should not be included with the comment. Comments that are not related to the Management Plan for the Apalachicola National Estuarine Research Reserve, or that contain profanity, vulgarity, threats, or other inappropriate language will not be considered.

**FOR FURTHER INFORMATION CONTACT:** Matt Chasse of NOAA's Office for Coastal Management by email at [matt.chasse@noaa.gov](mailto:matt.chasse@noaa.gov) or by phone at (410) 570-1020.

**SUPPLEMENTARY INFORMATION:** Pursuant to 15 CFR 921.33(c), Florida must revise the management plan for the Apalachicola Research Reserve at least every five years. If approved by NOAA, the Apalachicola Research Reserve's revised plan will replace the plan previously approved in 2015.

Management plans outline a reserve's strategic goals and objectives; administrative structure; programs for conducting research and monitoring, education, and training; resource protection, restoration, and manipulation plans; public access and visitor use plans; consideration for future land acquisition; and facility development to support reserve operations. In particular, this draft of the revised management plan focuses on addressing specific coastal management issues including hydrological changes in the Apalachicola River and floodplain; coastal development; and climate change and extreme events.

In developing the strategic plan, the reserve recognized that our natural environment and the human communities were inextricably linked. Likewise, the reserve identified a common theme, either prospective or continuing, among the issues discussed in the plan. This common theme informs the planned actions related to conservation or protection and restoration. Resilience is another common theme that is weaved throughout the plan.

The Research and Monitoring Program aims to expand its understanding of the ecological processes related to the Apalachicola River and watershed. This will be achieved through continuous monitoring of weather, climate, sea level, and water quality data to provide and maintain baseline ecological status for the Apalachicola estuary. The program plans to develop new research initiatives and monitoring projects to fill gaps in the understanding of key ecosystem functions related to pollutants, habitats, and diversity. The program plans to continue being a central player in gathering and applying scientific information regarding the Apalachicola River and Bay system, and its efforts have contributed to the protection and management of this unique and valuable ecosystem. The program will also continue summarizing existing scientific information related to pollutants, habitats, and biological diversity to improve our understanding of the reserve and its ecology.

Stewardship of the reserve is accomplished by actively managing resources that the reserve is directly responsible for, and by influencing the activities of others within and adjacent to reserve-managed areas. The reserve's key land and water habitats are influenced by upstream water quality and quantity issues, making the Apalachicola Research Reserve especially conscious of potential environmental changes associated with off-site activities. As a result, the reserve works to ensure that the most effective and efficient techniques are utilized in reserve resource management activities.

The Education and Outreach Program efforts include on-site and off-site education activities that prioritize in-field studies for students and teachers; development and distribution of various media; dissemination of information at local events; recruitment and management of volunteers; and training workshops for local citizens and decision-makers. Programs target participants from all ages and walks of life while recognizing the local community as key stakeholders. The

reserve is able to offer programming for K–12 students that provides for a continuity of content across the entire academic experience of local students.

The reserve's Coastal Training Program works with decision-makers, appointed leaders, and their staff to preserve the Apalachicola Bay and River by offering formal trainings, skill-building opportunities, tools, and technical assistance. These resources enable these groups to continue to implement sound policies based on science that protect the environment. Regular engagement with decision-makers strengthens partnerships, furthers the reserve's assessment of needs, and forges positive working relationships to increase stewardship and resilience throughout the reserve.

The Apalachicola Research Reserve is a complex of independently managed subunits that support an array of recreational and commercial activities and are impacted by water use policies of three states. This updated management plan aligns with similar plans being implemented by the land-managing partners within and adjacent to the reserve boundaries. Although the reserve boundaries are not changing in this management plan update, a possible future boundary expansion is in preliminary discussions with partners. Also, in 2020, the reserve completed the redesignation process for the Apalachicola Biosphere region as part of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) Man and the Biosphere program. The revised management plan, once approved, would serve as the guiding document for the 234,715-acre (950 sq. km) research reserve for the next five years.

NOAA's Office for Coastal Management analyzes the environmental impacts of the proposed approval of this draft revised management plan in accordance with the National Environmental Policy Act (NEPA) of 1969, as amended, 42 U.S.C. 4321 *et seq.*, and the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA (40 CFR 1500–1508). The public is invited to comment on the draft revised management plan. NOAA will take these comments into consideration in deciding whether to approve the draft revised management plan in whole or in part.

*Authority:* 16 U.S.C. 1451 *et seq.*; 15 CFR 921.33.

**Keelin S. Kuipers,**

*Deputy Director, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration.*

[FR Doc. 2023–28523 Filed 12–26–23; 8:45 am]

**BILLING CODE 3510–NK–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Resident Perceptions of Offshore Wind Energy Development Off the Oregon Coast and Along the Gulf of Mexico

**AGENCY:** National Oceanic & Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of information collection, request for comment.

**SUMMARY:** The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

**DATES:** To ensure consideration, comments regarding this proposed information collection must be received on or before February 26, 2024.

**ADDRESSES:** Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at [NOAA.PRA@noaa.gov](mailto:NOAA.PRA@noaa.gov). Please reference OMB Control Number 0648–0744 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or specific questions related to collection activities should be directed to Dr. Theresa L Goedeke, Supervisory Social Scientist, 1305 East-West Hwy., SSMC 4, Silver Spring, MD 2091, Email: [theresa.goedeke@noaa.gov](mailto:theresa.goedeke@noaa.gov), Ph: (240) 653–9143.

**SUPPLEMENTARY INFORMATION:**

## I. Abstract

This is a request for revision to an existing information collection. Pursuant to E.O. 14057 (Executive Order on Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability), the Outer Continental Shelf Land Act, the National Environmental Policy Act, and the Coastal Zone Management Act, the requested revision will expand the existing data collection, which is currently focused on coastal Oregon, by adding a new geographical location, specifically, coastal Texas and Louisiana along the Gulf of Mexico.

The Bureau of Ocean Energy Management (BOEM) held its first leasing auction for the Gulf of Mexico in August 2023. BOEM finalized four Wind Energy Areas (WEAs) in the Gulf of Mexico in October 2023. Outside of official public engagement forums, preferences about offshore wind energy development generally remain unknown for members of the public, as well as for groups who may not perceive themselves as stakeholders. Failure to gain the perspective of communities regarding potential benefits or impacts is problematic, particularly when latent stakeholders to local projects emerge late in the planning process.

The National Ocean Service (NOS) proposes to expand collection of data on the opinions, values, and attitudes relative to offshore wind energy development to coastal residents of Texas and Louisiana along the Gulf of Mexico in addition to coastal Oregon. Respondents (age 18 years and older) will be randomly sampled from households in 39 coastal counties in Texas and Louisiana. This information will be used by NOAA, BOEM, and others to understand what is important to communities; understand how differing values and perceptions across communities influence local receptivity to proposed development; and improve communication efforts targeted to residents, enabling agencies to more effectively and efficiently direct outreach and community inclusion activities. NOAA has a vested interest in offshore wind energy development, from many perspectives, including as it relates to the resilience, well-being, and sustainability of coastal communities.

## II. Method of Collection

Information will be collected with a combination of mail recruitment with push-to-web and mail-back survey instruments.

## III. Data

OMB Control Number: 0648–0744.

*Form Number(s)*: None.

*Type of Review*: Regular Submission. Revision of a currently approved collection.

*Affected Public*: Individuals or households.

*Estimated Number of Respondents*: 9,665.

*Estimated Time per Response*: Focus groups: 1 hour; Questionnaire: 20 minutes.

*Estimated Total Annual Burden Hours*: 3,286.

*Estimated Total Annual Cost to Public*: \$0.

*Respondent's Obligation*: Voluntary.

*Legal Authority*: NOAA's Programmatic Authority—Integrated Coastal and Ocean Observation System Act (33 U.S.C. 3601 *et seq.*); BOEM's Programmatic Authority—Outer Continental Shelf Lands Act (43 U.S.C. 1346).

#### IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) 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; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. 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 may 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.

**Sheleen Dumas,**

*Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.*

[FR Doc. 2023–28504 Filed 12–26–23; 8:45 am]

**BILLING CODE 3510-JE-P**

## DEPARTMENT OF COMMERCE

### National Telecommunications and Information Administration

#### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Public Wireless Supply Chain Innovation Fund Grant Program Forms

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on October 4, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

*Agency*: National Telecommunications and Information Administration (NTIA), Commerce.

*Title*: Public Wireless Supply Chain Innovation Fund Grant Program Forms. *OMB Control Number*: 0660–0053.

*Form Number(s)*: None.

*Type of Request*: Revision of a current information collection.

*Number of Respondents*: 18 hours for Baseline and Performance Progress Reports; 100 hours for Budget Submission Form.

*Average Hours Per Response*: 33.22.

*Burden Hours*: 1,856 hours.

*Needs and Uses*: With this information collection, NTIA will be able to monitor the grant recipients' spending habits and activities. In the absence of collecting this information, NTIA would fail to evaluate the grant recipients' progress toward the grant program priority areas and program goals. Moreover, without these reports, the grants could be the subject of waste, fraud, and abuse of Federal funds. Therefore, it is necessary for NTIA to collect information using the Performance Progress Report (PPR) form and Baseline Report.

For the budget submission form, NTIA intends to use the information collected (1) to evaluate whether an applicant is eligible for a grant; (2) to evaluate applications by peer/expert reviewers against objective criteria; and (3) to collect corroborative information, as applicable, from applicants deemed highly qualified. NTIA also intends to

use information collected from the application as baseline information after award of the grant to evaluate the grantee's progress toward completion of the objectives for which the grant was made.

*Affected Public*: Grant award recipients consisting of for-profit companies, non-profit companies, institutions of higher education, industry groups, and consortia including two or more such entities.

*Frequency*: One-time (Baseline and Budget Submission Forms) and bi-annual (Performance Progress Report).

*Respondent's Obligation*: Mandatory.

*Legal Authority*: Section 9202(a)(1) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116–283, 134 Stat. 3388 (Jan. 1, 2021).

This information collection request may be viewed at [www.reginfo.gov](http://www.reginfo.gov). Follow the instructions to view the Department of Commerce collections currently under review by OMB.

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](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 and entering either the title of the collection or the OMB Control Number 0660–0053.

**Sheleen Dumas,**

*Department PRA Clearance Officer, Office of the Under Secretary of Economic Affairs, Commerce Department.*

[FR Doc. 2023–28581 Filed 12–26–23; 8:45 am]

**BILLING CODE 3510–60-P**

## DEPARTMENT OF COMMERCE

### National Telecommunications and Information Administration

#### Commerce Spectrum Management Advisory Committee

**AGENCY**: National Telecommunications and Information Administration, U.S. Department of Commerce.

**ACTION**: Call for applications to serve on a Federal advisory committee.

**SUMMARY**: The National Telecommunications and Information Administration (NTIA) is seeking applications to serve on the Department of Commerce Spectrum Management Advisory Committee (“CSMAC” or “committee”) for a two-year term. The CSMAC provides advice to the Assistant

Secretary for Communications and Information and NTIA Administrator on spectrum policy matters.

**DATES:** Applications must be postmarked or electronically transmitted on or before January 31, 2024.

**ADDRESSES:** Persons may submit applications, with the information specified below, to Antonio Richardson, Designated Federal Officer, by email to [arichardson@ntia.gov](mailto:arichardson@ntia.gov), or by U.S. mail or commercial delivery service to Office of Spectrum Management, National Telecommunications and Information Administration, 1401 Constitution Avenue NW, Room 4600, Washington, DC 20230.

**FOR FURTHER INFORMATION CONTACT:** Antonio Richardson at (202) 482-4156 or [arichardson@ntia.gov](mailto:arichardson@ntia.gov).

**SUPPLEMENTARY INFORMATION:** The Commerce Spectrum Management Advisory Committee is chartered by the Department of Commerce under the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2, and pursuant to section 105(b) of the National Telecommunications and Information Administration Organization Act, as amended, 47 U.S.C. 904(b). The committee will continue as provided in Executive Order 14109, effective September 29, 2023. The Department of Commerce re-chartered the CSMAC on November 21, 2023, for a two-year period. The CSMAC advises the Assistant Secretary of Commerce for Communications and Information on a broad range of issues regarding spectrum policy. In particular, the current charter calls for the committee to provide advice and recommendations on needed reforms to domestic spectrum policies and management to: (1) license radio frequencies in a way that maximizes their public benefit; (2) keep wireless networks as open to innovation as possible; and (3) make wireless services available to all Americans. The CSMAC functions solely as an advisory body in compliance with the FACA. Additional information about the CSMAC and its activities may be found at <https://www.ntia.gov/category/csmac>.

Under the terms of the committee's charter, it will have no fewer than five (5) members and no more than thirty (30) members, who serve in the capacity of Special Government Employee (SGE). As SGEs, members must comply with certain Federal conflict-of-interest statutes and ethics regulations, including some financial disclosure requirements. Members will not receive compensation or reimbursement for travel or for per diem expenses. No

member may be a registered Federal lobbyist, pursuant to the Lobbying Disclosure Act of 1995 (codified at 2 U.S.C. 1601 *et seq.*). See Office of Management and Budget, "Revised Guidance on Appointment of Lobbyists to Federal Advisory Committees, Boards, and Commissions", 79 FR 47482 (Aug. 13, 2014). No member may be an agent of a foreign principal required to register pursuant to the Foreign Agents Registration Act of 1938, as amended (codified at 22 U.S.C. 611 *et seq.*).

The Secretary of Commerce appoints members of the committee, who serve at the Secretary's pleasure and discretion for up to a two-year term and may be reappointed for additional terms. NTIA currently seeks applicants for a new two-year term that will commence approximately in June 2024 and continue for two years from that date, subject to the anticipated timely renewal of the committee's charter or its termination by proper authority.

The committee's membership will be fairly balanced in terms of the points of view represented by members and the functions to be performed. Accordingly, its membership will reflect a cross-section of interests in spectrum management and policy, including non-Federal spectrum users; State, regional, and local sectors; technology developers and manufacturers; academia; civil society; and service providers with customers in both domestic and international markets. A description of factors to be considered in determining each applicant's expertise is contained in the committee's Membership Balance Plan, available at [https://www.ntia.gov/sites/default/files/2023-12/csmac-membership\\_balance\\_plan.pdf](https://www.ntia.gov/sites/default/files/2023-12/csmac-membership_balance_plan.pdf).

NTIA seeks applicants with strong technical and engineering knowledge and experience, familiarity with commercial or private wireless technologies and associated businesses, or expertise with specific applications of wireless technologies. The Secretary may consider factors including, but not limited to, educational background, past work or academic accomplishments, and the industry sector in which a member is currently or previously employed. All appointments are made without discrimination on the basis of age, ethnicity, gender, sexual orientation, disability, cultural, religious, or socioeconomic status. A diverse membership of the Committee assures expertise reflecting the breadth of the Committee's responsibilities and, where possible, the Secretary will also consider the ethnic, racial, and gender diversity and various abilities of the United States population.

Each application must include the applicant's full name, address, telephone number, and email address, along with a summary of the applicant's qualifications that identifies, with specificity, how his or her education, training, experience, expertise, or other factors would support the CSMAC's work and how his or her participation would help achieve the balance factors described above. Each application must also include a detailed resume or curriculum vitae.

**Stephanie Weiner,**

*Chief Counsel, National Telecommunications and Information Administration.*

[FR Doc. 2023-28558 Filed 12-26-23; 8:45 am]

**BILLING CODE 3510-10-P**

## DEPARTMENT OF COMMERCE

### National Telecommunications and Information Administration 2024 NTIA Spectrum Policy Symposium

**AGENCY:** National Telecommunications and Information Administration, Department of Commerce.

**ACTION:** Notice of public meeting.

**SUMMARY:** The National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce, will host a public symposium on February 1, 2024, focusing on implementation of the National Spectrum Strategy, which the Executive Office of the President released on November 13, 2023.

**DATES:** The symposium will be held on February 1, 2024, from 9:00 a.m. to 4:30 p.m., Eastern Standard Time (EST).

**ADDRESSES:** The symposium will take place at the National Press Club, located at 529 14th St. NW, Washington, DC 20045. The event also will be webcast through the NTIA website at <https://www.ntia.gov/page/ntia-spectrum-policy-symposium>.

**FOR FURTHER INFORMATION CONTACT:** John Alden, Telecommunications Specialist, Office of Spectrum Management, NTIA, at (202) 482-8046 or [spectrumsymposium@ntia.gov](mailto:spectrumsymposium@ntia.gov). Please direct media inquiries to NTIA's Office of Public Affairs, (202) 482-7002; email: [press@ntia.gov](mailto:press@ntia.gov).

**SUPPLEMENTARY INFORMATION:** NTIA serves as the president's principal advisor on telecommunications policies and manages the use of the radio-frequency spectrum by federal agencies. See 47 U.S.C. 902(b)(2). NTIA is hosting a symposium to focus on implementing the National Spectrum Strategy released by the Executive Office of the President on November 13, 2023. The Strategy

was accompanied by a *Presidential Memorandum* titled “Modernizing United States Spectrum Policy and Establishing a National Spectrum Strategy,” which calls for the Secretary of Commerce, acting through NTIA, to publish an Implementation Plan for the Strategy. This will chart the course for federal agency actions, pursuant to the *Presidential Memorandum*, to further the policy objectives stated in the Strategy.

The strategic objectives in the Strategy are grouped under four “pillars” for further action:

- *Pillar One:* A spectrum pipeline to ensure U.S. leadership in advanced and emerging technologies;
- *Pillar Two:* Collaborative long-term planning to support the nation’s evolving spectrum needs;
- *Pillar Three:* Unprecedented spectrum innovation, access, and management through technology development; and
- *Pillar Four:* Expanded spectrum expertise and elevated national awareness.

Speakers from the Department of Commerce, the Executive Office of the President, the Federal Communications Commission and Congress have been invited to provide keynote remarks. Panelists are expected to include participants from the FCC, Executive Branch agencies, and the private sector. Prior to the symposium event, NTIA will post detailed program information on its website: [www.ntia.gov](http://www.ntia.gov).

The symposium is open to the public and members of the press to attend or to view through a webcast available on the NTIA website. While it is not required, NTIA asks that online attendees provide registration information prior to the event. This information will include names, email addresses, and organizations (optional). Registration information, the agenda, meeting updates, if any, and other relevant documents will be available on NTIA’s website.

The event webcast will be close-captioned. Individuals requiring special accommodations, such as sign language interpretation or other ancillary aids, should notify Mr. Alden at the contact information listed above at least ten (10) business days before the event.

**Stephanie Weiner,**

*Chief Counsel, National Telecommunications and Information Administration.*

[FR Doc. 2023–28564 Filed 12–26–23; 8:45 am]

**BILLING CODE 3510–60–P**

## COMMODITY FUTURES TRADING COMMISSION

**RIN 3038–AF40**

### Commission Guidance Regarding the Listing of Voluntary Carbon Credit Derivative Contracts; Request for Comment

**AGENCY:** Commodity Futures Trading Commission

**ACTION:** Proposed guidance; request for comment.

**SUMMARY:** The Commodity Futures Trading Commission (the “Commission” or “CFTC”) is issuing for public comment this proposed guidance regarding the listing for trading of voluntary carbon credit (“VCC”) derivative contracts. Specifically, the Commission is proposing to issue guidance to outline factors that designated contract markets (“DCMs”) should consider when addressing certain provisions of the Commodity Exchange Act (“CEA”), and CFTC regulations thereunder, that are relevant to the listing for trading of VCC derivative contracts. The Commission recognizes that VCC derivatives are a comparatively new and evolving class of products, and believes that guidance that outlines factors for a DCM to consider in connection with product design and listing may help to advance the standardization of such products in a manner that promotes transparency and liquidity. The Commission requests comment on this proposed guidance and further invites comment on specific questions related to the listing for trading of VCC derivative contracts.

**DATES:** Comments must be received on or before February 16, 2024.

**ADDRESSES:** You may submit comments, identified by “Commission Guidance Regarding the Listing of Voluntary Carbon Credit Derivative Contracts” and RIN 3038–AF40, by any of the following methods:

- *CFTC Comments Portal:* <https://comments.cftc.gov>. Select the “Submit Comments” link for this release and follow the instructions on the Public Comment Form.
- *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Follow the same instructions as for Mail, above.

Please submit your comments using only one of these methods. Submissions through the CFTC Comments Portal are encouraged.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <https://comments.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (“FOIA”), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission’s regulations.<sup>1</sup>

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse, or remove any or all of your submission from <https://www.comments.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the guidance will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under FOIA.

#### FOR FURTHER INFORMATION CONTACT:

Lillian A. Cardona, Assistant Chief Counsel, (202) 418–5012, [lcardona@cftc.gov](mailto:lcardona@cftc.gov); Steven Benton, Industry Economist, (202) 418–5617, [sbenton@cftc.gov](mailto:sbenton@cftc.gov); Nora Flood, Chief Counsel, (202) 418–6059, [nflood@cftc.gov](mailto:nflood@cftc.gov); Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

##### A. The Regulatory Framework for DCMs

The CFTC’s mission is to promote the integrity, resilience, and vibrancy of the U.S. derivatives markets through sound regulation.<sup>2</sup> An independent agency of the U.S. federal government, the CFTC exercises the authorities granted to it under the CEA to promote market integrity, prevent price manipulation and other market disruptions, protect customer funds, and avoid systemic risk, while fostering responsible innovation and fair competition in the derivatives markets.<sup>3</sup>

DCMs are CFTC-regulated exchanges that provide participants in the derivatives markets with the ability to execute or trade derivative contracts

<sup>1</sup> 17 CFR 145.9.

<sup>2</sup> CFTC Mission Statement, available at: <https://www.cftc.gov/About/AboutTheCommission>.

<sup>3</sup> See CEA section 3(b), 7 U.S.C. 5(b).

with one another.<sup>4</sup> In order to obtain and maintain designation with the CFTC, DCMs must comply with statutory “Core Principles” that are set forth in the CEA,<sup>5</sup> as well as applicable CFTC rules and regulations.<sup>6</sup> The statutory Core Principles for DCMs reflect the important role that these exchanges play in promoting the integrity of derivatives markets. DCMs are self-regulatory organizations, and each DCM has Core Principle obligations to, among other things, establish and enforce rules for trading on the DCM;<sup>7</sup> provide a competitive, open and efficient market for trading;<sup>8</sup> and monitor trading activity.<sup>9</sup> For example, DCM Core Principle 4 requires a DCM to have the capacity and responsibility to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process, through market surveillance, compliance, and enforcement practices and procedures.<sup>10</sup> DCM Core Principle 5

requires a DCM to adopt for each contract that it lists for trading, as is necessary and appropriate, position limitations or position accountability for speculators, in order to reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month.<sup>11</sup> DCM Core Principle 12 requires a DCM to establish and enforce rules to protect markets and market participants from abusive practices, and to promote fair and equitable trading on the DCM.<sup>12</sup>

Additionally, each DCM has a specific statutory obligation, under DCM Core Principle 3, to only list for trading contracts that are not readily susceptible to manipulation.<sup>13</sup> As discussed in greater detail below, a DCM may generally elect to list a new derivative contract for trading either by certifying to the Commission that the contract complies with the CEA and CFTC regulations,<sup>14</sup> or by seeking Commission approval of the contract.<sup>15</sup> In either case, the DCM must submit the contract’s terms and conditions, and other prescribed information relating to the contract, to the Commission prior to listing.<sup>16</sup>

For a number of the statutory Core Principles for DCMs, the Commission has adopted rules that establish the manner in which a DCM must comply with the Core Principle.<sup>17</sup> These implementing rules are set forth in Part 38 of the Commission’s regulations.<sup>18</sup> The Commission has also adopted, in Appendix B to Part 38,<sup>19</sup> guidance and acceptable practices for DCMs to take into consideration with respect to certain of the Core Principles.<sup>20</sup>

With respect to the DCM Core Principle 3 requirement that a DCM only list for trading contracts that are not readily susceptible to manipulation, the Commission has adopted guidance that is set forth in Appendix C to Part 38 of the Commission’s regulations (the “Appendix C Guidance”).<sup>21</sup> The Appendix C Guidance outlines certain relevant considerations for a DCM when developing derivative contract terms and conditions, and providing supporting documentation and data in connection with the submission of the derivative contract to the Commission.<sup>22</sup> The Commission takes these considerations into account when determining whether, with respect to the contract, the DCM is satisfying its Core Principle obligation only to list contracts that are not readily susceptible to manipulation.

Among other things, the Appendix C Guidance outlines, for both physically-settled and cash-settled derivative contracts, certain considerations in connection with the design of the contract’s rules and terms and conditions.<sup>23</sup> With respect to physically-settled derivative contracts, the Appendix C Guidance states, among other things, that the contract’s terms and conditions should conform to the most common commercial practices and conditions in the cash market for the underlying commodity.<sup>24</sup> The Appendix

detailed examples of how a DCM may satisfy particular requirements of a DCM Core Principle. Similar to guidance, acceptable practices are for illustrative purposes only, and do not establish a mandatory means of Core Principle compliance. 17 CFR part 38, Appendix B.

<sup>21</sup> 17 CFR part 38, Appendix C. Guidance set forth in Appendix B to Part 38 states that a DCM may use the Appendix C Guidance as guidance in meeting DCM Core Principle 3 for both new product listings and existing listed contracts. 17 CFR part 38, Appendix B, Core Principle 3. Guidance.

<sup>22</sup> See Core Principles and Other Requirements for Designated Contract Markets, 77 FR 36612 at 36632 (June 19, 2012). The Appendix C Guidance is also relevant to swap execution facilities (“SEFs”), another category of CFTC-regulated exchange that provides eligible contract participants with the ability to execute or trade, with one another, derivative contracts that are swaps. Like DCMs, SEFs are obligated by statute only to permit trading in contracts that are not readily susceptible to manipulation. See CEA section 5h(f)(3), 7 U.S.C 7b–3(f)(3); 17 CFR 37.301.

<sup>23</sup> Physically-settled derivative contracts are contracts that may settle directly into the commodity underlying the contract. If the holder of a position in a physically-settled derivative contract still has an open position at the expiration of trading in the contract, then the position holder must, in accordance with the rules for delivery set forth in the contract, make or take delivery (as applicable) of the underlying commodity. By contrast, cash-settled derivative contracts are, at the expiration of trading in the contract, settled by way of a cash payment instead of physical delivery of the underlying commodity.

<sup>24</sup> Appendix C Guidance, paragraph (b)(1).

<sup>4</sup> See CEA section 1a(6), 7 U.S.C. 1a(6). (The term “board of trade” means any organized exchange or other trading facility); CEA section 1a(51)(A), 7 U.S.C. 1a(51)(A) (The term “trading facility” means a person or group of persons that constitutes, maintains, or provides a physical or electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts, or transactions—(i) by accepting bids or offers made by other participants that are open to multiple participants in the facility or system; or (ii) through the interaction of multiple bids or multiple offers within a system with a pre-determined non-discretionary automated trade matching or execution algorithm); and CEA section 5(d)(1)(A), 7 U.S.C. 7(d)(1)(A) (To be designated, and maintain a designation, as a contract market, a board of trade shall comply with—(i) any core principle described in this subsection; and (ii) any requirement that the Commission may impose by rule or regulation pursuant to CEA section 8a(5)).

<sup>5</sup> See, generally, CEA Section 5(d), 7 U.S.C. 7(d). There are 23 statutory Core Principles for DCMs.

<sup>6</sup> CEA section 5(d)(1)(A), 7 U.S.C. 7(d)(1)(A).

<sup>7</sup> DCM Core Principle 2 requires, among other things, that a DCM establish, monitor, and enforce compliance with the rules of the DCM, including access requirements, the terms and conditions of any contracts to be traded on the DCM, and rules prohibiting abusive trade practices on the DCM. DCM Core Principle 2 also requires a DCM to have the capacity to detect, investigate, and apply appropriate sanctions to any person that violates any rule of the DCM. CEA section 5(d)(2), 7 U.S.C. 7(d)(2). See also 17 CFR 38.150–160. DCM Core Principle 13 requires that a DCM establish and enforce disciplinary procedures that authorize the DCM to discipline, suspend, or expel members or market participants that violate the DCM’s rules. CEA section 5(d)(13), 7 U.S.C. 7(d)(13). See also 17 CFR 38.700–712.

<sup>8</sup> DCM Core Principle 9 requires, among other things, that a DCM provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the DCM. CEA section 5(d)(9), 7 U.S.C. 7(d)(9). See also 17 CFR 38.500.

<sup>9</sup> See, e.g., DCM Core Principles 4, 5, and 12, discussed *infra*.

<sup>10</sup> CEA section 5(d)(4) 7 U.S.C. 7(d)(4). See also 17 CFR 38.250–258.

<sup>11</sup> CEA section 5(d)(5), 7 U.S.C. 7(d)(5). See also 17 CFR 38.300–301.

<sup>12</sup> CEA section 5(d)(12), 7 U.S.C. 7(d)(12). See also 17 CFR 38.650–651.

<sup>13</sup> CEA section 5(d)(3), 7 U.S.C. 7(d)(3). See also 17 CFR 38.200–201.

<sup>14</sup> CEA section 5c(c)(1), 7 U.S.C. 7a–2(c)(1). See also 17 CFR 40.2.

<sup>15</sup> CEA sections 5c(c)(4)–(5), 7 U.S.C. 7a–2(c)(4)–(5). See also 17 CFR 40.3.

<sup>16</sup> See, generally, 17 CFR 40.2 and 40.3. Amendments to contract terms and conditions also must be submitted to the Commission in accordance with procedures set forth at CEA section 5c(c), 7 U.S.C. 7a–2(c), and Part 40 of the Commission’s regulations.

<sup>17</sup> Unless otherwise determined by the Commission by rule or regulation, a DCM has reasonable discretion in establishing the manner in which it complies with a Core Principle. CEA section 5(d)(1)(B), 7 U.S.C. 7(d)(1)(B).

<sup>18</sup> 17 CFR part 38.

<sup>19</sup> 17 CFR part 38, Appendix B.

<sup>20</sup> Guidance provides contextual information regarding a Core Principle, including important concerns which the Commission believes should be considered in complying with the Core Principle. The guidance for a DCM Core Principle is illustrative only of the types of matters that a DCM may address, and is not intended to be used as a mandatory checklist. Acceptable practices are more

C Guidance also states that the contract's terms and conditions should be designed to avoid impediments to the delivery of the underlying commodity, so as to promote convergence between the price of the contract and the cash market value of the underlying commodity at the expiration of trading in the contract.<sup>25</sup> The Appendix C Guidance outlines certain criteria that should be addressed in the contract's terms and conditions, including contract size, the period for making and taking delivery under the contract, delivery points, quality standards for the underlying commodity, and inspection/certification procedures for verifying compliance with those quality standards or any other related delivery requirements under the contract.<sup>26</sup>

The criteria outlined in the Appendix C Guidance that relate to the quality and other attributes of the underlying commodity that would be delivered under a physically-settled contract upon the expiration of trading, inform the pricing of the contract. Addressing these criteria clearly in the contract's terms and conditions, in a manner that reflects the individual characteristics of the underlying commodity, helps to ensure that trading in the contract is based on accurate information about the underlying commodity. This, in turn, helps to promote accurate pricing and helps to reduce the susceptibility of the contract to manipulation. Further, when a contract's terms and conditions help to ensure that, upon delivery, the quality and other attributes of the underlying commodity will be as expected by position holders, this helps to prevent price distortions and fosters confidence in the contract that can incentivize trading and enhance liquidity.

With respect to cash-settled derivative contracts, the Appendix C Guidance states that an acceptable specification of the cash settlement price would, among other things, include rules that fully describe the essential economic characteristics of the underlying commodity, as well as how the final settlement price is calculated.<sup>27</sup> The Appendix C Guidance states that the utility of a cash-settled contract for risk management and price discovery purposes would be significantly impaired if the cash settlement price is not a reliable or robust indicator of the value of the underlying commodity.<sup>28</sup> The Appendix C Guidance states that, accordingly, careful consideration

should be given to the potential for manipulation or distortion of the cash settlement price, as well as the reliability of that price as an indicator of cash market values.<sup>29</sup> Appropriate consideration also should be given to the commercial acceptability, public availability, and timeliness of the price series that is used to calculate the cash settlement price.<sup>30</sup>

## B. Voluntary Carbon Markets

### 1. Overview of Voluntary Carbon Markets

As discussed further below, this proposed guidance addresses an emerging class of climate-related derivative contracts listed for trading by DCMs, where the underlying commodity is a VCC.<sup>31</sup>

In addition to direct greenhouse gas ("GHG") emissions reduction initiatives, market-based mechanisms, such as carbon markets,<sup>32</sup> have developed to support emissions reduction efforts. A carbon market generally refers to an economic mechanism to support the buying and selling of environmental commodities<sup>33</sup> that represent GHG emission reductions or removals from the atmosphere. Carbon markets are intended to harness market forces to incentivize carbon mitigation activities. Carbon markets generally fall into two categories: (i)

mandatory (or compliance) markets, and (ii) voluntary carbon markets.

Mandatory markets, such as cap-and-trade programs, emissions trading systems and allowance trading systems, are established and regulated by national, regional, or international governmental bodies.<sup>34</sup> Entities subject to the requirements of a mandatory market generally must demonstrate compliance by directly reducing their emissions from their own operations or activities, or by purchasing eligible compliance credits representing emission reductions or removals achieved by others.

Voluntary carbon markets are not established by any government body. They enable market participants to purchase, on a voluntary basis, carbon credits that upon retirement represent reductions or removals of GHG emissions. A voluntary carbon credit, or "VCC," is a tradeable intangible instrument that is issued by a carbon crediting program ("crediting program").<sup>35</sup> The general industry standard is for a VCC to represent a GHG emissions reduction to, or removal from, the atmosphere equivalent to one metric ton of carbon dioxide.<sup>36</sup>

A participant in the voluntary carbon markets may purchase a VCC, representing an emissions reduction or removal by another party, to supplement emissions reductions or removals achieved from the participant's own operations or activities. Liquid and transparent markets in high-integrity VCCs may serve as a tool to facilitate emissions reduction efforts.<sup>37</sup>

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> This proposed guidance uses the term "voluntary carbon credits" rather than "verified carbon credits," as the proposed guidance is focused on the quality and other attributes of the intangible commodity underlying a *derivative contract*. The Commission recognizes that market participants in the *cash or secondary market* for voluntary carbon credits may choose to use a set of standardized terms for the trading and retirement of "verified carbon credits," as defined by the International Swaps and Derivatives Association ("ISDA"), in the market participants' physically-settled *spot, forward or option* transactions. See 2022 ISDA Verified Carbon Credit Transactions Definitions ("VCC Definitions") Frequently Asked Questions, available at: <https://www.isda.org/a/jBXgE/2022-ISDA-Verified-Carbon-Credit-Transactions-Definitions-FAQs-061323.pdf>.

<sup>32</sup> While the term "carbon" is generally intended to also include other greenhouse gases, such as methane, nitrous oxide, sulfur hexafluoride, hydro fluorocarbons and perfluorocarbons, most emissions trading involves emissions trading of carbon dioxide.

<sup>33</sup> An agreement, contract or transaction in an environmental commodity may qualify for the forward exclusion from the "swap" definition set forth in section 1a(47) of the CEA, 7 U.S.C. 1a(47), if the agreement, contract or transaction is intended to be physically settled. For further discussion of the Commission's interpretation of whether agreements, contracts, or transactions in environmental commodities fall within the forward exclusion from the swap definition, see Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Final Rule, 77 FR 48208 (August 13, 2012).

<sup>34</sup> See, for example, the United Nation's Clean Development Mechanism ("CDM"), the California Compliance Offset Program, the Regional Greenhouse Gas Initiative ("RGGI"), the Alberta Emission Offset System ("AEOS"), and the EU Emissions Trading System ("ETS").

<sup>35</sup> See, e.g., The Integrity Council for the Voluntary Carbon Market Carbon Core Principles, Section 5 Definitions, available at: <https://icvcm.org/wp-content/uploads/2023/07/CCP-Section-5-R2-FINAL-26jul23.pdf>.

<sup>36</sup> This is calculated as the difference in GHG emission reductions or removals from a baseline scenario, to the emission reductions or removals occurring under the carbon mitigation project or activity, with any adjustments for leakage. See The Integrity Council for the Voluntary Carbon Market Carbon Core Principles, Section 5 Definitions, available at: <https://icvcm.org/wp-content/uploads/2023/07/CCP-Section-5-R2-FINAL-26jul23.pdf>.

<sup>37</sup> The Board of the International Organization of Securities Commissions ("IOSCO") published a Voluntary Carbon Markets consultation for public comment. The IOSCO consultation paper sought feedback on a potential approach that regulatory authorities and market participants could take to foster sound and well-functioning voluntary carbon market structure and, as a consequence, scale up these markets to allow them to achieve their environmental objectives. Voluntary Carbon Markets, Discussion Paper, CR/06/22, November

<sup>25</sup> *Id.*

<sup>26</sup> Appendix C Guidance, paragraph (b)(2).

<sup>27</sup> Appendix C Guidance, paragraph (c)(1).

<sup>28</sup> Appendix C Guidance, paragraph (c)(2).

The process by which VCCs are issued deserves careful consideration, as that process informs VCC quality and, by extension, the overall integrity and effective functioning of voluntary carbon markets. Generally, parties that play a role in the issuance of a VCC include: (1) the developer of a mitigation project or activity that is intended to reduce or remove GHG emissions from the atmosphere (“project developer”); (2) a crediting program that, among other things, issues VCCs for mitigation projects or activities that satisfy the crediting program’s standards;<sup>38</sup> and (3) an independent third party that verifies and validates the mitigation project or activity.

A project developer must first select the crediting program with which it seeks to certify its mitigation project or activity. The crediting program will certify the project or activity if it satisfies the crediting program’s standards for issuing VCCs. A crediting program generally engages an independent third party to review project or activity documentation, including, among other things, to verify the accuracy of the estimated amount of emission reductions or removals that are expected to be associated with the project or activity, based on the project’s or activity’s baseline scenario<sup>39</sup> and the crediting program’s methodology or protocol for quantifying reduction or removal levels. The estimated emission reductions or removals serve as the basis for the determination of the number of VCCs to be issued for the project or activity.

Once the crediting program determines that the mitigation project or activity satisfies the crediting program’s standards for issuing VCCs, the project or activity will be certified. The crediting program typically operates or makes use of a registry, which serves as a central repository for tracking certified mitigation projects or activities and their associated VCCs. Once registered, VCCs associated with a mitigation project or activity may be bought and sold to end users (businesses or individuals) or to intermediaries such as brokers or aggregators that provide liquidity to voluntary carbon market participants.<sup>40</sup>

2022, available at: <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD718.pdf>.

<sup>38</sup> Currently, the four largest crediting programs in the voluntary carbon markets are the American Carbon Registry, the Climate Action Reserve, the Gold Standard and the Verified Carbon Standard.

<sup>39</sup> A baseline scenario is the predicted or assumed outcome in the absence of the incentives created by carbon credits, holding all other factors constant.

<sup>40</sup> Funding by investors for a mitigation project or activity could begin as early as the planning stage.

## 2. Initiatives To Promote Transparency, Integrity and Standardization in the Voluntary Carbon Markets

As the voluntary carbon markets have continued to develop and mature, private sector and multilateral initiatives have sought to address certain issues—relevant to both the supply side (generation of VCCs from carbon mitigation projects or activities), and the demand side (businesses or individuals purchasing VCCs)—impacting the speed at which transparent, robustly traded markets for high-integrity VCCs are scaled.

On the supply side, a key focus has been on the quality of VCCs, particularly, whether they accurately reflect the nature and level of GHG emission reductions or removals that they are intended to represent. Given the current absence of a standardized methodology or protocol to quantify emissions reduction or removal levels, there is a possibility that methodologies or protocols of differing degrees of robustness may calculate different reduction or removal impacts for two projects that are identical in type and size (or even for the same project). This could result in different amounts of carbon credits being issued for each project, despite their actual reduction or removal impact being the same. It may also create incentives for project developers to seek to apply the quantification protocol or methodology, or to seek to certify with the crediting program, that would result in the issuance of the most credits. Among other things, these possibilities create challenges for accurately pricing VCCs. Further, it can be difficult to discern the extent to which the price of any particular VCC reflects the price of one metric ton of carbon dioxide equivalent reduced or removed from the atmosphere, and the extent to which the price reflects understandings or concerns relating to the mitigation project or activity for which the VCC was issued, or other aspects of the process for issuing the VCC.<sup>41</sup>

Early investors may enter into agreements with a project developer for funding in exchange for discounted VCCs, once issued.

<sup>41</sup> Factors that may affect the price of VCCs issued for any particular mitigation project or activity may include the type of the project or activity, the geographic location of the project or activity, and the methodology or protocol used to measure the levels of emissions reductions or removals associated with the project or activity. Types of carbon mitigation projects or activities for which VCCs are issued include renewable energy, industrial gas capture, energy efficiency, forestry initiatives (avoiding deforestation), regenerative agriculture, wind power, and biogas. The location of a mitigation project or activity may, for example, impact the cost of implementing and/or operating

Challenges with respect to accurately ascertaining VCC quality, and associated pricing challenges,<sup>42</sup> can erode confidence in voluntary carbon markets. Furthermore, opaque or inadequate calculation methodologies or protocols, which can obscure or mischaracterize the carbon impact of a mitigation project or activity, can undermine both the integrity and purpose of those markets.

On the demand side, concerns have been raised that, in connection with meeting their carbon mitigation goals, businesses or individuals may be utilizing low integrity VCCs which do not accurately reflect the nature or level of GHG emission reductions or removals that are associated with the mitigation projects or activities for which the VCCs have been issued.<sup>43</sup> This can raise questions not only about the business’s or individual’s progress towards their goals, but also about whether any claims related to those goals are misleading.<sup>44</sup> Market participants that are purchasing VCCs to help meet their mitigation goals may be focused largely or primarily on price, and also may not have ready access to all of the information that they need to make informed evaluations, and comparisons, of VCC quality. All of this may incentivize, intentionally or not, the purchase of lower quality VCCs. This may be facilitated by the opaque pricing of VCCs, as described above—and by the fact that, recently, supplies of VCCs are generally considered to be high relative to demand.<sup>45</sup>

the project or activity. Mitigation projects and activities for which VCCs are issued are located in countries worldwide. See Berkeley Voluntary Registry Offsets Database, available at: <https://gspp.berkeley.edu/research-and-impact/centers/cepp/projects/berkeley-carbon-trading-project/offsets-database>.

<sup>42</sup> Observed trading of VCCs is not as readily transparent as for other financial instruments. Spot markets for VCCs are still largely bespoke, with buyers purchasing directly from project developers or via intermediaries. Some exchanges for trading VCCs have been established and are evolving. For example, the AirCarbon Exchange (<https://acx.net/acx-singapore/>), located in Singapore; Carbon Trade Exchange (<https://ctxglobal.com/>), located in the United Kingdom; and Xpansiv CBL (<https://xpansiv.com/cbl/>), located in the United States.

<sup>43</sup> See, e.g., Forbes, Carbon Neutral Claims Under Investigation In Greenwashing Probe (June 16, 2023), available at: <https://www.forbes.com/sites/amynguyen/2023/06/16/carbon-neutral-claims-under-investigation-in-greenwashing-probe/?sh=2a6170466431>.

<sup>44</sup> Federal Trade Commission, *Guides for the Use of Environmental Marketing Claims*, Regulatory Review Notice and Request for Public Comment, 87 FR 77,766 (December 20, 2022) (Federal Trade Commission request for public comment on updating its Green Guides to include claims made regarding carbon offsets).

<sup>45</sup> Transcript of Commission’s Second Voluntary Carbon Markets Convening (July 19, 2023), Kyle Harrison, stating, “Because you have an oversupply, you have a surplus of cheaper credits and

Continued

Private sector and multilateral efforts have spearheaded the development of various initiatives to address the above challenges, and to promote transparency, integrity and standardization in the voluntary carbon markets. To support and promote VCC quality, these private sector and multilateral initiatives have focused on developing standards for high-integrity VCCs.<sup>46</sup> Among other things, these standards are intended to help provide assurance that the VCCs that have been issued for a carbon mitigation project or activity accurately reflect the actual GHG emissions reduction or removal levels associated with that project or activity. These standards also generally highlight the importance of effective crediting program processes, procedures, and governance arrangements, in ensuring that a crediting program is issuing high integrity VCCs.

Standards that assist market participants in making informed evaluations, and comparisons, of VCC quality may promote accurate pricing and enhance confidence that the voluntary carbon markets can serve as a tool to assist in emissions reduction efforts. Such standards can thereby play a valuable role in supporting market transparency and liquidity, and the scaling of high-integrity voluntary carbon markets.

Such standards may also support initiatives being developed to address concerns about the accuracy of claims made by purchasers of VCCs regarding the role that VCCs play in the purchasers' progress toward carbon mitigation goals.<sup>47</sup> Such standards could serve as a foundation or reference

companies can go ahead and use those in many cases as a band-aid solution, as opposed to decarbonizing and reducing their gross emissions," available at: [https://www.cftc.gov/sites/default/files/2023/11/1700165549/SVCMC\\_transcript071923.pdf](https://www.cftc.gov/sites/default/files/2023/11/1700165549/SVCMC_transcript071923.pdf).

<sup>46</sup> See, e.g., The Integrity Council for the Voluntary Carbon Market's Core Carbon Principles (July 2023), available at: <https://icvcm.org/wp-content/uploads/2023/07/CCP-Book-R2-FINAL-26Jul23.pdf>; the International Civil Aviation Organization's Carbon Offsetting and Reduction Scheme for International Aviation ("CORSIA") (2023), available at: <https://www.icao.int/environmental-protection/CORSIA/Pages/default.aspx>; the G7 Principles of High Integrity Carbon Markets (2023), available at: <https://www.meti.go.jp/information/g7hirosima/energy/pdf/Annex004.pdf>.

<sup>47</sup> See, e.g., the World Wildlife Fund (WWF-US), Environmental Defense Fund (EDF) and Oeko-Institut's Carbon Credit Quality Initiative (<https://carboncreditquality.org/>); the Tropical Forest Credit Integrity Guide for Companies: Differentiating Tropical Forest Carbon Credit by Impact, Quality, and Scale (<https://tfciguide.org/>); and the Voluntary Carbon Markets Integrity Initiative's Claims Code of Practice (<https://vcmin integrity.org/vcmi-claims-code-of-practice/>).

for criteria that purchasers of VCCs could voluntarily adhere to, in order to demonstrate their commitment to using high integrity VCCs to support their mitigation goals, and to being transparent in their progress towards those goals.

### C. The Commission and Voluntary Carbon Markets

#### 1. Derivative Contracts on Environmental Commodities, Including VCCs

Derivative contracts on environmental commodities have been trading on CFTC-regulated exchanges for decades. Derivative contracts on mandatory emissions program instruments have been trading since 2005, with GHG emissions-related instruments first listed in 2007.<sup>48</sup> There are currently over 150 derivative contracts on mandatory emissions program instruments listed on DCMs.<sup>49</sup> As of November 2023, eighteen futures contracts on voluntary carbon market products have been submitted by DCMs to the Commission for listing.<sup>50</sup> Three of

<sup>48</sup> The Chicago Climate Futures Exchange ("CCFE") listed a Sulfur Financial Instruments Current Vintage Delivery futures contract in 2005. In 2006, the New York Mercantile Exchange ("NYMEX") listed a nitrogen oxide ("NO<sub>x</sub>") Emissions Allowance futures contract. In 2007, CCFE listed the first Carbon Financial Instrument futures contract and other emission contracts. In 2008, NYMEX listed the first RGGI futures contract. In 2011, Green Exchange listed its European Union Allowance futures contract. In 2012, NYMEX listed its California Carbon Allowance futures contract. To date, there have been over 1,500 mandatory emissions-related futures and options contracts listed for trading on various DCMs. The vast majority of those contracts are no longer listed for trading.

<sup>49</sup> Examples of derivatives contracts on mandatory emissions program instruments, such as renewable energy credits ("RECs") and renewable fuel standards ("RFS"), that currently have open interest include: the ICE Futures U.S. ("ICE U.S.") PJM Tri Qualified Renewable Energy Certificate Class I futures contract; the ICE U.S. Texas Compliance Renewable Energy Certificate from CRS Listed Facilities Front Half Specific futures contract; the ICE U.S. New Jersey Compliance Renewable Energy Certificate Class II futures contract; the Chicago Mercantile Exchange ("CME") Ethanol T2 FOB Rotterdam Including Duty (Platts) futures contract; the ICE U.S. Biofuel Outright—D4 RINS (OPIS) futures contract; the ICE U.S. RGGI Vintage 2024 futures contract; and the ICE U.S. California Carbon Allowance Current Auction futures contract.

<sup>50</sup> For example, NYMEX lists the following physically-settled futures contracts based on voluntary carbon market products: (1) CBL Global Emissions Offset (GEO) futures contract; (2) CBL Nature-Based Global Emissions Offset (N-GEO) futures contract; (3) CBL Core Global Emissions Offset (C-GEO) futures contract; (4) CBL Nature-Based Global Emissions Offset Trailing futures contract; and (5) CBL Core Global Emissions Offset Trailing futures contract. Nodal Exchange lists the following physically-settled futures and options contracts based on voluntary carbon market products: (1) Verified Emission Reduction—Nature-Based Vintage 2017 futures and options contracts;

those contracts currently have open interest.<sup>51</sup>

Derivative contracts on VCCs base their prices on the spot price of VCCs. For example, NYMEX's CBL Global Environmental Offset futures contracts, and Nodal Exchange's Verified Emission Reduction futures and options contracts, are physically-settled contracts. If the holder of a position in the contract still has an open position at the expiration of trading in the contract, then the position holder must, in accordance with the rules for delivery set forth in the contract, make or take delivery (as applicable) of 1,000 VCCs that meet the contract's rules for delivery eligibility.<sup>52</sup>

#### 2. Initiatives Relating to Voluntary Carbon Markets

##### First Voluntary Carbon Markets Convening

In June 2022, Chairman Behnam held the first-ever Voluntary Carbon Markets Convening to discuss issues related to the supply of and demand for high quality carbon credits, including product standardization and the data necessary to support the integrity of carbon credits' GHG emissions removal and reduction claims.<sup>53</sup> A further goal of this convening was to gather information from a wide variety of

(2) Verified Emission Reduction—Nature-Based Vintage 2018 futures and options contracts; (3) Verified Emission Reduction—Nature-Based Vintage 2019 futures and options contracts; (4) Verified Emission Reduction—Nature-Based Vintage 2020 futures and options contracts; (5) Verified Emission Reduction—Nature-Based Vintage 2021 futures and options contracts; (6) Verified Emission Reduction—Nature-Based Vintage 2022 futures and options contracts; (7) Verified Emission Reduction—Nature-Based Vintage 2023 futures contract; (8) Verified Emission Reduction—Nature-Based Vintage 2024 futures contract; (9) Verified Emission Reduction—Nature-Based Vintage 2025 futures contract; (10) Verified Emission Reduction—Nature-Based futures and options contracts; (11) Carbon Removal futures contract; (12) Verified Emission Reduction—CORSIA-Eligible futures and options contracts; and (13) Global Emission Reduction futures contract.

<sup>51</sup> The NYMEX CBL Global Emissions Offset (GEO) futures contract; the NYMEX CBL Nature-Based Global Emissions Offset (N-GEO) futures contract; and the NYMEX CBL Core Global Emission Offset (C-GEO) futures contract are currently the only listed futures contracts with open interest and trading volume. Information is available at: <https://www.cmegroup.com/markets/energy/emissions/cbl-global-emissions-offset.volume.html>.

<sup>52</sup> The CME Group CBL contracts permit VCCs to be delivered from the Verified Carbon Standard ("VCS") Verra Registry, the American Carbon Registry ("ACR"), and the Climate Action Reserve ("CAR"). The Nodal contracts permit VCCs to be delivered from VCS's Verra Registry and from the Gold Standard Impact Registry, as well as from the American Carbon Registry for certain contracts.

<sup>53</sup> For the official announcement of the convening and related materials, See <https://www.cftc.gov/PressRoom/Events/opaeventcftccarbonmarketconvene060222>.

market participants in the voluntary carbon markets to better understand the potential role of the official sector in these markets, particularly in connection with the emergence of CFTC-regulated derivatives referencing VCCs. The convening included participants from carbon credit standard setting bodies, a crediting program, private sector integrity initiatives, spot platforms, DCMs, intermediaries, end-users, public interest groups, and others.

#### Commission Request for Information

In June 2022, the Commission issued for public comment a Request for Information (“RFI”) <sup>54</sup> in order to better inform the Commission on how, consistent with its statutory authority, to address climate-related financial risk as pertinent to the derivatives markets and underlying commodities markets.<sup>55</sup>

The responsive comments that the Commission received included feedback on specific questions relating to product innovation and voluntary carbon markets.<sup>56</sup> Several commenters expressed support for the Commission to take steps that could support transparency and confidence in the voluntary carbon markets, particularly through recognition or support of private sector and multilateral initiatives to promote standardization and integrity.<sup>57</sup> In connection with product innovation, certain commenters expressed the view that the Commission’s current statutory framework and regulations are sufficient to regulate voluntary carbon market derivatives products.<sup>58</sup> While there were comments expressing different views on the reach of the Commissions’ jurisdiction to regulate voluntary carbon

markets,<sup>59</sup> many commenters supported the Commission utilizing its spot market anti-fraud and anti-manipulation authority in the voluntary carbon market space.<sup>60</sup>

#### Second Voluntary Carbon Markets Convening

In July 2023, Chairman Behnam held the Second Voluntary Carbon Markets Convening. The purpose of this convening was to discuss recent private sector initiatives for high quality carbon credits; current trends and developments in the cash and derivatives markets for carbon credits; public sector initiatives related to carbon markets; and market participants’ perspectives on how the CFTC can promote integrity for high quality carbon credit derivatives.<sup>61</sup>

#### II. Guidance Regarding the Listing of VCC Derivative Contracts

The Commission is proposing guidance that outlines factors that DCMs should consider when addressing certain requirements under the CEA and CFTC regulations that are relevant to the listing for trading of VCC derivative contracts. The Commission recognizes that VCC derivatives are a comparatively new and evolving class of

products,<sup>62</sup> and believes that guidance that outlines factors for a DCM to consider in connection with product design and listing may help to advance the standardization of such products in a manner that promotes transparency and liquidity.

This proposed guidance addresses certain Core Principle compliance considerations, as well as certain requirements relating to the submission of new contracts, and contract amendments, to the Commission. This proposed guidance is not intended to modify or supersede existing statutory or regulatory requirements, or existing Commission guidance that addresses the listing of derivative products by CFTC-regulated exchanges, including the Appendix C Guidance. Rather, taking into account certain unique attributes of VCC derivatives and voluntary carbon markets, this proposed guidance outlines particular matters that a DCM should consider, to help ensure compliance with existing requirements when listing a VCC derivative contract. Among other things, this proposed guidance addresses how certain aspects of the Appendix C Guidance should be understood to apply in the specific context of VCC derivative contracts.

This proposed guidance focuses primarily on the listing by DCMs of physically-settled VCC derivative contracts. In part, this focus reflects the fact that all VCC derivative contracts that are currently listed for trading on DCMs are physically-settled contracts. To date, no DCM has listed for trading a cash-settled VCC derivative contract. In addition, the Commission believes that at this juncture in the evolution of VCC derivatives as a product class, it may be of particular benefit to outline considerations for a DCM, when developing contract terms and conditions, that can help to ensure that, upon delivery, the quality and other attributes of the underlying VCC will be as expected by position holders. This will support accurate pricing, help reduce the susceptibility of the contract to manipulation, and foster confidence in the contract that can enhance liquidity.

While this proposed guidance focuses primarily on physically-settled VCC derivative contracts, the Commission continues to believe that, with respect to cash-settled derivative contracts, an acceptable specification of the cash

<sup>54</sup> Request for Information on Climate-Related Financial Risk, 87 FR 34856 (June 8, 2022).

<sup>55</sup> In addition to soliciting feedback on all aspects of climate-related financial risk as it may pertain to the derivatives market, the RFI also specifically requested feedback on ten categories of information: 1. Data, 2. Scenario Analysis and Stress Testing, 3. Risk Management, 4. Disclosure, 5. Product Innovation, 6. Voluntary Carbon Markets, 7. Digital Assets, 8. Financially Vulnerable Communities, 9. Public-Private Partnerships/Engagement, and 10. Capacity Coordination. The RFI stated that the Commission may use responsive information to inform potential future actions including, but not limited to, the issuance of new or amended guidance, interpretations, policy statements, or regulations, or other potential Commission action.

<sup>56</sup> Twenty-five commenters on the RFI responded to questions regarding product innovation and 44 commenters on the RFI responded to questions regarding the voluntary carbon markets.

<sup>57</sup> International Swaps and Derivatives Association (“ISDA”) at 6; American Petroleum Institute (“API”) at 4; Center for American Progress at 10; Environmental Defense Fund at 12; Futures Industry Association (“FIA”) at 9; Intercontinental Exchange, Inc. (“ICE”) at 4.

<sup>58</sup> CME Group at 10, FIA at 3; ISDA at 7.

<sup>59</sup> Heritage Foundation at 7.

<sup>60</sup> See, e.g., API at 3; ISDA at 6; Verra at 2. With respect to the Commission’s spot market anti-fraud, false-reporting, and anti-manipulation authority, see, e.g., CEA section 6(c)(1), 7 U.S.C. 9(1), which prohibits any person from using or employing, or attempting to use or employ, in connection with a contract for sale of any commodity in interstate commerce, any manipulative or deceptive device or contrivance, in contravention of rules and regulations promulgated by the Commission; CEA section 9(a)(2), 7 U.S.C. 13(a)(2), which among other things makes it a felony for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce; and implementing Commission rules at Part 180 of the CFTC’s regulations, 17 CFR part 180. In June 2023, the CFTC’s Whistleblower Office issued an alert notifying the public on how to identify and report potential CEA violations connected to fraud or manipulation in the carbon markets. See CFTC Whistleblower Alert, available at: <https://www.whistleblower.gov/sites/whistleblower/files/2023-06/06.20.23%20Carbon%20Markets%20WBO%20Alert.pdf>. Also in June 2023, the CFTC’s Division of Enforcement announced the creation of an Environmental Fraud Task Force to combat environmental fraud and misconduct. Specifically, the Task Force’s mission is to address fraud and other misconduct in both the derivatives markets and the relevant spot markets (e.g., voluntary carbon markets) and to examine, among other things, fraud with respect to the purported environmental benefits of purchased carbon credits. See CFTC Release Number 8736–23 (“CFTC Division of Enforcement Creates Two New Task Forces”) available at: <https://www.cftc.gov/PressRoom/PressReleases/8736-23>.

<sup>61</sup> For the official announcement of the convening and related materials, see <https://www.cftc.gov/PressRoom/Events/opaeventvoluntarycarbonmarkets071923>.

<sup>62</sup> In 2022, ISDA published a whitepaper providing background on the cash and derivatives markets for voluntary carbon credits. See Voluntary Carbon Markets: Analysis of Regulatory Oversight in the U.S. (2022), available at: <https://www.isda.org/2022/06/02/voluntary-carbon-markets-analysis-of-regulatory-oversight-in-the-us/>.

settlement price would include rules that fully describe the essential economic characteristics of the underlying commodity.<sup>63</sup> Accordingly, the Commission preliminarily believes that discussions in this proposed guidance of VCC commodity characteristics that a DCM should consider when developing the terms and conditions of a physically-settled VCC derivative contract, should also be considered for cash-settled derivative contracts that settle to the price of a VCC, unless otherwise noted.<sup>64</sup>

Further, while this proposed guidance focuses on the listing of VCC derivative contracts by DCMs, the Commission preliminarily believes that the proposed guidance also should be considered by any SEF that may seek to permit trading in swap contracts that settle to the price of a VCC, or in physically-settled VCC swap contracts.<sup>65</sup>

In developing this proposed guidance, the Commission has considered those public comments on the RFI that addressed product innovation and voluntary carbon markets. Taking into account those public comments, the Commission believes that this proposed guidance furthers the agency's mission and may help to advance the standardization of VCC derivative contracts in a manner that fosters transparency and liquidity, accurate pricing, and market integrity.<sup>66</sup>

The Commission recognizes that VCCs and voluntary carbon markets are

evolving and that it may therefore be appropriate for the Commission to revisit this guidance or to issue additional guidance in the future,<sup>67</sup> as VCCs and voluntary carbon markets continue to develop and mature.<sup>68</sup>

#### *A. A DCM Shall Only List Derivative Contracts That Are Not Readily Susceptible to Manipulation*

As discussed above, DCM Core Principle 3 provides that a DCM shall only list for trading derivative contracts that are not readily susceptible to manipulation.<sup>69</sup> With respect to DCM Core Principle 3, the Appendix C Guidance outlines certain relevant considerations for a DCM when developing contract terms and conditions and providing supporting documentation and data in connection with the submission of a contract to the Commission.<sup>70</sup>

With respect to a physically-settled derivative contract, the Appendix C Guidance states that the terms and conditions of the contract “should describe or define all of the economically significant characteristics or attributes of the commodity underlying the contract.”<sup>71</sup> Among other things, failure to specify the economically significant attributes of the underlying commodity may cause confusion among market participants, who may expect a commodity of different quality, or with other features, to underlie the contract. This may render the precise nature of the commodity that the contract is pricing ambiguous, and make the contract susceptible to manipulation or price distortion.

The Appendix C Guidance states that, for any particular contract, the specific attributes of the underlying commodity that should be described or defined in the contract's terms and conditions

“depend upon the individual characteristics of the commodity.”<sup>72</sup> Where the underlying commodity is a VCC, the Commission recognizes that standardization and accountability mechanisms for VCCs are currently still developing. The Commission believes that the fact that standardization and accountability mechanisms for VCCs are currently still developing is, itself, an “individual characteristic of the commodity” that should be taken into account by a DCM when designing a VCC derivative contract and addressing the underlying commodity in the contract's terms and conditions.

To that end, the Commission recognizes that, while standardization and accountability mechanisms for VCCs are currently still being developed, there are certain characteristics that have been identified broadly—across both mandatory and voluntary carbon markets—as helping to inform the integrity of carbon credits. The Commission preliminarily believes that a DCM should take these characteristics—referred to in this proposed guidance as “VCC commodity characteristics,” and discussed more fully below—into consideration when designing a VCC derivative contract, and addressing in the contract's terms and conditions the underlying VCC. The Commission believes that consideration of these VCC commodity characteristics will help the DCM to ensure that it understands, and is clearly specifying in the contract's terms and conditions, the economically significant attributes of the underlying VCC.

As a general matter, the Commission believes that a DCM should consider the VCC commodity characteristics when selecting one or more crediting programs from which eligible VCCs, meeting the derivative contract's specifications, may be delivered at the contract's expiration. The Commission believes that this will help the DCM evaluate whether the crediting program is a reliable source of high integrity VCCs.

More specifically, the Commission preliminarily believes that, at a minimum, a DCM should consider the VCC commodity characteristics when addressing the following criteria in the design of a VCC derivative contract:

- Quality standards,
- Delivery points and facilities, and
- Inspection provisions.

These are among the criteria identified in the Appendix C Guidance as criteria that should be addressed in the terms and conditions of a physically-delivered derivative contract.

<sup>63</sup> Appendix C Guidance, paragraph (c)(1).

<sup>64</sup> As noted herein, and for the avoidance of doubt, this proposed guidance is not intended to modify or supersede the Appendix C Guidance, which outlines considerations for both cash-settled and physically-settled derivative contracts—including considerations that are not touched on in this proposed guidance. DCMs are reminded to consult and consider the Appendix C Guidance when developing terms and conditions, and contract submissions to the Commission, for all derivative product types—including VCC derivative products.

<sup>65</sup> As noted above, the Appendix C Guidance is also relevant to SEFs, which, like DCMs, are obligated by statute only to permit trading in contracts that are not readily susceptible to manipulation. CEA section 5h(f)(3), 7 U.S.C. 37b-3(f)(3). Like DCMs, SEFs also are subject to a statutory obligation to monitor trading in swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures. CEA section 5h(f)(4) 7 U.S.C. 37b-3(f)(4). See also 17 CFR 37.400-408.

<sup>66</sup> See also, e.g., International Emissions Trading Association comment in response to the Second Voluntary Carbon Markets Convening at 5-6 (stating that the CFTC is in a fortunate position to leverage the evolving work of existing initiatives to support the drive for quality and integrity in the voluntary carbon markets), and BP America, Inc. comment in response to the Second Voluntary Carbon Markets Convening at 3 (supporting guidance for CFTC regulated exchanges.)

<sup>67</sup> For example, the Commission may in the future revisit this guidance, or issue additional guidance, to further address the listing of cash-settled VCC derivatives contracts, including index-based contracts, or to further address the listing of VCC derivative contracts by SEFs.

<sup>68</sup> For the avoidance of doubt, this proposed guidance does not address the regulatory treatment of any underlying VCC or associated offset project or activity, including whether any such product, project or activity may qualify as a swap or be eligible for the forward contract exclusion under Commission's “swaps” definition. See Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Final Rule, 77 FR 48208 (August 13, 2012).

<sup>69</sup> CEA section 5(d)(3), 7 U.S.C. 7(d)(3).

<sup>70</sup> As noted above, the Appendix C Guidance is also relevant to SEFs, which are similarly obligated by statute only to permit trading in contracts that are not readily susceptible to manipulation. CEA section 5h(f)(3); 7 U.S.C. 37b-3(f)(3).

<sup>71</sup> Appendix C Guidance, paragraph (b)(2)(i)(A).

<sup>72</sup> *Id.*

As discussed above, addressing these criteria clearly in the contract's terms and conditions helps to ensure that trading in the contract is based on accurate information about the underlying commodity. This, in turn, helps to promote accurate pricing and helps to reduce the susceptibility of the contract to manipulation.

#### 1. Quality Standards

The Commission preliminarily believes that a DCM should consider the following VCC commodity characteristics when addressing quality standards in the development of the terms and conditions of a VCC derivative contract: (i) transparency, (ii) additionality, (iii) permanence and risk of reversal, and (iv) robust quantification.<sup>73</sup>

##### a. Transparency—Publicly Available Data to Promote Transparency

As a threshold matter, the Commission believes that a DCM should provide, in the terms and conditions of a VCC derivative contract, information about the VCCs that are eligible for delivery under the contract. The contract terms and conditions should include information that readily specifies the crediting program or programs—and, as applicable, the specific types of projects or activities—from which VCCs that are eligible for delivery under the contract may be issued. Specifying which crediting programs, and as applicable, which types of projects or activities, are eligible for purposes of delivery will help to provide clarity to market participants regarding the VCCs that can be expected to deliver under the contract, and will thereby help to ensure that the pricing of the contract accurately reflects the intended quality of the underlying VCCs. Where there is ambiguity or confusion about the quality of the VCCs that may be delivered under the contract, this may render the contract susceptible to manipulation or price distortion.

The Commission preliminarily believes that, in developing the terms and conditions of a VCC derivative contract, DCMs should also consider whether the crediting program for the underlying VCCs is making detailed information about the crediting program's policies and procedures and the projects or activities that it credits,

such as relevant project documentation, publicly available in a searchable and comparable manner. Making such information publicly available would assist market participants in understanding how GHG emission reductions or removals are calculated by the crediting program—including how additionality, which is discussed further below, is assessed—and how GHG emission reductions or removals are quantified. This would assist market participants in making informed evaluations, and comparisons, of the quality of the VCCs that underlie derivative contracts, which would help to support accurate pricing. Accordingly, information regarding the crediting program's policies and procedures for making program information publicly available may constitute an economically significant attribute of the underlying VCC that should be described or defined in the terms and conditions of the VCC derivative contract.

##### b. Additionality—The Underlying VCC Represents GHG Emission Reductions or Removals That Would Not Have Been Developed and Implemented in the Absence of the Added Monetary Incentive Created by the Revenue From the Sale of Carbon Credits

The Commission preliminarily believes that, in developing the terms and conditions of a VCC derivative contract, a DCM should consider whether the underlying VCCs represent GHG emission reductions or removals that are “additional”—in other words, whether the VCCs are credited only for projects or activities that result in GHG emission reductions or removals that would not have been developed and implemented in the absence of the added monetary incentive created by the revenue from the sale of carbon credits.<sup>74</sup> Additionality is viewed by many as a necessary element of a high quality VCC: if a VCC does not represent emission reductions or removals that would not have occurred in the absence of the added monetary incentive created by the revenue from the sale of carbon credits, then the VCC will not serve a market participant's goals of contributing to emissions mitigation.

Accordingly, as part of its contract design market research, a DCM should consider whether a crediting program can demonstrate that it has procedures in place to assess or test for additionality. A DCM should consider

whether those procedures are sufficiently rigorous and reliable to provide a reasonable assurance that GHG emission reductions or removals are credited only if they are additional. If holders of positions in a VCC derivative contract understand and intend for VCCs that are eligible for delivery under the contract to be additional, but in fact they may not be, then the pricing of the contract may not accurately reflect the quality of the VCCs that may be delivered under the contract: the cheapest-to-deliver VCC,<sup>75</sup> that otherwise meets the contract's specifications, may not have additionality.

Given that additionality is viewed by many as a necessary element of a high quality VCC, information regarding a crediting program's procedures for assessing or testing for additionality may constitute an economically significant attribute of the underlying VCCs, which should be described or defined in the terms and conditions of a VCC derivative contract.

##### c. Permanence and Accounting for the Risk of Reversal

The Commission preliminarily believes that, in developing the terms and conditions of a VCC derivative contract, a DCM should consider whether the crediting program for the underlying VCCs can demonstrate that it has measures in place to address and account for the risk of reversal (*i.e.*, the risk that VCCs issued for a project or activity may have to be recalled or cancelled due to carbon removed by the project or activity being released back into the atmosphere, or due to a reevaluation of the amount of carbon reduced or removed from the atmosphere by the project or activity). Understanding and evaluating the measures that a crediting program has in place to address and account for the risk of reversal may be particularly important where the underlying VCCs are issued for project or activity types with a higher reversal risk.

The risk of reversal may impact the risk management needs of VCC derivative market participants. Market participants that are utilizing physically-settled VCC derivative contracts to help meet their carbon mitigation goals have an interest in ensuring that, upon physical settlement, the underlying VCCs will actually reduce or remove the amount of emissions that they were intended to

<sup>73</sup> As is the case for physically-settled VCC derivative contracts, for cash-settled derivative contracts that settle to the price of a VCC, it is important to clearly specify the VCC quality standards in the contract's terms and conditions to help ensure that the pricing of the contract reflects the quality of the VCC underlying the contract.

<sup>74</sup> For example, a project or activity may not be considered to be “additional” if the project or activity is already required by law, regulation, or any other legally binding mandate applicable in the project's or activity's jurisdiction.

<sup>75</sup> The term “cheapest-to-deliver” refers to the least expensive commodity that can be delivered under the derivative contract that otherwise meets the contract's specifications.

reduce or remove. Accordingly, the risk of reversal—and the manner in which it is accounted for by a crediting program—is tied to the quality of the underlying VCCs and, by extension, to the pricing of the derivative contract. As a result, information regarding a crediting program's measures for estimating, monitoring, and addressing the risk of reversal may constitute an economically significant attribute of the underlying VCCs that should be described or defined in the terms and conditions of a VCC derivative contract.

As part of its contract design market research, the Commission preliminarily believes that a DCM should consider whether the crediting program for a VCC has measures in place that provide reasonable assurance that, in the event of a reversal, the VCC will be replaced by a VCC of comparably high quality that meets the contemplated specifications of the contract. Most crediting programs have established VCC “buffer reserves” to address the risk of credited GHG emission reductions or removals being reversed. Under this approach, VCCs are set aside into a common buffer reserve (or “pool”). Reserved VCCs can be drawn upon to compensate for reversals associated with a project or activity. If a reversal occurs, VCCs are drawn upon from the buffer reserve to replace VCCs that are canceled, proportional to the size of the reversal.

A DCM should consider whether a crediting program has a buffer reserve or other measures in place that provide reasonable assurance that, in the event of a reversal, the VCCs intended to underlie the derivative contract would be replaced by VCCs of comparable high quality that meets the contemplated specifications of the contract. The DCM could also consider whether the crediting program regularly reviews the methodology by which the size of its buffer pool is calculated in order to address evolving climate risks that may heighten the risk of reversal, and whether there is a mechanism in place to audit the continuing sufficiency of the buffer pool.

#### d. Robust Quantification—GHG Emission Reductions or Removals Should be Conservatively Quantified

The Commission preliminarily believes that, as part of its contract design market research, a DCM should consider the methodology or protocol used by a crediting program to calculate the level of GHG emission reductions or removals associated with credited projects or activities. Given the current absence of a standardized methodology or protocol to quantify GHG emission

reduction or removal levels<sup>76</sup>—not only across crediting programs, but even by a particular crediting program, with respect to different types of projects or activities—the Commission believes that a DCM that lists a VCC derivative contract should consider whether the crediting program for the underlying VCCs can demonstrate that the quantification methodology or protocol that it uses to calculate emission reductions or removals for the underlying VCCs is robust, conservative, and transparent. A robust, conservative, and transparent quantification methodology or protocol helps to ensure that the number of VCCs that are issued for a project or activity accurately reflects the level of GHG emission reductions or removals associated with the project or activity. Accordingly, information about the quantification methodology or protocol used by the crediting program to calculate GHG emission reductions or removals for projects or activities associated with the underlying VCCs may constitute an economically significant attribute of the underlying VCCs that should be described or defined in the terms and conditions of a VCC derivative contract.

For the derivative contracts that they list, DCMs are required to adopt, as is necessary and appropriate, exchange-set position limits for speculators.<sup>77</sup> To establish exchange-set position limits, a DCM should derive a quantitative estimate of the deliverable supplies of the underlying commodity for the delivery period specified in the contract.<sup>78</sup> A DCM's estimate of a VCC's deliverable supplies is likely to be informed by understanding how the relevant crediting program determines the amount of VCCs that are issued for credited projects or activities. Where the quantification methodology or protocol used to calculate the amount of VCCs is robust, conservative, and transparent, the DCM should have a more reliable basis from which to form its deliverable supply estimate. That deliverable supply estimate, in turn, can be used as the basis for effectively setting the DCM's exchange-set speculative

position limits to help reduce the possibility of corners or squeezes that may distort or manipulate the price of the derivative contract.<sup>79</sup>

#### 2. Delivery Points and Facilities

The Appendix C Guidance states that the delivery procedures for a physically-settled derivative contract should, among other things, seek to minimize or eliminate any impediments to making or taking delivery by both deliverers and takers of delivery, to help ensure convergence of cash and derivative contract prices at the expiration of the derivative contract.<sup>80</sup> When addressing delivery procedures for a physically-settled VCC derivative contract, the Commission preliminarily believes that a DCM should consider the governance framework and tracking mechanisms of the crediting program for the underlying VCCs, as well as the crediting program's measures to prevent double-counting.<sup>81</sup>

##### a. Governance

The Commission preliminarily believes that a DCM should consider whether the crediting program for the underlying VCCs can demonstrate that it has a governance framework that effectively supports the crediting program's independence, transparency and accountability. As a threshold matter, a governance framework that effectively supports transparency and accountability helps to ensure the overall quality of the VCCs issued by a crediting program. Furthermore, it is the Commission's understanding that a crediting program's registry may be used as a delivery point to facilitate physical settlement for a VCC derivative contract. As discussed above, a registry is a repository for tracking mitigation projects or activities and associated VCCs. An effective crediting program governance framework can help to ensure that the crediting program operates or makes use of a registry that has appropriate measures in place to

<sup>79</sup> For a cash-settled VCC derivative contract, a DCM may similarly consider the deliverable supply of the underlying VCCs when setting exchange-set speculative position limits or historical open interest when establishing non-spot month position accountability levels. *See*, 17 CFR 150.5 and Appendix F to Part 150, Title 17.

<sup>80</sup> Appendix C Guidance, paragraph (b)(2)(i)(B).

<sup>81</sup> While cash-settled VCC derivative contracts do not result in the delivery of a VCC, the Commission preliminarily believes that considering the VCC commodity characteristics of governance, tracking and no double-counting when developing the terms and conditions of a cash-settled VCC derivative contract will help to ensure that the contract terms and conditions address essential economic characteristics of the underlying VCC in a manner that promotes accurate pricing and helps to reduce the susceptibility of the contract to manipulation.

<sup>76</sup> Related specifically to the agriculture and forest sector, the U.S. Department of Agriculture's Office of the Chief Economist has published a Request for Information on the Federal Strategy to Advance Measurement and Monitoring Greenhouse Gas Measurement and Monitoring for the Agriculture and Forest Sectors. This Request for Information was issued on behalf of the Administration's Greenhouse Gas Monitoring and Measurement Interagency Working Group (“GHG IWC”). *See*, 88 FR 44251 (July 12, 2023).

<sup>77</sup> CEA section 5(d)(5), 7 U.S.C. 7(d)(5). *See also* 17 CFR 38.300–301.

<sup>78</sup> Guidance on estimating deliverable supply can be found in the Appendix C Guidance.

facilitate the physical settlement of a VCC derivative contract.

In reviewing a crediting program's governance framework, the Commission preliminarily believes that a DCM should consider, among other things, the program's decision-making procedures, including who is responsible for administration of the program and how the independence of key functions is ensured; reporting and disclosure procedures; public and stakeholder engagement processes; and risk management policies, such as financial resources/reserves, cybersecurity, and anti-money laundering policies. The DCM also should consider whether information regarding these procedures and policies is made publicly available.

Given the importance of a crediting program's governance framework in ensuring the overall quality of the VCCs issued by the program, as well as the potential importance of a crediting program's registry in facilitating delivery, it may be appropriate for the DCM to include information about the crediting program's governance framework in the terms and conditions of a physically-settled VCC derivative contract.

#### b. Tracking

The Commission preliminarily believes that a DCM should consider whether the crediting program for the underlying VCCs can demonstrate that it has processes and procedures in place to help ensure clarity and certainty with respect to the issuance, transfer, and retirement of VCCs. The DCM should consider whether the crediting program operates or makes use of a registry that has measures in place to effectively track the issuance, transfer, and retirement of VCCs; to identify who owns or retires a VCC; and to make sure that each VCC is uniquely and securely identified and associated with a single emission reduction or removal of one metric ton of carbon dioxide equivalent. In circumstances where the registry will serve as the delivery point for a physically-settled VCC derivative contract, it may be appropriate for the DCM to include as a condition of the contract that the registry have such measures to address tracking in place, as well as effective measures to address double-counting, as discussed below.

#### c. No Double Counting

The Commission preliminarily believes that a DCM should consider whether the crediting program for the underlying VCCs can demonstrate that it has effective measures in place that provide reasonable assurance that

credited emission reductions or removals are not double counted. That is, that the VCCs representing the credited emission reductions or removals are issued to only one registry and cannot be used after retirement or cancellation. As discussed above in connection with the VCC commodity characteristics of additionality and permanence, market participants that are utilizing physically-settled VCC derivative contracts to help meet carbon mitigation goals have an interest in ensuring that, upon physical settlement, the underlying VCCs will actually reduce or remove the emissions that they were intended to reduce or remove. In order for VCCs to effectively further carbon mitigation goals, it is important for each credited VCC to be uniquely associated with a single emission reduction or removal of one metric ton of carbon dioxide equivalent—and a crediting program should have effective measures in place that provide reasonable assurance of this. If there is not a reasonable assurance that the VCCs underlying a derivative contract are each unique, then, among other things, this could distort or obscure the accuracy of the derivative contract's pricing.

In the context of evolving national and international carbon markets and emissions trading frameworks, effective measures to ensure that emission reductions or removals are not double counted may include, among other things, procedures for conducting cross-checks across multiple carbon credit registries.

#### 3. Inspection Provisions—Third-Party Validation and Verification

Consistent with the Appendix C Guidance, the Commission believes that any inspection or certification procedures for verifying compliance with quality requirements or any other related delivery requirements for physically-settled VCC derivatives contracts should be specified in the contract's terms and conditions.<sup>82</sup> The Commission believes that these inspection or certification procedures should be consistent with the latest procedures in the voluntary carbon markets. To that end, the Commission preliminarily believes that the DCM should consider, among other things,

how the crediting program for the underlying VCCs requires validation and verification that credited mitigation projects or activities meet the crediting program's rules and standards.

The Commission preliminarily believes that, when designing a VCC derivative contract, a DCM should consider whether the crediting program has up-to-date, robust and transparent validation and verification procedures, including whether those procedures contemplate validation and verification by a reputable, disinterested party or body. By providing independent confirmation that mitigation projects or activities are achieving the claimed GHG emission reductions or removals, third-party validation and verification can help to ensure that the underlying VCC accurately reflects the quality intended by the DCM and supports voluntary carbon market integrity.<sup>83</sup>

A DCM should consider whether the crediting program is employing best practices with respect to third-party validation and verification, which may include conducting reviews of the performance of validators, procedures for remediating performance issues, not using the same third party validator to verify every project type or project category, and using a separate third party to conduct ongoing validation and verification from the third party that completed the initial validation and verification process.

#### *B. A DCM Shall Monitor a Derivative Contract's Terms and Conditions as They Relate to the Underlying Commodity Market*

DCM Core Principle 4 requires a DCM to prevent manipulation, price distortion, and disruptions of the physical delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures.<sup>84</sup> For physically-settled derivative contracts, the Commission has recognized DCM Core Principle 4 to include, among other things, an obligation to monitor the contract's terms and conditions as they relate the underlying commodity market, and to the convergence between the contract price and the price of the underlying commodity, and to monitor the supply of the underlying commodity in light of the contract's delivery requirements.<sup>85</sup> Such monitoring will help a DCM identify circumstances that may cause the contract to become susceptible to price manipulation or distortions, and

<sup>82</sup> Appendix C Guidance, paragraph (b)(2)(i)(G) (To the extent that formal inspection procedures are not used in the cash market, an acceptable specification would contain provisions that assure accuracy in assessing the commodity, that are available at a low cost, that do not pose an obstacle to delivery on the contract and that are performed by reputable, disinterested third-party or by qualified designated contract market employees.).

<sup>83</sup> *Id.*

<sup>84</sup> CEA Section 5(d)(4), 7 U.S.C. 7(d)(4). See also 17 CFR 38.250–258.

<sup>85</sup> 17 CFR 38.252.

to assess whether the terms and conditions of the contract continue to be appropriate—or whether a change in circumstances should be addressed, for example, through changes to the contract's terms and conditions.<sup>86</sup>

Given that VCC derivatives are a comparatively new and evolving class of products, and given that standardization and accountability mechanisms for VCCs are still being developed, the Commission preliminarily believes that the monitoring by a DCM of the terms and conditions of a physically-settled VCC derivative contract should include continual monitoring of the appropriateness of the contract's terms and conditions that includes, among other things, monitoring to ensure that the delivery instrument—that is, the underlying VCC—conforms or, where appropriate, updates to reflect the latest certification standard(s) applicable for that VCC. For example, where there are changes to either the crediting program or the types of projects or activities associated with the underlying VCC, due for example to new standards or certifications, then the DCM should amend the contract's terms and conditions to reflect this update. In such circumstances, the DCM should also ensure that it is monitoring the adequacy of the estimated deliverable supply of the underlying VCC to satisfy the contract's delivery requirements.

Finally, the Commission reminds market participants that Commission regulations implementing DCM Core Principle 4 require DCMs to have rules requiring their market participants to keep records of their trading that include records of their activity in the underlying commodity and related derivatives markets.<sup>87</sup> A DCM's rules also must require market participants to make such records available upon request to the DCM.<sup>88</sup> As such, DCM market participants are required, upon request, to make records of their trading in underlying VCC cash markets available to the DCM, in order to assist the DCM in fulfilling its market monitoring obligations. These records also are subject to Commission inspection under applicable Commission recordkeeping rules.

### *C. A DCM Must Satisfy the Product Submission Requirements Under Part 40 of the CFTC's Regulations and CEA Section 5c(c)*

There are generally two processes by which a DCM may list a new derivative contract for trading.<sup>89</sup> The DCM may elect to list the contract for trading by providing the Commission with a written certification—a “self-certification”—that the contract complies with the CEA, including the CFTC's regulations thereunder.<sup>90</sup> Alternatively, the DCM may elect voluntarily to seek prior Commission approval of the contract.<sup>91</sup> In each case, the DCM must submit prescribed information to the Commission, including but not limited to the contract's terms and conditions.<sup>92</sup> Amendments to an existing derivative contract also must be submitted to the Commission, along with prescribed information, either by way of self-certification or for prior Commission approval.<sup>93</sup>

This proposed guidance highlights three submission requirements in connection with the listing of VCC derivative contracts. These requirements apply regardless of whether a DCM elects to list the contract by way of self-certification, or with prior Commission approval. These requirements generally apply with respect to the listing by a DCM of a derivative contract, regardless of the underlying asset class. However, the Commission wishes to remind DCMs of the importance of fully complying with these requirements in a submission for a VCC derivative contract.

The relevant requirements provide, first, that a contract submission to the Commission must include an explanation and analysis of the contract and its compliance with applicable provisions of the CEA, including core principles and the Commission's regulations thereunder.<sup>94</sup> Second, the

relevant requirements provide that the explanation and analysis of the contract either be accompanied by the documentation relied upon to establish the basis for compliance with applicable law, or incorporate information contained in such documentation, with appropriate citations to data sources.<sup>95</sup> Third, the relevant requirements provide that, if requested by Commission staff, a DCM must provide any additional evidence, information or data that demonstrates that the contract meets, initially or on a continuing basis, the requirements of the CEA or the Commission's regulations or policies thereunder.<sup>96</sup>

Since VCC derivatives are a comparatively new and evolving class of products, and since standardization and accountability mechanisms for VCCs are still being developed, the Commission anticipates that in connection with the submission for a VCC derivative contract, a DCM may provide qualitative explanations and analysis to assist in addressing the three above-described requirements. The Commission expects that the information—including supporting documentation, evidence and data—provided by the DCM to describe how the contract complies with the CEA and applicable Commission regulations, will be complete and thorough. Given unique and developing aspects of VCCs and VCC derivative markets, including complete and thorough information in a submission for a VCC derivative contract will assist the Commission and its staff in their understanding of the contract and their analysis of the contract's compliance with applicable statutory and regulatory requirements, including whether or not the contract is readily susceptible to manipulation.

### **III. Request for Comment**

The Commission requests comment from the public on all aspects of the Commission's proposed guidance regarding the listing of VCC derivative contracts, and further invites comments on specific questions related to the listing of such contracts. The Commission encourages all comments including background information, actual market examples, and best practice principles. Specifically, the Commission requests comment on the following questions:

analysis of contracts that are submitted for affirmative Commission approval.

<sup>95</sup> 17 CFR 40.2(a)(3)(v) (for self-certification) and 40.3(a)(4) (for Commission approval).

<sup>96</sup> 17 CFR 40.2(b) (for self-certification) and 40.3(a)(10) (for Commission approval).

<sup>86</sup> The Commission has, similarly, recognized that a DCM has a responsibility to monitor the continued appropriateness of the terms and conditions of a cash-settled derivative contract. *See, e.g.*, 17 CFR 38.253(a)(2).

<sup>87</sup> 17 CFR 38.254(a).

<sup>88</sup> *Id.*

<sup>89</sup> SEFs also may generally list new contracts by way of either of these two processes. *See, generally*, CEA section 5c(c), 7 U.S.C. 7a–2(c).

<sup>90</sup> CEA section 5c(c)(1), 7 U.S.C. 7a–2(c)(1). *See also* 17 CFR 40.2 The Commission must receive the DCM's self-certified submission at least one business day before the contract's listing. 17 CFR 40.2(a)(2).

<sup>91</sup> CEA sections 5c(c)(4)–(5), 7 U.S.C. 7a–2(c)(4)–(5). *See also* 17 CFR 40.3.

<sup>92</sup> 17 CFR 40.2–40.3.

<sup>93</sup> 17 CFR 40.5–40.6.

<sup>94</sup> 17 CFR 40.2(a)(3)(v) (for self-certification) and 40.3(a)(4) (for Commission approval). The “explanation and analysis” requirement for self-certified contracts provides for such explanation and analysis to be “concise.” The “explanation and analysis” requirement for contracts submitted for prior Commission approval does not include the “concise” qualifier. The Commission requires DCMs to provide a more detailed explanation and

## General

1. In addition to the VCC commodity characteristics identified in this proposed guidance, are there other characteristics informing the integrity of carbon credits that are relevant to the listing of VCC derivative contracts? Are there VCC commodity characteristics identified in this proposed guidance that are not relevant to the listing of VCC derivative contracts, and if so, why not?

2. Are there standards for VCCs recognized by private sector or multilateral initiatives that a DCM should incorporate into the terms and conditions of a VCC derivative contract, to ensure the underlying VCCs meet or exceed certain attributes expected for a high-integrity carbon credit?

3. In addition to the criteria and factors discussed in this proposed guidance, are there particular criteria or factors that a DCM should consider in connection with monitoring the continual appropriateness of the terms and conditions of a VCC derivative contract?

4. In addition to the criteria and factors discussed in this proposed guidance, are there particular criteria or factors that a DCM should consider, which may inform its analysis of whether or not a VCC derivative contract would be readily susceptible to manipulation?

5. Should the VCC commodity characteristics that are identified in this proposed guidance as being relevant to the listing by a DCM of VCC derivative contracts, also be recognized as being relevant to submissions with respect to VCC derivative contracts made by a registered foreign board of trade under CFTC regulation 48.10?

## Transparency

6. Is there particular information that DCMs should take into account when considering, and/or addressing in a VCC derivative contract's terms and conditions, whether a crediting program is providing sufficient access to information about the projects or activities that it credits? Are there particular criteria or factors that a DCM should take into account when considering, and/or addressing in a contract's terms and conditions, whether there is sufficient transparency about credited projects or activities?

## Additionality

7. Are there particular criteria or factors that DCMs should take into account when considering, and/or addressing in a VCC derivative contract's terms and conditions,

whether the procedures that a crediting program has in place to assess or test for additionality provide a reasonable assurance that GHG emission reductions or removals will be credited only if they are additional?

8. In this proposed guidance, the Commission recognizes VCCs as additional where they are credited for projects or activities that would not have been developed and implemented in the absence of the added monetary incentive created by the revenue from carbon credits. Is this the appropriate way to characterize additionality for purposes of this guidance, or would another characterization be more appropriate? For example, should additionality be recognized as the reduction or removal of GHG emissions resulting from projects or activities that are not already required by law, regulation, or any other legally binding mandate applicable in the project's or activity's jurisdiction?

## Risk of Reversal

9. Are there particular criteria or factors that DCMs should take into account when considering, and/or addressing in a VCC derivative contract's terms and conditions, a crediting program's measures to avoid or mitigate the risk of reversal, particularly where the underlying VCC is sourced from nature-based projects or activities such as agriculture, forestry or other land use initiatives?

10. How should DCMs treat contracts where the underlying VCC relates to a project or activity whose underlying GHG emission reductions or removals are subject to reversal? Are there terms, conditions or other rules that a DCM should consider including in a VCC derivative contract in order to account for the risk of reversal?

## Robust Quantification

11. Are there particular criteria or factors that a DCM should take into account when considering, and/or addressing in a contract's terms and conditions, whether a crediting program applies a quantification methodology or protocol for calculating the level of GHG reductions or removals associated with credited projects or activities that is robust, conservative and transparent?

## Governance

12. In addition to a crediting program's decision-making, reporting, disclosure, public and stakeholder engagement, and risk management policies, are there other criteria or factors that a DCM should take into account when considering, and/or addressing in a VCC derivative

contract's terms and conditions, whether the crediting program can demonstrate that it has a governance framework that effectively supports the program's transparency and accountability?

## Tracking and No Double Counting

13. In addition to the factors identified in this proposed guidance, are there other factors that should be taken into account by a DCM when considering, and/or addressing in a VCC derivative contract's terms and conditions, whether the registry operated or utilized by a crediting program has processes and procedures in place to help ensure clarity and certainty with respect to the issuance, transfer, and retirement of VCCs?

14. Are there particular criteria or factors that a DCM should take into account when considering, and/or addressing in a VCC derivative contract's terms and conditions, whether it can be demonstrated that the registry operated or utilized by a crediting program has in place measures that provide reasonable assurance that credited emission reductions or removals are not double-counted?

## Inspection Provisions

15. Should the delivery procedures for a physically-settled VCC derivative contract describe the responsibilities of registries, crediting programs, or any other third-parties required to carry out the delivery process?

## Sustainable Development Benefits and Safeguards

16. Certain private sector and multilateral initiatives recognize the implementation by a crediting program of measures to help ensure that credited mitigation projects or activities meet or exceed best practices on social and environmental safeguards, as a characteristic that helps to inform the integrity of VCCs issued by the crediting program. When designing a VCC derivative contract, should a DCM consider whether a crediting program has implemented such measures?

17. Certain private sector and multilateral initiatives recognize the implementation by a crediting program of measures to help ensure that credited mitigation projects or activities would avoid locking in levels of GHG emissions, technologies or carbon intensive practices that are incompatible with the objective of achieving net zero GHG emissions by 2050, as a characteristic that helps to inform the integrity of VCCs issued by the crediting program. When designing a VCC derivative contract, should a DCM

consider whether a crediting program has implemented such measures?

Issued in Washington, DC, on December 21, 2023, by the Commission.

**Christopher Kirkpatrick,**  
*Secretary of the Commission.*

**NOTE:** The following appendices will not appear in the Code of Federal Regulations.

## **Appendices to Commission Guidance Regarding the Listing of Voluntary Carbon Credit Derivative Contracts; Request for Comment—Voting Summary and Chairman’s and Commissioners’ Statements**

### **Appendix 1—Voting Summary**

On this matter, Chairman Behnam and Commissioners Johnson, Goldsmith Romero, and Pham voted in the affirmative. Commissioner Mersinger voted to concur. No Commissioner voted in the negative.

### **Appendix 2—Statement of Support of Chairman Rostin Behnam**

The CFTC as a market regulator has a significant role to play in the voluntary carbon markets (VCMs). As we have seen the listing of listed futures on voluntary carbon credits (VCCs), the Agency’s relationship and responsibility is real. These markets present an opportunity for the agricultural economy that historically underpins the need for derivatives markets for risk management and price discovery, but they also provide a useful tool throughout the financial markets and the real economy. And today, the Agency takes the most significant step of a financial regulator to promote fundamental standards for high integrity VCCs.

Market participants from across all asset classes will increasingly turn to the derivatives markets as they manage the impact of physical and transition risks related to extreme weather events and climate-related financial risk. The CFTC’s role is to ensure that these developing derivatives markets, including those for VCCs, have integrity, adhere to basic market regulatory requirements, and remain resilient as we most certainly will continue to experience extreme and dramatic weather events that will impact pricing and volatility.

The Commission’s proposed guidance for designated contract markets (DCMs) that list derivatives contracts with voluntary carbon credits (VCC) as the underlying commodity is an important step in shaping the development of high-integrity voluntary carbon markets. For the first time ever, the CFTC is proposing regulatory guidance for

exchanges listing products aimed at providing tools to manage risk, promote price discovery, and help channel capital to support decarbonization. The publication of this proposed guidance and request for public comment marks the culmination of years of work with stakeholders such as farmers, foresters, end users, energy traders and associations, emission-trading focused entities, carbon-credit rating agencies, crediting programs, CFTC-registered exchanges and clearinghouses, and derivatives trade associations. This proposal also represents a whole-of-government approach in coordination with our partners across the federal complex.

Each step has been intentional. My sponsorship of the Market Risk Advisory Committee’s Climate-Related Market Risk Subcommittee, which issued a report on Managing Climate Risk in the U.S. Financial System Report in 2020 identified putting a price on carbon as a fundamental element for financial markets to efficiently channel capital to reduce greenhouse gas emissions (GHGs).<sup>1</sup> My establishment of the CFTC’s Climate Risk Unit in March 2021 allowed the Commission to build its subject matter expertise regarding the role that climate-related derivatives will have in pricing and managing climate-related financial risk.<sup>2</sup> I hosted two VCM Convenings to gather information from a wide variety of market participants to better understand the potential role of the official sector in these markets, particularly as we began to see the emergence of listed futures products that reference VCC cash markets.<sup>3</sup> The CFTC, with the support of my fellow commissioners, issued a Request for Information on Climate-Related Financial Risk that received 80 comments on ten priority areas of interest including VCMs and product innovation.<sup>4</sup> I have also testified before

<sup>1</sup> Managing Climate Risk in the U.S. Financial System, Sept. 9, 2020, <https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf>.

<sup>2</sup> CFTC Acting Chairman Behnam Establishes New Climate Risk Unit, Mar. 17, 2021, <https://www.cftc.gov/PressRoom/PressReleases/8368-21>.

<sup>3</sup> CFTC, Event: Commission Meetings, CFTC Announces Voluntary Carbon Markets Convening (Jun. 2, 2022), <https://www.cftc.gov/PressRoom/Events/opaeventcftccarbonmarketconvene060222>; and CFTC, Event: Commission Meetings, CFTC Announces Second Voluntary Carbon Markets Convening, (July 19, 2023), <https://www.cftc.gov/PressRoom/Events/opaeventvoluntarycarbonmarkets071923>.

<sup>4</sup> Request for Information on Climate-Related Financial Risk, 87 FR 34856 (Jun. 8, 2022), available

Congress on several occasions specifically on the role of financial markets in addressing the climate crisis and my views on the CFTC’s role in supporting solutions.<sup>5</sup>

The primary takeaway from this research and public engagement is clear: the Commission should act, consistent with its statutory authority under the Commodity Exchange Act (CEA), to strengthen market integrity, transparency, and liquidity for derivatives with an underlying VCC that are real, additional, permanent, verifiable, and represent unique metric tons of GHG emissions reduced or removed from the atmosphere.

While VCC derivatives are a comparatively new and evolving class of products, DCMs must ensure that any listed derivatives comply with the CEA and Commission regulations. The proposed guidance outlines factors that DCMs should consider when listing products including: DCM Core Principle 3, which requires DCMs to list only contracts that are not readily susceptible to manipulation; DCM Core Principle 4, which requires DCMs to have the capacity and responsibility to prevent manipulation, price distortion, and other market disruptions through market surveillance, compliance, and enforcement practices and procedures; the Commission’s regulations promulgated for these DCM Core Principles; and the product submission provisions set forth in CEA section 5c(c) and Part 40 of the Commission regulations.

The proposed guidance is not intended to modify or supersede existing statutory or regulatory requirements, or existing Commission guidance that addresses the DCMs’ listing of derivative contracts, such as Appendix C to Part 38 of the Commission’s regulations. Instead, the proposed guidance outlines particular VCC commodity characteristics that a DCM should consider in the design of a VCC futures contract’s terms and conditions such (i) quality standards, which include transparency, additionality, permanence and accounting for the risk of reversal, and

at <https://www.cftc.gov/sites/default/files/2022/06/2022-12302a.pdf>.

<sup>5</sup> See, e.g., Rostin Behnam, Chairman, CFTC, Testimony by Chairman Rostin Behnam Before the Subcommittee on Agriculture, Rural Development, Food and Drug Administration and Related Agencies Committee on Appropriations, U.S. House of Representatives (Mar. 28, 2023), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam35>; Rostin Behnam, CFTC, Testimony of Commissioner Rostin Behnam before the House Select Committee on the Climate Crisis (Oct. 1, 2020), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam16>.

robust quantification of emissions reductions or removals; (ii) delivery points and facilities which include effective governance at the carbon crediting program, tracking the issuance, transfer, and retirement of VCCs, and no double counting; and (iii) inspection provisions which includes independent third-party validation and verification. A DCM's consideration of these factors during the design of a derivative product's terms and conditions should promote accurate pricing, reduce susceptibility of the contract to manipulation, help prevent price distortions, and foster confidence in the VCC contracts. Consistent with the current statutory and regulatory requirements, DCMs would retain reasonable discretion in establishing the manner in which it complies with a DCM Core Principles and the Commission's regulations.

I believe the proposed guidance outlines well-researched VCC commodity characteristics that build on several private sector and multilateral initiatives that have made great strides to strengthen VCC credit integrity standards. I also believe the proposed guidance supports transparency, liquidity, and market integrity. This effort is the product of a strong public-private partnership that I have strived to achieve with the CFTC's traditional stakeholders as well as those VCM stakeholders that may be newer to the derivatives markets.

The Commission is cognizant that the derivatives markets are global markets and has crafted this proposed guidance to be complementary to the important work underway by the International Organization of Securities Commissions (IOSCO) through its Sustainable Finance Task Force's Carbon Market Workstream, which I co-chair with Verena Ross, the Chair of ESMA. While this proposed Commission guidance focuses on the due diligence that DCMs should undertake when designing and monitoring their proprietary listed VCC derivative contracts, IOSCO's work over nearly two years is focused on how regulators can promote sound market structure and enhance financial integrity in the VCMs so that high-quality carbon credits can be traded in an orderly and transparent way. I invite our stakeholders to also provide comment on IOSCO's December 2023 publication of its VCM Consultation Report.<sup>6</sup>

<sup>6</sup> International Organization of Securities Commissions (IOSCO), CR06/2023 Voluntary Carbon Markets, Consultation Report (Dec. 2023), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD749.pdf>.

The proposed guidance is not intended to suggest that the Commission has a role in creating or mandating compliance with any kind of climate policy. The CFTC's unique mission focused on risk mitigation and price discovery, however, puts us on the front lines of the now global nexus between financial markets and decarbonization efforts. Leveraging the CFTC's personnel and expertise demonstrates our commitment to taking thoughtful and deliberate next steps toward building a financial system that provides effective tools in achieving emission reductions.

I thank my fellow commissioners for enabling the Commission to publish this proposed guidance for public comment. I greatly appreciate the expertise and all of the hard work done by the staff in my office, the Division of Market Oversight, and the Office of the General Counsel on this proposed guidance. I look forward to reviewing the public comments on all aspects of the guidance as well as on the seventeen specific questions relating to the listing for trading of VCC derivative contracts.

### Appendix 3—Statement of Commissioner Kristin Johnson

Today, the Commodity Futures Trading Commission (Commission or CFTC) adopts proposed Guidance and a Request for Comments regarding the listing of voluntary carbon credit (VCC) derivative contracts on designated contract markets (DCMs)—boards of trade that operate under the regulatory oversight of the CFTC (Proposed Guidance). I support the Proposed Guidance as it advances important transparency and market integrity efforts.

However, evidence suggests that environmental commodity markets, specifically the underlying spot markets for carbon credits, are rife with fraud. Consequently, I find the Proposed Guidance to be necessary, but insufficient. I am hopeful that the Proposed Guidance ushers in discussion and the development of a comprehensive regulatory initiative to address the deeply concerning, and nearly indisputable, proliferation of fraud in the carbon credit markets.

As I noted, in a recent speech at a joint convening of the Environmental Advisory Council and the Financial Sector Advisory Council of the Dallas Federal Reserve Bank:

While the issues and concerns regarding climate risks are endemic, complex, and inherently require multi-lateral solutions effectuated by an international coalition of stakeholders—let's call it: a coalition of the willing—I strongly believe that financial market regulators and committed market

participants may play a pivotal role in developing and implementing some basic, foundational market reforms.<sup>1</sup>

I anticipate and look forward to the public engagement regarding the Proposed Guidance and responses to the Request for Comments, particularly as relates to the efforts of the Proposed Guidance to address transparency, additionality, risk of reversal, robust quantification, governance, tracking and double counting, inspection provisions, and sustainable development benefits and safeguards. In developing a formal framework to support the VCC markets, I strongly believe that a comprehensive approach that addresses the diversity of environmental derivatives emerging in our markets will improve visibility, enhance integrity, and promote carbon neutrality.

### *The Market for Carbon Credits*

A VCC is a tradeable intangible instrument that is issued by a carbon crediting program. Once registered, VCCs associated with a mitigation project or activity may be acquired by end users (businesses or individuals) or intermediaries who act as brokers. While the number of VCC exchanges continues to increase, the spot market for such products remains largely bespoke, with buyers purchasing directly from mitigation project developers or via intermediaries. A carbon credit market creates a forum that enables buyers and distributors to engage in the purchase and sale, respectively, of environmental commodities. Each environmental commodity represents the acquisition or distribution of a credit that contributes to the reduction or sequestration (capturing and storage) of greenhouse gas emissions. Carbon markets are either mandatory (compliance) markets or voluntary. VCC markets are not established by any government authority.

The VCC market serves as an important tool, among many needed

<sup>1</sup> Kristin Johnson, Commissioner, CFTC, Keynote Address at The Federal Reserve Bank of Dallas: All Hat, No Cattle: The Need For Market Structure Reforms in the Voluntary Carbon Markets (Nov. 29, 2023), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson10>. In October, the United Nations Sustainable Stock Exchanges (UN SSE), in collaboration with the International Organization of Securities Commissions (IOSCO), hosted a roundtable on Carbon Markets at the 8th UNCTAD World Investment Forum to engage in dialogue on the future of carbon markets and the role exchanges and securities market regulators can play in making these markets work effectively in combating climate change. Sustainable Stock Exchanges initiative, Carbon markets action framework launched at UNCTAD World Investment Forum (Oct. 18, 2023), <https://sseinitiative.org/all-news/carbon-markets-action-framework-launched-at-unctad-world-investment-forum/>.

tools, designed to address mounting evidence of climate change and the attendant, significant effects on the global economy. Under Chair Behnam's leadership, in 2020, the Climate-Related Market Risk Subcommittee of the Commission's Market Risk Advisory Committee (an Advisory Committee that I currently sponsor), released a report identifying actions the Commission could take to address climate change and finding that climate-related financial risks pose a major risk to the stability of the U.S. financial system.<sup>2</sup>

A report by the U.S. Department of the Treasury released in September explains that "[t]he impacts of climate change are significant and escalating, including through more frequent and severe weather events, rising sea levels, and higher temperatures."<sup>3</sup> The report details how climate risks are impacting individual household finances, U.S. financial markets, and supply chains. "In 2022 alone, the cost of climate and weather disasters in the United States totaled more than \$176 billion—the third most costly year on record."<sup>4</sup>

There are deep and persistent concerns regarding the integrity, credibility, and lack of visibility in the market for carbon credits. Indisputably, challenged efforts to establish universally-adopted and enforceable integrity standards has further stymied attempts to scale carbon credit markets.

Just last fall, U.S. Senators Elizabeth Warren, Cory Booker, and Kirsten Gillibrand alongside several other Senators, encouraged the CFTC to use its enforcement jurisdiction aggressively to investigate and prosecute fraud and manipulation in spot and forward environmental commodity markets.<sup>5</sup>

On June 29, 2023, the Commission announced the Environmental Fraud Task Force, which was created to address misconduct in the regulated derivatives markets and to investigate fraud in the spot market for VCCs, in particular with respect to the purported environmental benefits of purchased carbon credits, and registrants' misrepresentations regarding purported environmental benefits and

environmental, social, and governance (ESG) products or strategies.<sup>6</sup>

These issues have become so much a part of the cultural dialogue that *The New Yorker* featured an article titled "The Great Cash-For-Carbon Hustle," which detailed the rise and fall of South Pole, led by its forty-four-year-old CEO Rant Heuberger, and the revelation that it sold carbon credits that were not real.

In recent speeches at the Federal Reserve Banks in Atlanta and Dallas and Rice University's Baker Institute for Public Policy Annual Energy Summit, I outlined the necessity for market structure reforms in the VCC markets as well as derivatives on VCCs.<sup>7</sup> As I have previously stated:

in order for the carbon offset markets to have any significance (and, arguably, for such markets to avoid extinction), we must ensure the integrity of the market.<sup>8</sup> Financial market regulators and committed market participants play a pivotal role in developing and implementing some basic, foundational market reforms.<sup>9</sup>

Today's Proposed Guidance marks a step in the right direction.

#### *Commission Regulatory Authority*

The Proposed Guidance applies to the listing of futures with VCCs as the underlying assets. DCMs that list and offer derivatives on VCCs, which are commodities, must be registered with the Commission prior to offering such contracts. Pursuant to the Commodity Exchange Act (CEA), to be designated, and maintain a designation, as a contract market, a board of trade must comply with all core principles and any requirement that the Commission may impose by rule or regulation.

<sup>6</sup> Release Number 8736–23, CFTC Division of Enforcement Creates Two New Task Forces, <https://www.cftc.gov/PressRoom/PressReleases/8736-23>.

<sup>7</sup> Kristin Johnson, Commissioner, CFTC, Keynote Address at Rice University's Baker Institute for Public Policy Annual Energy Summit: Credibility, Integrity, Visibility: The CFTC's Role in the Oversight of Carbon Offset Markets (Oct. 5, 2023), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson7>; Kristin Johnson, Commissioner, CFTC, Keynote Address at The Federal Reserve Bank of Atlanta: Policing the (Token) Economy: Introducing Corporate Governance and Market Structure Reforms in Crypto and Environmental Commodities Markets (Nov. 13, 2023), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson8>; Kristin Johnson, Commissioner, CFTC, Keynote Address at The Federal Reserve Bank of Dallas: All Hat, No Cattle: The Need For Market Structure Reforms in Voluntary Carbon Markets (Nov. 29, 2023), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson10>.

<sup>8</sup> Kristin Johnson, Commissioner, CFTC, Keynote Address at The Federal Reserve Bank of Dallas: All Hat, No Cattle: The Need For Market Structure Reforms in Voluntary Carbon Markets (Nov. 29, 2023), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson10>.

<sup>9</sup> *Id.*

Core principle 3 requires a DCM to demonstrate that listed contracts are not readily subject to manipulation. Core principle 4 requires a DCM to prevent manipulation, price distortion, and disruptions of the physical delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures.<sup>10</sup> Guidance and acceptable practices provide contextual information regarding the core principles and detailed examples of how a DCM must satisfy a core principle. Additionally, DCMs must comply with "submission requirements . . . prior to listing a product for trading," including by way of self-certification or Commission approval of such products.

The Commission reviews the product specifications, including information about the underlying asset, as part of this review process.

#### *Futures on VCCs: Great Interest, Limited Volume*

Over the last several years, the Commission authorized the listing of futures contracts on certain environmental instruments, including mandatory emissions and voluntary carbon program instruments. There are almost two hundred derivative contracts on environmental commodities although at this time only three contracts have open interest. As of November 2023, DCMs submitted eighteen futures contracts on voluntary carbon market products the Commission for listing. Derivative contracts on VCCs base their prices on the spot price of VCCs,<sup>11</sup> and therefore the integrity of the underlying spot market is critical to the stability of the derivatives market for those underlying VCC commodities.

#### *General Summary of the Proposed Guidance*

Endemic fraud in the VCC spot market impacts the integrity of environmental derivative contracts that reference spot market projects. While the Commission's authority to introduce regulation is limited to commodity

<sup>10</sup> 17 CFR part 38, Appendix B to Part 38 (*Guidance on, and Acceptable Practices in, Compliance With Core Principles*), and Appendix C to Part 38 (*Demonstration of Compliance That a Contract Is Not Readily Susceptible to Manipulation*).

<sup>11</sup> For example, NYMEX's CBL Global Environmental Offset futures contracts, and Nodal Exchange's Verified Emission Reduction futures and options contracts, are physically-settled contracts. If the holder of a position in the contract still has an open position at the expiration of trading in the contract, then the position holder must, in accordance with the rules for delivery set forth in the contract, make or take delivery (as applicable) of 1,000 VCCs that meet the contract's rules for delivery eligibility.

<sup>2</sup> Release Number 8234–20, CFTC's Climate-Related Risk Subcommittee Releases Report, <https://www.cftc.gov/PressRoom/PressReleases/8234-20>.

<sup>3</sup> U.S. Dep't of the Treasury, *The Impact of Climate Change on American Household Finances* 1 (2023), [https://home.treasury.gov/system/files/136/Climate\\_Change\\_Household\\_Finances.pdf](https://home.treasury.gov/system/files/136/Climate_Change_Household_Finances.pdf).

<sup>4</sup> *Id.*

<sup>5</sup> Letter from Cory A. Booker, et al., U.S. Senators, to Rostin Behnam, Chairman, CFTC (Oct. 13, 2022).

derivatives, the Commission has broad authority to address fraud and market manipulation in the spot market.

The Proposed Guidance outlines factors that DCMs should consider when addressing certain requirements under the CEA and CFTC regulations that are relevant to the listing for trading of VCC derivative contracts, as previously mentioned, without providing a qualitative element in terms of identifying how the Commission expects the DCM to weigh those factors to create a certain aspirational goal.

Specifically:

- When addressing quality standards in the development of the terms and conditions of a VCC derivative contract, the Proposed Guidance states that a DCM should consider transparency, additionality, permanency and risk of reversal, and robust quantification in connection with the underlying VCC. The governance framework and tracking mechanisms of the crediting program for the underlying VCCs and the crediting program's measures to prevent double-counting are all additional considerations. Inspection or certification provisions should be specified in the terms and conditions.

- DCMs should actively monitor the terms and conditions of VCC derivative contracts to ensure conformity with current standards and should require their market participants to keep records of their trading, including activity in the underlying spot market, and make such records available upon request to the DCM.

- As part of the product review process, a DCM is required to submit the contract's terms and conditions and any contract amendments and must also include an explanation and analysis of the contract and its compliance with applicable CEA provisions. The submitted information—including supporting documentation, evidence and data—provided by the DCM should describe how the contract complies with the CEA and applicable Commission regulations and should be complete and thorough.

DMO suggests that the Proposed Guidance should be considered by a swap execution facility (SEF) that proposes to trade swaps with VCCs as underlying commodities. Similar to DCMs, SEFs are directly subject to core principles, guidance, acceptable practices, and product listing requirements.<sup>12</sup>

The Proposed Guidance may help to improve the integrity of the VCC

markets. Yet, there are additional and significant issues that the Proposed Guidance does not address.

On November 13, 2023, I delivered a keynote speech at the Federal Reserve Bank of Atlanta. During that discussion, I noted:

There are certain principles that must guide the development of market structure for [VCC markets] including the introduction of transaction reporting; secondary market regulation including, where relevant, clearing and settlement guidance; accountability standards for intermediaries to ensure integrity and reliability (and in the context of environmental commodities additionality); business conduct standards, including standardized documentation (and requirements for certification of environmental commodities); and appropriate guardrails for any retail market participation.<sup>13</sup>

On November 29, 2023, I delivered keynote remarks at a joint convening of the Energy Advisory Council and Financial Sector Advisory Council of the Dallas Federal Reserve Bank. There, I outlined additional interventions that may mitigate the proliferation of fraud in VCC markets and foster innovation and competition, while ensuring the integrity of our markets.

The Proposed Guidance provides much-needed direction to DCMs (and SEFs) to facilitate their compliance with core principles when they list futures contracts (and swaps contracts) on VCCs. However, the Commission is only addressing one small aspect of the market for derivatives on these underlying assets. There is also a segment of the swaps market that is not traded on a SEF for which VCCs are underliers and an even more significant volume of environmental forwards that are not considered to be swaps.

The Proposed Guidance suggests the potential for a broader and more comprehensive framework. Applying the approach adopted in the Proposed Guidance, there may be several interventions that may introduce similar needed clarifications—material risk disclosures, good faith and fair dealing, and clearing.

#### *A Comprehensive Approach To Regulating VCC Markets*

A comprehensive framework enhances the integrity of futures and OTC markets enabling risk transfer, investment, hedging, and price discovery.

<sup>13</sup> Kristin Johnson, Commissioner, CFTC, Keynote Address at The Federal Reserve Bank of Atlanta: Policing the (Token) Economy: Introducing Corporate Governance and Market Structure Reforms in Crypto and Environmental Commodities Markets (Nov. 13, 2023), <https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson8>.

#### Material Risk Disclosures

The CEA and CFTC regulations impose material risk disclosure requirements on registered market participants in connection with their communications, solicitations, and negotiations of transactions and material contractual terms.

These material risk disclosure requirements reduce information asymmetries and improve transparency. The requirements obligate certain parties to disclose material information sufficient to enable counterparties to make informed decisions about the appropriateness of entering into a transaction.

In the swaps market,<sup>14</sup> a swap dealer is required to disclose to its non-swap dealer counterparty material information concerning the swap in a manner reasonably designed to allow the counterparty to assess the material risks, material characteristics, material incentives and conflicts of interest that the swap dealer may have in connection with a particular swap.<sup>15</sup>

In the adopting release for the material risk disclosure requirement, the Commission clarified that the material risk disclosure requirement reaches disclosures regarding the risks associated with the economic terms of the product and risks associated with the underlying asset. The Commission noted that:

The Commission believes that for most swaps information about the material risks and characteristics of the swap will relate to the risks and characteristics of the economic terms of the swap. For certain swaps, however, where payments or cash-flows are materially affected by the performance of an underlying asset for which there is not publicly available information (or the information is not otherwise accessible to the counterparty), final § 23.431 would require disclosures about the material risks and characteristics that affect the value of the underlying asset to enable a counterparty to assess the material risks of the swap.<sup>16</sup>

<sup>14</sup> For reference, in futures markets, futures commission merchants are required to provide comprehensive disclosures under CFTC Regulation 1.55 where all material risks are specifically addressed. Registered commodity pool operators and commodity trading advisors are also required to provide disclosures on risks of trading futures and swaps.

<sup>15</sup> 7 CFR 23.431. This provision requires the disclosure of market, credit, liquidity, foreign currency, legal, operational, any other applicable risks; the material economic terms of the swap, the terms relating to the operation of the swap, and the rights and obligations of the parties during the term of the swap; and the price of the swap, the mid-market mark of the swap, and any compensation or other incentive from any source other than the counterparty that the swap dealer may receive in connection with the swap.

<sup>16</sup> Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties

Continued

<sup>12</sup> 17 CFR part 37 and Appendix B to Part 37 (Guidance on, and Acceptable Practices in, Compliance with Core Principles).

In my view, the concepts of material information, material risks, material characteristics, material incentives and conflicts of interest of a derivative must necessarily include the underlying commodity on which a derivative is priced. In light of the lack of visibility into pricing in the VCC markets and the dearth of publicly available information regarding pricing methodologies, such disclosures are particularly important.

Using the risk disclosure requirement as a framework, the Commission should provide guidance that applies to all environmental derivative products. In the context of derivatives on VCCs or other environmental products, where the risk of loss may be magnified because of leverage, the sellers must ensure its counterparty has adequate information to understand how observed volatility and inherent risk in the nascent and evolving VCC market could impact the price of the derivative.

For certain forward contracts on VCCs, it is possible that no material risk disclosure requirement applies; however, the CFTC does have enforcement jurisdiction if there is fraud, including where incorrect or misleading information is provided. CFTC regulations do not require parties to make affirmative statements about nonpublic information—but if a party does speak, CFTC Regulation 180.1(b) specifically requires that a materially misleading statement be corrected, including nonpublic information that may be material to the market price, rate, or level of the commodity transaction.<sup>17</sup>

The Commission may not need to prescribe the precise language of the disclosures. The material risk disclosure rule is principles-based. Instead, the Commission may identify factors that a market participant must consider in a risk disclosure, including all the factors that could lead to significant losses. Information about a carbon credit, including information about the environmental project and market structure, is material because there is a substantial likelihood that a reasonable counterparty would consider it important in making a trading decision.

#### Guidance on Good Faith and Fair Dealing

The principles of good faith and fair dealing are well-established in the futures, swaps and securities industries. The National Futures Association's customer communication rule also imposes a duty to communicate in a fair and balanced manner.

In the swaps market, the risk disclosure requirement is closely linked to the swap dealer's obligation to communicate in a fair and balanced manner. Swap dealers have a duty to communicate with all of their counterparties in a fair and balanced manner based on principles of fair dealing and good faith.<sup>18</sup> This duty, the Commission notes, "is designed to ensure a balanced treatment of potential benefits and risks."<sup>19</sup>

In the adopting release for the fair dealing requirement, the Commission noted:

In a complex swap, where the risks and characteristics associated with an underlying asset are not readily discoverable by the counterparty upon the exercise of reasonable diligence, the swap dealer or major swap participant is expected, under both the disclosure rule and fair dealing rule, to provide a sound basis for the counterparty to assess the swap by providing information about the risks and characteristics of the underlying asset.<sup>20</sup>

The Commission should offer guidance as to its expectations of how the fair dealing requirement should be considered in the context of an underlying asset that is a VCC. The fair dealing rule provides an independent basis for enforcement proceedings—for example where the swap dealer makes exaggerated or unwarranted claims, opinions, or forecasts in violation of the fair dealing requirement.<sup>21</sup>

Such a requirement may not apply to certain forward contracts on VCCs. Yet, the Commission maintains broad enforcement jurisdiction in the event that there is an allegation of fraud, including where incorrect or misleading information is provided. CFTC Regulation 180.1(a)(2) makes unlawful the making of an untrue or misleading statement of a material fact or omitting a material fact necessary to make a statement made not untrue or misleading.<sup>22</sup>

<sup>18</sup> 7 CFR 23.433.

<sup>19</sup> Business Conduct Standards, 77 FR at 9769.

<sup>20</sup> *Id.* at 9770.

<sup>21</sup> *Id.* at 9769.

<sup>22</sup> 17 CFR 180.1(a)(2) (providing that it is unlawful for any person in connection with any contract of sale of any commodity in interstate commerce to intentionally or recklessly make, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a

#### Guidance on Product Eligibility for Clearing

In the future, should the market evolve and become more standardized, the clearing framework may also provide valuable risk reduction benefits for derivatives on environmental commodities. Clearing, by way of novation, reduces counterparty credit risk because a DCO serves as a seller to every buyer and a buyer to every seller, remaining neutral. DCOs are highly regulated by the Commission, are subject to core principles, and have significant, mutualized financial resources. At settlement, DCOs may facilitate the physical delivery of the actual underlying commodity or cash payments based on the final price of the underlying commodity in connection with the derivatives contract.

In the context of environmental derivatives, DCOs would facilitate delivery of the VCC or determine the cash amount based on the price of the VCC in the cash market. For purposes of physical settlement, a well-functioning carbon credit cash market is essential.

Core principle C sets out product eligibility requirements. A DCO must have appropriate requirements for determining the eligibility of contracts submitted to the DCO for clearing, taking into account the DCO's ability to manage the risks associated with such contracts.

Some factors the DCO must consider include the availability of reliable prices, the ability of the DCO and clearing members to gain access to the relevant market for purposes of creating, liquidating, transferring, auctioning, and/or allocating positions, and the operational capacity of the DCO and clearing members to address any unique risk characteristics of a product clearing members.<sup>23</sup> A DCO should take care not to clear transactions that present an unacceptable level of risk.

In the context of the current VCC market, significant questions arise as to whether certain elements of the DCO core principles would be easily established, including whether there are reliable prices for these carbon credits, the access to carbon credit markets, and whether there is material information about the carbon credit. Additional Commission guidance perhaps could facilitate the market, increase volumes and promote sound risk management, reasonably-designed policies and procedures, and robust rules.

The development of rules that facilitate the clearing of derivatives

material fact necessary in order to make the statements made not untrue or misleading).

<sup>23</sup> 17 CFR 39.12(b).

(Business Conduct Standards), 77 FR 9734, 9760 (Feb. 17, 2012).

<sup>17</sup> 17 CFR 180.1(b) (stating that nothing in that section shall be construed to require any person to disclose to another person nonpublic information that may be material to the market price, rate, or level of the commodity transaction, except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect).

based on environmental commodities would be greatly advanced by Commission guidance on the application of those principles to the clearing of such products. Forwards on carbon credits are not required to be cleared at a DCO; but clearing and settlement provide critical counterparty credit risk management.

### Conclusion

It is difficult to overstate the significance of today's announced Proposed Guidance. Once again, the CFTC is demonstrating leadership in the novel carbon credit markets and contemporaneously enhancing the integrity of carbon-credit markets.<sup>24</sup>

I believe the Commission has taken an important step forward by announcing the Proposed Guidance advanced today. However, I am hopeful that this step is the first on a long journey to introduce effective market structure reforms in VCC markets.

### Appendix 4—Statement of Commissioner Christy Goldsmith Romero

I am pleased to support today's proposed guidance regarding the listing of voluntary carbon credit derivatives. I want to recognize Chairman Behnam's leadership in the voluntary carbon credit space. The proposed guidance follows efforts by the Commission to develop capacity in understanding and regulating voluntary carbon credits.<sup>1</sup>

The physical effects of climate change are amplifying. 2023 is likely to go down as the warmest year on record.<sup>2</sup> The intensifying physical impacts of climate change pose serious risks to commodities derivatives markets and potentially systemic risk to the financial system if not effectively managed. Our mission includes promoting resilience in derivatives markets that can play a critical role in managing climate risk.

Many market participants are seeking opportunities in derivatives markets to promote resilience to climate risk,

including through voluntary carbon credits. The CFTC oversees voluntary carbon credit derivatives listed and trading on CFTC-registered exchanges. In addition to regulatory authority over derivatives, the CFTC also has antifraud authority in the spot voluntary carbon credit markets given the potential for impact to the derivatives markets.

In response to our public consultation, various market participants, public interest groups, and U.S. Senators have asked the CFTC to take a leading role in promoting the integrity of voluntary carbon markets.<sup>3</sup> I was pleased to help launch the CFTC's Environmental Fraud Task Force that will pursue individual cases of fraud related to carbon credits, weeding out bad actors, and promoting market integrity.<sup>4</sup> Today's proposed guidance is the next step in promoting market integrity.

I have met with exchanges to discuss their process for listing these emerging products, and found differing approaches to these products and due diligence in the underlying credit. CFTC-registered exchanges have certain requirements under the Commodity Exchange Act including to list only contracts that are not readily susceptible to manipulation, to have the capacity and responsibility to prevent manipulation, price distortion and other market disruptions, and other requirements aimed at market integrity.

<sup>3</sup> See *Letter from Senators Booker, Warren, Markey, Blumenthal, Sanders, Merkley and Gillibrand* (Oct. 13, 2022); see also *ISDA Comment Letter on CFTC Request for Information on Climate-Related Financial Risk* (Oct. 7, 2022) ("We believe that the Commission should take a leading role in supporting and enhancing the integrity of voluntary carbon markets."); see also *Intercontinental Exchange Inc. Comment Letter on CFTC Request for Information on Climate-Related Financial Risk* (Oct. 7, 2022) ("ICE supports the Commission taking a leadership role in supporting and enhancing the integrity of project-based carbon markets."); see also *Environmental Defense Fund Comment Letter on CFTC Request for Information on Climate-Related Financial Risk* (Oct. 7, 2022) ("EDF respectfully welcomes CFTC's interest in identifying the potential for fraud and market manipulation in voluntary carbon markets. Enhanced quality and integrity in voluntary carbon markets can help mobilize carbon finance, help cut emissions and facilitate the achievement of corporate and national greenhouse gas reduction goals."); see also *bp Comment Letter on CFTC Request for Information on Climate-Related Financial Risk* (Oct. 7, 2022) ("bp believes the CFTC should focus on simultaneously enhancing its oversight role in derivatives and futures markets while allowing these markets to become deeper and more liquid.").

<sup>4</sup> Commissioner Christy Goldsmith Romero, *Remarks of Commissioner Christy Goldsmith Romero at ISDA's ESG Forum on Promoting Market Resilience: A Thoughtful Approach to the Daunting Challenge of Climate Financial Risk*, (Mar. 7, 2023); See Commissioner Christy Goldsmith Romero, *Adjusting the Sails for Cyber and Climate Resilience* (Feb. 10, 2023).

Commission guidance, like what is proposed today, can help exchanges understand what compliance means in a still rapidly evolving market for voluntary carbon credits, one where there can be concerns about integrity, including for carbon credits listed on some of the largest registries,<sup>5</sup> a lack of transparency, and uncertainty related to pricing. These concerns in the spot market could affect the regulated derivatives market. For a market to work well, market participants need to be confident they have credible information about the product, that there are appropriate levels of pricing, and that the market has integrity, so that they do not face legal, reputational and regulatory risks.

I continue to believe that bringing more of this market onto regulated exchanges could increase integrity, transparency, and bring greater confidence to the market. I agree with a response to our consultation which said that "the expansion of exchanges offering products . . . would help grow liquidity and therefore the value of the market for price discovery and risk shifting."<sup>6</sup> CFTC-regulated exchanges have important responsibilities under the Commodity Exchange Act, and stand as the first line of defense to ensure market integrity. The market should signal through pricing which carbon credits are high quality compared to credits reflecting projects that do not achieve the requisite level of one ton of greenhouse gases removed or reduced.

However, one of the biggest challenges in voluntary carbon markets is fragmentation which different projects, registries, and standards, that can impact derivatives markets and harm market confidence. A lack of transparency through consistent, comparable data can present challenges to proper functioning of markets, including price discovery. There are important and welcome efforts by voluntary bodies like the Integrity Council on Voluntary Carbon Markets ("ICVCM") to create voluntary

<sup>5</sup> In one relevant example, several press sources reported serious allegations about a project developed by the market's largest firm, a project that has been among the leading sources of carbon credits globally. Blake, Heidi, *The Great Cash-for-Carbon Hustle*, The New Yorker (Oct. 16, 2023); Ben Elgin, Alastair Marsh, and Max de Haldevang, *Faulty Credits Tarnish Billion-Dollar Carbon Offset Seller*, Bloomberg (Mar. 24, 2023). The allegations were sufficiently credible that the project's registry put on hold issuance of credits from the project, pending an investigation. *Verra Statement on the New Yorker Article of October 16, 2023*, Verra (Oct. 17, 2023).

<sup>6</sup> See *Ceres Comment Letter on CFTC Request for Information on Climate-Related Financial Risk* (Oct. 7, 2022).

<sup>24</sup> In June 2022, the Commission held the first-ever Voluntary Carbon Markets Convening to discuss issues related to the supply and demand for high quality carbon offsets. Then in July 2023, the Commission held the second Voluntary Carbon Markets Convening to discuss recent private sector initiatives for high quality carbon credits, among other topics.

<sup>1</sup> The Commission has held two convenings to gather information from a range of carbon market stakeholders and last year conducted a request for information on climate-related risks, which asked several questions about carbon markets. The Commission received significant comments on voluntary carbon credit products and markets.

<sup>2</sup> National Oceanic and Atmospheric Administration, *Topping the charts: September 2023 was Earth's warmest September in 174-year record* (Oct. 13, 2023).

standards to address concerns about credibility and to develop a common understanding of a high-quality credit, efforts that are ongoing.

In March, I proposed that the Commission work with regulated exchanges to develop common baseline standards for listing voluntary carbon credit derivatives.<sup>7</sup> At a conference held by ISDA, I proposed that the Commission consider requiring exchanges to take certain actions to increase confidence that underlying voluntary carbon credits reliably remove or avoid the amount of carbon claimed of one ton of greenhouse gases per credit. I proposed that such actions could include information sharing agreements with carbon registries and baseline standards for carbon credits that could reference either the ICVCM core carbon principles once they became final or the basic principles on which they are based. I thank the Chairman for working with me on these efforts.

Today's guidance adapts terminology, concepts and standards from the ICVCM's Core Carbon Principles and its recently issued Assessment Framework. I support the Commission's recognition of the efforts made by this body that could improve integrity, transparency, and price discovery, and thereby improve confidence in these markets.

The Commission's guidance adapts ICVCM concepts and standards that commenters told us were needed for integrity in voluntary carbon markets. The guidance sets an expectation for exchanges to ensure that underlying VCC's represent an actual ton of carbon dioxide removed or reduced and that there is no double counting of those reductions or removals.<sup>8</sup> It also sets an expectation that underlying VCC's are subject to a meaningful independent evaluation and verification before issuance.<sup>9</sup> Aligning the CFTC's

expectations with the ICVCM's work also recognizes the global nature of this market and of the challenges posed by climate-related financial risk.

I am interested in hearing from commenters if the guidance adapts the right parts of the ICVCM standards to encourage integrity and transparency in these markets and if the Commission's adaptation provides clear, workable expectations. As the ICVCM standards have only been recently released, it will be important to monitor the adoption of these standards.

I am also interested in hearing more from commenters about whether market integrity can be improved by exchanges relying on a crediting program's processes and diligence, as assumed in the proposed guidance, or if there is a benefit to exchanges conducting additional due diligence into specific categories, protocols, or projects.

I am interested to hear from commenters, including participants in our previous public consultation if this guidance meets their needs and helps address concerns they have raised. I especially hope to hear from farmers and others in the agricultural community, several of whom encouraged the CFTC to play a role in ensuring integrity in carbon markets in response to last year's public consultation.<sup>10</sup>

As derivatives markets evolve, it is important that the Commission remain nimble and aware of changes, and continue to work with exchanges in listing products. I applaud the staff for their hard work on this guidance and I thank them for working with me to incorporate feedback I have heard in meetings with exchanges, market participants and public interest groups over the past 18 months.

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require all credits underlying derivative instruments be subject to a meaningful evaluation and certification process by an outside, neutral, and expert third party.”)

<sup>10</sup> See *Blue Diamond Farming Company Comment Letter on CFTC Request for Information on Climate-Related Financial Risk* (Oct. 7, 2022); see also *Bryan Agricultural Enterprises Comment Letter on CFTC Request for Information on Climate-Related Financial Risk* (Oct. 7, 2022).

## DEPARTMENT OF ENERGY

[GDO Docket No. EA–463–A]

### Application for Renewal of Authorization To Export Electric Energy; Boston Energy Trading and Marketing LLC

**AGENCY:** Grid Deployment Office, Department of Energy.

**ACTION:** Notice of application.

**SUMMARY:** Boston Energy Trading and Marketing LLC (the Applicant or BETM) has applied for renewed authorization to transmit electric energy from the United States to Canada pursuant to the Federal Power Act.

**DATES:** Comments, protests, or motions to intervene must be submitted on or before January 26, 2024.

**ADDRESSES:** Comments, protests, motions to intervene, or requests for more information should be addressed by electronic mail to [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**FOR FURTHER INFORMATION CONTACT:** Christina Gomer, (240) 474–2403, [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:** The United States Department of Energy (DOE) regulates electricity exports from the United States to foreign countries in accordance with section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)) and regulations thereunder (10 CFR 205.300 *et seq.*). Sections 301(b) and 402(f) of the DOE Organization Act (42 U.S.C. 7151(b) and 7172(f)) transferred this regulatory authority, previously exercised by the now-defunct Federal Power Commission, to DOE.

Section 202(e) of the FPA provides that an entity which seeks to export electricity must obtain an order from DOE authorizing that export. (16 U.S.C. 824a(e)). On April 10, 2023, the authority to issue such orders was delegated to the DOE's Grid Deployment Office (GDO) by Delegation Order No. S1–DEL–S3–2023 and Redelegation Order No. S3–DEL–GD1–2023.

On December 19, 2018, DOE issued Order No. EA–463 to BETM to transmit electric energy from the United States to Canada as a power marketer for a period of five years. On November 14, 2023, BETM filed an application with DOE (Application or App.) for renewal of their export authority for a five-year term. App. at 8.

According to the Application, BETM is a California limited liability company that is a wholly owned subsidiary of Diamond Energy Trading and Marketing, LLC. *Id.* at 1–2. BETM represents that it is a power marketer

<sup>7</sup> Commissioner Christy Goldsmith Romero, *Remarks of Commissioner Christy Goldsmith Romero at ISDA's ESG Forum on Promoting Market Resilience: A Thoughtful Approach to the Daunting Challenge of Climate Financial Risk* (Mar. 7, 2023).

<sup>8</sup> See *ISDA Comment Letter on CFTC Request for Information on Climate-Related Financial Risk* (Oct. 7, 2022) (“In order for these markets to flourish, there can be no room for greenwashing, double-counting of credits or any other types of fraud and manipulation . . .”); See also *EDF Comment Letter on CFTC Request for Information on Climate-Related Financial Risk* (Oct. 7, 2022) (“One particular concern in carbon markets is that traded reductions might be “double counted,” a situation in which a single GHG emission reduction or removal (i.e. credit) is counted more than once towards achieving mitigation targets or goals.”).

<sup>9</sup> See *Ceres Comment Letter on CFTC Request for Information on Climate-Related Financial Risk* (Oct. 7, 2022) (“The best way to guard against the risk of market disruption because of the lack of the integrity of the underlying credits would be to

authorized to sell wholesale electric energy, capacity and ancillary services outside of the Electric Reliability Council of Texas at market-based rates pursuant to authority granted by the Federal Energy Regulatory Commission (FERC) under a wholesale power sales tariff currently on file with FERC. *Id.* at 2. BETM states that as a power marketer, it “does not own any electric generation or transmission facilities and does not hold a franchise or service territory or native load obligation.” *Id.* at 4. Further, BETM represents that “none of BETM’s U.S.-based affiliates or subsidiaries own any electric transmission facilities other than generating facility interconnection facilities necessary to connect individual generating facilities to the grid[,] and BETM is not affiliated with an entity that holds a franchise or service territory in the U.S.” *Id.* BETM represents that because it neither owns, operates nor controls an electric power supply transmission and/or distribution system, “its exports cannot have any adverse impact on the reliability, stability, or sufficiency of supply on a franchised electric supply system or the electric power supply within the U.S.” *Id.* at 5.

The existing international transmission facilities to be utilized by the Applicant have been previously authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties. *See App.* at Exhibit C.

**Procedural Matters:** Any person desiring to be heard in this proceeding should file a comment or protest to the Application at [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov). Protests should be filed in accordance with Rule 211 of FERC’s Rules of Practice and Procedure (18 CFR 385.211). Any person desiring to become a party to this proceeding should file a motion to intervene at [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov) in accordance with FERC Rule 214 (18 CFR 385.214).

Comments and other filings concerning BETM’s Application should be clearly marked with GDO Docket No. EA-463-A. Additional copies are to be provided directly to BETM Contract Administrator, Boston Energy Trading and Marketing LLC, One International Place, 9th Floor, Boston, MA 02110, [BETMContractAdmin@betm.com](mailto:BETMContractAdmin@betm.com), and Catherine McCarthy, Partner, Bracewell LLP, 2001 M Street NW, Suite 900, Washington DC 20036, [cathy.mccarthy@bracewell.com](mailto:cathy.mccarthy@bracewell.com).

A final decision will be made on the requested authorization after the environmental impacts have been evaluated pursuant to DOE’s National

Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after DOE evaluates whether the proposed action will have an adverse impact on the sufficiency of supply or reliability of the United States electric power supply system.

Copies of this Application will be made available, upon request, by accessing the program website at <https://www.energy.gov/gdo/pending-applications-0> or by emailing [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**Signing Authority:** This document of the Department of Energy was signed on December 19, 2023, by Maria Robinson, Director, Grid Deployment Office, 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. 2023-28475 Filed 12-26-23; 8:45 am]

**BILLING CODE 6450-01-P**

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## DEPARTMENT OF ENERGY

### Isotope Research & Development and Production Advisory Committee

**AGENCY:** Department of Energy, Office of Science.

**ACTION:** Notice of establishment.

**SUMMARY:** The CHIPS and Science Act of 2022 requires the Secretary of Energy to establish an advisory committee in alignment with the Department of Energy (DOE) Isotope Program. Pursuant to the Federal Advisory Committee Act, and in accordance with title 41 of the Code of Federal Regulations, and following consultation with the Committee Management Secretariat, General Services Administration, notice is hereby given that the Isotope Research & Development and Production Advisory Committee will be established for a two-year period. The Committee will provide advice, information, and recommendations to the Director, Office of Science, DOE, on

a continuing basis on the DOE Isotope Program.

#### **SUPPLEMENTARY INFORMATION:**

Committee members will be carefully considered to be balanced in terms of views represented and functions to be performed, in accord with FACA, and to obtain diversity, equity, and inclusion with a balance of disciplines, experiences, points of view, and geography. Members shall be experts in their respective fields from entities, including, but not limited to, research facilities, industry, and academic institutions. Membership and representation of all interests will be determined in accordance with the requirements of the Federal Advisory Committee Act, and implementing regulation.

The Committee will operate in accordance with the provisions of the Federal Advisory Committee Act, and the rules and regulations in implementation of that Act.

#### **FOR FURTHER INFORMATION CONTACT:**

Jehanne Gillo at (301) 903-3400, or email at [jehanne.gillo@science.doe.gov](mailto:jehanne.gillo@science.doe.gov).

#### **Signing Authority**

This document of the Department of Energy was signed on December 20, 2023, by Sarah E. Butler, Committee Management Officer, pursuant to delegated authority from the Secretary of Energy. The 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. 2023-28432 Filed 12-26-23; 8:45 am]

**BILLING CODE 6450-01-P**

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## DEPARTMENT OF ENERGY

[GDO Docket No. EA-393-B]

### Application for Renewal of Authorization To Export Electric Energy; Emera Energy Services Subsidiary No. 8 LLC

**AGENCY:** Grid Deployment Office, Department of Energy.

**ACTION:** Notice of application.

**SUMMARY:** Emera Energy Services Subsidiary No. 8 LLC (the Applicant or EES No. 8) has applied for renewed authorization to transmit electric energy from the United States to Canada pursuant to the Federal Power Act.

**DATES:** Comments, protests, or motions to intervene must be submitted on or before January 26, 2024.

**ADDRESSES:** Comments, protests, motions to intervene, or requests for more information should be addressed by electronic mail to [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**FOR FURTHER INFORMATION CONTACT:** Christina Gomer, (240) 474-2403, [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:** The United States Department of Energy (DOE) regulates electricity exports from the United States to foreign countries in accordance with section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)) and regulations thereunder (10 CFR 205.300 *et seq.*). Sections 301(b) and 402(f) of the DOE Organization Act (42 U.S.C. 7151(b) and 7172(f)) transferred this regulatory authority, previously exercised by the now-defunct Federal Power Commission, to DOE.

Section 202(e) of the FPA provides that an entity which seeks to export electricity must obtain an order from DOE authorizing that export. (16 U.S.C. 824a(e)). On April 10, 2023, the authority to issue such orders was delegated to the DOE's Grid Deployment Office (GDO) by Delegation Order No. S1-DEL-S3-2023 and Redlegation Order No. S3-DEL-GD1-2023.

In May 2014, DOE issued Order No. EA-393, authorizing EES No. 8 to transmit electric energy from the United States to Canada as a power marketer for a five-year term. This authority was renewed in 2019 (Order No. EA-393-A). On November 9, 2023, EES No. 8 filed an application with DOE (Application or App.) for renewal of their export authority for another five-year term. App. at 1.

In its Application, EES No. 8 states that it is a "wholly-owned subsidiary of Emera Incorporated ('Emera'), a Nova Scotia company that is a publicly-traded diversified energy and services company." *Id.* at 1. EES No. 8 states that it "is currently authorized to export electric energy from the United States to Canada and has also received market-based rate authority from the Federal Energy Regulatory Commission ('FERC')." *Id.* at 1-2. According to the Application, the Applicant's parent company, Emera, "owns other energy

concerns." *Id.* at 2. However, the Applicant states EES No. 8 itself "does not own or control any electric power generation or transmission facilities and does not have a franchised electric power service area." *Id.* at 6.

The existing international transmission facilities to be utilized by the Applicant have been previously authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties. *See* App. at Exhibit C.

**Procedural Matters:** Any person desiring to be heard in this proceeding should file a comment or protest to the Application at [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov). Protests should be filed in accordance with Rule 211 of FERC's Rules of Practice and Procedure (18 CFR 385.211). Any person desiring to become a party to this proceeding should file a motion to intervene at [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov) in accordance with FERC Rule 214 (18 CFR 385.214).

Comments and other filings concerning EES No. 8's Application should be clearly marked with GDO Docket No. EA-393-B. Additional copies are to be provided directly to Keith Sutherland, Vice President, Legal & Regulatory Affairs, Emera Energy, Inc., 5151 Terminal Road, Halifax, NS B3J 1A1, Canada, [keith.sutherland@emeraenergy.com](mailto:keith.sutherland@emeraenergy.com), Jeffrey Jakubiak, Vinson & Elkins LLP, 1114 Avenue of the Americas, 32nd Floor, New York, NY 10036, [JJakubiak@velaw.com](mailto:JJakubiak@velaw.com), and Jennifer Mansh, Vinson & Elkins LLP, 2200 Pennsylvania Avenue NW, Suite 500 West, Washington, DC 20037, [JMansh@velaw.com](mailto:JMansh@velaw.com).

A final decision will be made on the requested authorization after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after DOE evaluates whether the proposed action will have an adverse impact on the sufficiency of supply or reliability of the United States electric power supply system.

Copies of this Application will be made available, upon request, by accessing the program website at <https://www.energy.gov/gdo/pending-applications-0> or by emailing [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**Signing Authority:** This document of the Department of Energy was signed on December 19, 2023, by Maria Robinson, Director, Grid Deployment Office, 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. 2023-28462 Filed 12-26-23; 8:45 am]

**BILLING CODE 6450-01-P**

## DEPARTMENT OF ENERGY

[GDO Docket No. EA-458-A]

### Application for Renewal of Authorization To Export Electric Energy; Sempra Gas & Power Marketing, LLC

**AGENCY:** Grid Deployment Office, Department of Energy.

**ACTION:** Notice of application.

**SUMMARY:** Sempra Gas & Power Marketing, LLC (the Applicant) has applied for renewed authorization to transmit electric energy from the United States to Mexico pursuant to the Federal Power Act.

**DATES:** Comments, protests, or motions to intervene must be submitted on or before January 26, 2024.

**ADDRESSES:** Comments, protests, motions to intervene, or requests for more information should be addressed by electronic mail to [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**FOR FURTHER INFORMATION CONTACT:** Christina Gomer, (240) 474-2403, [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:** The United States Department of Energy (DOE) regulates electricity exports from the United States to foreign countries in accordance with section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)) and regulations thereunder (10 CFR 205.300 *et seq.*). Sections 301(b) and 402(f) of the DOE Organization Act (42 U.S.C. 7151(b) and 7172(f)) transferred this regulatory authority, previously exercised by the now-defunct Federal Power Commission, to DOE.

Section 202(e) of the FPA provides that an entity which seeks to export electricity must obtain an order from DOE authorizing that export. (16 U.S.C. 824a(e)). On April 10, 2023, the

authority to issue such orders was delegated to the DOE's Grid Deployment Office (GDO) by Delegation Order No. S1–DEL–S3–2023 and Redelelegation Order No. S3–DEL–GD1–2023.

On November 2, 2018, DOE issued Order No. EA–458 authorizing Sempra Gas & Power Marketing LLC to transmit electric energy from the United States to Mexico as a power marketer for a term of five years. On November 1, 2023, Sempra Gas & Power Marketing LLC filed an application with DOE (Application or App.) for renewal of their export authority for a period of ten years or for such period that DOE deems appropriate. App. at 3.

In its Application, the Applicant states it is a Delaware limited liability company and is a “wholly owned indirect subsidiary of Sempra f/k/a Sempra Energy, a public utility holding company based in San Diego, California.” *Id.* at 1–2. The Applicant further states it is a gas and power marketer and “is not a franchised public utility with a transmission or distribution system, and does not have captive customers.” *Id.* at 1. The Applicant represents that “[t]he electric energy that [the] Applicant would export on a firm or interruptible basis would be surplus energy purchased in wholesale markets in bilateral, voluntary transactions.” *Id.* at 5.

The existing international transmission facilities to be utilized by the Applicant have been previously authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties. See App. at Exhibit C.

**Procedural Matters:** Any person desiring to be heard in this proceeding should file a comment or protest to the Application at [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov). Protests should be filed in accordance with Rule 211 of FERC's Rules of Practice and Procedure (18 CFR 385.211). Any person desiring to become a party to this proceeding should file a motion to intervene at [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov) in accordance with FERC Rule 214 (18 CFR 385.214).

Comments and other filings concerning the Applicant's Application should be clearly marked with GDO Docket No. EA–458–A. Additional copies are to be provided directly to Jerrod Harrison and Kevin Ding, Sempra Infrastructure, 488 8th Avenue, HQ12, San Diego, CA 92101, [jharrison@sempraglobal.com](mailto:jharrison@sempraglobal.com) and [kdng@sempraglobal.com](mailto:kdng@sempraglobal.com), and Brett Snyder and Lamiya Rahman, Blank Rome LLP, 1825 Eye Street NW, Washington DC

20006, [brett.snyder@blankrome.com](mailto:brett.snyder@blankrome.com) and [lamiya.rahman@blankrome.com](mailto:lamiya.rahman@blankrome.com).

A final decision will be made on the requested authorization after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after DOE evaluates whether the proposed action will have an adverse impact on the sufficiency of supply or reliability of the United States electric power supply system.

Copies of this Application will be made available, upon request, by accessing the program website at <https://www.energy.gov/gdo/pending-applications-0> or by emailing [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**Signing Authority:** This document of the Department of Energy was signed on December 19, 2023, by Maria Robinson, Director, Grid Deployment Office, 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. 2023–28477 Filed 12–26–23; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### President's Council of Advisors on Science and Technology

**AGENCY:** Office of Science, Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces an open virtual meeting of the President's Council of Advisors on Science and Technology (PCAST). The Federal Advisory Committee Act (FACA) requires that public notice of these meetings be announced in the **Federal Register**.

**DATES:** Thursday, January 18, 2024; 1:45 p.m. to 4:15 p.m. EST.

**ADDRESSES:** Information for viewing the livestream of the meeting can be found on the PCAST website closer to the

meeting at: [www.whitehouse.gov/PCAST/meetings](http://www.whitehouse.gov/PCAST/meetings).

**FOR FURTHER INFORMATION CONTACT:** Dr. Melissa A. Edwards, Designated Federal Officer, PCAST, email: [PCAST@ostp.eop.gov](mailto:PCAST@ostp.eop.gov); telephone: 202–881–9018.

**SUPPLEMENTARY INFORMATION:** PCAST is an advisory group of the nation's leading scientists and engineers, appointed by the President to augment the science and technology advice available to him from the White House, cabinet departments, and other Federal agencies. See the Executive Order at [whitehouse.gov](http://whitehouse.gov). PCAST is consulted on and provides analyses and recommendations concerning a wide range of issues where understanding of science, technology, and innovation may bear on the policy choices before the President. The Designated Federal Officer is Dr. Melissa A. Edwards. Information about PCAST can be found at: [www.whitehouse.gov/PCAST](http://www.whitehouse.gov/PCAST).

**Tentative Agenda:** PCAST may discuss and vote on the approval of two reports, one on improving the cyber-physical resilience of the nation's critical infrastructure and another on greenhouse gas measuring and monitoring. Additional information and the meeting agenda, including any changes that arise, will be posted on the PCAST website at: [www.whitehouse.gov/PCAST/meetings](http://www.whitehouse.gov/PCAST/meetings).

**Public Participation:** The meeting is open to the public. The meeting will be held virtually for members of the public. It is the policy of the PCAST to accept written public comments no longer than 10 pages and to accommodate oral public comments whenever possible. The PCAST expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements.

The public comment period for this meeting will take place on January 18, 2024, at time specified in the meeting agenda. This public comment period is designed only for substantive commentary on PCAST's work, not for business marketing purposes.

**Oral Comments:** To be considered for the public speaker list at the meeting, interested parties should register to speak at [PCAST@ostp.eop.gov](mailto:PCAST@ostp.eop.gov), no later than 12:00 p.m. Eastern Time on January 11, 2024. To accommodate as many speakers as possible, the time for public comments will be limited to two (2) minutes per person, with a total public comment period of up to 10 minutes. If more speakers register than there is space available on the agenda, PCAST will select speakers on a first-come, first-served basis from those who registered. Those not able to present oral

comments may file written comments with the council.

**Written Comments:** Although written comments are accepted continuously, written comments should be submitted to [PCAST@ostp.eop.gov](mailto:PCAST@ostp.eop.gov) no later than 12:00 p.m. Eastern Time on January 11, 2024, so that the comments can be made available to the PCAST members for their consideration prior to this meeting.

PCAST operates under the provisions of FACA, all public comments and/or presentations will be treated as public documents and will be made available for public inspection, including being posted on the PCAST website at: [www.whitehouse.gov/PCAST/meetings](http://www.whitehouse.gov/PCAST/meetings).

**Minutes:** Minutes will be available within 45 days at: [www.whitehouse.gov/PCAST/meetings](http://www.whitehouse.gov/PCAST/meetings).

Signed in Washington, DC, on December 21, 2023.

**LaTanya Butler,**

*Deputy Committee Management Officer.*

[FR Doc. 2023-28517 Filed 12-26-23; 8:45 am]

BILLING CODE 6450-01-P

## DEPARTMENT OF ENERGY

[GDO Docket No. EA-257-F]

### Application for Authorization To Export Electric Energy; Emera Energy Services, Inc.

**AGENCY:** Grid Deployment Office, Department of Energy.

**ACTION:** Notice of application.

**SUMMARY:** Emera Energy Services, Inc. (the Applicant or EES) has applied for renewed authorization to transmit electric energy from the United States to Canada pursuant to the Federal Power Act.

**DATES:** Comments, protests, or motions to intervene must be submitted on or before January 26, 2024.

**ADDRESSES:** Comments, protests, motions to intervene, or requests for more information should be addressed by electronic mail to [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**FOR FURTHER INFORMATION CONTACT:** Christina Gomer, (240) 474-2403, [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:** The United States Department of Energy (DOE) regulates electricity exports from the United States to foreign countries in accordance with section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)) and regulations thereunder (10 CFR 205.300 *et seq.*). Sections 301(b) and 402(f) of the DOE Organization Act (42 U.S.C. 7151(b) and 7172(f)) transferred this regulatory authority,

previously exercised by the now-defunct Federal Power Commission, to DOE.

Section 202(e) of the FPA provides that an entity which seeks to export electricity must obtain an order from DOE authorizing that export (16 U.S.C. 824a(e)). On April 10, 2023, the authority to issue such orders was delegated to the DOE's Grid Deployment Office (GDO) by Delegation Order No. S1-DEL-S3-2023 and Redelegation Order No. S3-DEL-GD1-2023.

In April 2002, DOE issued Order No. EA-257, authorizing EES to transmit electric energy from the United States to Canada as a power marketer. This authority was renewed in 2004 (Order No. EA-257-A), 2006 (Order No. EA-257-B), 2009 (Order No. EA-257-C), 2014 (Order No. EA-257-D), and 2019 (Order No. EA-257-E). On October 25, 2023, EES filed an application with DOE (Application or App.) for renewal of their export authority for a five-year term. App at 1.

In its Application, EES states that it is a Delaware corporation with its principal place of business in Kittery, Maine. *Id.* EES states it is a "wholly-owned subsidiary of Emera Incorporated ("Emera"), a Nova Scotia company that is a publicly-traded diversified energy and services company." *Id.* The Application represents that EES is authorized to export energy from the United States to Canada and has market-based authority from FERC to provide wholesale and retail marketing services as a power marketer. *Id.* at 1-2. The Applicant notes that Emera holds ownership interests in various subsidiaries that provide energy services. *Id.* at 2-6. Although some of Emera's subsidiaries own and control electric power generation and transmission facilities, the Applicant asserts that EES does not "own or control any electric power generation or transmission facilities and does not have a franchised electric power service area." *Id.* at 6. EES represents that it will "purchase surplus electric energy from electric utilities and other suppliers within the United States and will export this energy to Canada" and that the "export of power will not impair the sufficiency of electric power supply in the U.S." App. at 7. The existing international transmission facilities to be utilized by the Applicant have been previously authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties. *Id.* at Exhibit C.

**Procedural Matters:** Any person desiring to be heard in this proceeding

should file a comment or protest to the Application at [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov). Protests should be filed in accordance with Rule 211 of Federal Energy Regulatory Commission's (FERC) Rules of Practice and Procedure (18 CFR 385.211). Any person desiring to become a party to this proceeding should file a motion to intervene at [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov) in accordance with FERC Rule 214 (18 CFR 385.214).

Comments and other filings concerning EES' Application should be clearly marked with GDO Docket No. EA-257-F. Additional copies are to be provided directly to Keith Sutherland, Emera Energy, Inc., 5151 Terminal Road, Halifax, NS B3J 1A1 Canada, [keith.sutherland@emeraenergy.com](mailto:keith.sutherland@emeraenergy.com); Jeffrey Jakubiak, Vinson & Elkins LLP, 1114 Avenue of the Americas, 32nd Floor, New York, NY 10036, [jjakubiak@velaw.com](mailto:jjakubiak@velaw.com); and Jennifer Mansh, Vinson & Elkins LLP, 2200 Pennsylvania Ave., Suite 500 West, Washington, DC 20037, [JMansh@velaw.com](mailto:JMansh@velaw.com).

A final decision will be made on the requested authorization after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after DOE evaluates whether the proposed action will have an adverse impact on the sufficiency of supply or reliability of the United States electric power supply system.

Copies of this Application will be made available, upon request, by accessing the program website at <https://www.energy.gov/gdo/pending-applications-0> or by emailing [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**Signing Authority:** This document of the Department of Energy was signed on December 19, 2023, by Maria Robinson, Director, Grid Deployment Office, 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. 2023–28466 Filed 12–26–23; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

[GDO Docket No. EA–468–A]

### Application for Renewal of Authorization To Export Electric Energy; TransCanada Energy Sales Ltd.

**AGENCY:** Grid Deployment Office,  
Department of Energy.

**ACTION:** Notice of application.

**SUMMARY:** TransCanada Energy Sales Ltd. (the Applicant or TCES) has applied for renewed authorization to transmit electric energy from the United States to Canada pursuant to the Federal Power Act.

**DATES:** Comments, protests, or motions to intervene must be submitted on or before January 26, 2024.

**ADDRESSES:** Comments, protests, motions to intervene, or requests for more information should be addressed by electronic mail to [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**FOR FURTHER INFORMATION CONTACT:** Christina Gomer, (240) 474–2403, [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:** The United States Department of Energy (DOE) regulates electricity exports from the United States to foreign countries in accordance with section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)) and regulations thereunder (10 CFR 205.300 *et seq.*). Sections 301(b) and 402(f) of the DOE Organization Act (42 U.S.C. 7151(b) and 7172(f)) transferred this regulatory authority, previously exercised by the now-defunct Federal Power Commission, to DOE.

Section 202(e) of the FPA provides that an entity which seeks to export electricity must obtain an order from DOE authorizing that export. (16 U.S.C. 824a(e)). On April 10, 2023, the authority to issue such orders was delegated to the DOE's Grid Deployment Office (GDO) by Delegation Order No. S1–DEL–S3–2023 and Redelegation Order No. S3–DEL–GD1–2023.

On May 6, 2014, DOE issued Order No. EA–98–M, authorizing certain members of WSPP Inc., including TCES, to transmit electric energy from the United States to Canada as power marketers. TCES's export authority was

renewed on May 13, 2019 (Order No. EA–468). On November 14, 2023, TCES filed an application with DOE (Application or App.) for renewal of their export authority for an additional five-year term. App. at 1.

In its Application, TCES states that it “does not own or control any generation, transmission, or distribution facilities within the United States and does not have a franchised electric power service area.” *Id.* at 2. Further, TCES is not affiliated with an entity that holds an electric franchise or service territory in the United States. *Id.* Rather, TCES is a power marketer seeking continued authorization to transmit electric energy, on either a firm or interruptible basis, to Canada and plans to purchase the power to be exported from electric utilities, qualifying small power production facilities, cogeneration facilities and federal power marketing agencies. *Id.* at 3–4. The Applicant represents that because it neither owns, operates nor controls an electric power supply transmission and/or distribution system, “its exports cannot have any adverse impact on the reliability, stability, or sufficiency of supply on a franchised electric supply system or the electric power supply within the U.S.” *Id.* at 5.

The existing international transmission facilities to be utilized by the Applicant have been previously authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties. *See id.* at Exhibit C.

**Procedural Matters:** Any person desiring to be heard in this proceeding should file a comment or protest to the Application at [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov). Protests should be filed in accordance with Rule 211 of Federal Energy Regulatory Commission's (FERC's) Rules of Practice and Procedure (18 CFR 385.211). Any person desiring to become a party to this proceeding should file a motion to intervene at [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov) in accordance with FERC Rule 214 (18 CFR 385.214).

Comments and other filings concerning TCES's Application should be clearly marked with GDO Docket No. EA–468–A. Additional copies are to be provided directly to David Farmer, Senior Legal Counsel and Manager, TC Energy, 450–1 Street SW, Calgary, AB T2P 5H1, [david\\_farmer@tcenergy.com](mailto:david_farmer@tcenergy.com), and Catherine McCarthy, Partner, Bracewell LLP, 2001 M Street NW, Suite 900, Washington, DC 20036, [cathy.mccarthy@bracewell.com](mailto:cathy.mccarthy@bracewell.com).

A final decision will be made on the requested authorization after the

environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after DOE evaluates whether the proposed action will have an adverse impact on the sufficiency of supply or reliability of the United States electric power supply system.

Copies of this Application will be made available, upon request, by accessing the program website at <https://www.energy.gov/gdo/pending-applications-0> or by emailing [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**Signing Authority:** This document of the Department of Energy was signed on December 19, 2023, by Maria Robinson, Director, Grid Deployment Office, 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. 2023–28480 Filed 12–26–23; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF ENERGY

[GDO Docket No. EA–391–B]

### Application for Renewal of Authorization To Export Electric Energy; Emera Energy Services Subsidiary No. 6 LLC

**AGENCY:** Grid Deployment Office,  
Department of Energy.

**ACTION:** Notice of application.

**SUMMARY:** Emera Energy Services Subsidiary No. 6 LLC (the Applicant or EES No. 6) has applied for renewed authorization to transmit electric energy from the United States to Canada pursuant to the Federal Power Act.

**DATES:** Comments, protests, or motions to intervene must be submitted on or before January 26, 2024.

**ADDRESSES:** Comments, protests, motions to intervene, or requests for more information should be addressed

by electronic mail to  
*Electricity.Exports@hq.doe.gov*.

**FOR FURTHER INFORMATION CONTACT:**

Christina Gomer, (240) 474-2403,  
*Electricity.Exports@hq.doe.gov*.

**SUPPLEMENTARY INFORMATION:** The United States Department of Energy (DOE) regulates electricity exports from the United States to foreign countries in accordance with section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)) and regulations thereunder (10 CFR 205.300 *et seq.*). Sections 301(b) and 402(f) of the DOE Organization Act (42 U.S.C. 7151(b) and 7172(f)) transferred this regulatory authority, previously exercised by the now-defunct Federal Power Commission, to DOE.

Section 202(e) of the FPA provides that an entity which seeks to export electricity must obtain an order from DOE authorizing that export. (16 U.S.C. 824a(e)). On April 10, 2023, the authority to issue such orders was delegated to the DOE's Grid Deployment Office (GDO) by Delegation Order No. S1-DEL-S3-2023 and Redelegation Order No. S3-DEL-GD1-2023.

In May 2014, DOE issued Order No. EA-391, authorizing EES No. 6 to transmit electric energy from the United States to Canada as a power marketer for a five-year term. This authority was renewed in 2019 (Order No. EA-391-A). On November 9, 2023, EES No. 6 filed an application with DOE (Application or App.) for renewal of their export authority for another five-year term. App. at 1.

In its Application, EES No. 6 states that it is a "wholly-owned subsidiary of Emera Incorporated ('Emera'), a Nova Scotia company that is a publicly-traded diversified energy and services company." *Id.* at 1. EES No. 6 states that it "is currently authorized to export electric energy from the United States to Canada and has also received market-based rate authority from the Federal Energy Regulatory Commission ('FERC')." *Id.* at 1-2. According to the Application, the Applicant's parent company, Emera, "owns other energy concerns." *Id.* at 2. However, the Applicant states EES No. 6 itself "does not own or control any electric power generation or transmission facilities and does not have a franchised electric power service area." *Id.* at 6.

The existing international transmission facilities to be utilized by the Applicant have been previously authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties. *See* App. at Exhibit C.

**Procedural Matters:** Any person desiring to be heard in this proceeding should file a comment or protest to the Application at *Electricity.Exports@hq.doe.gov*. Protests should be filed in accordance with Rule 211 of FERC's Rules of Practice and Procedure (18 CFR 385.211). Any person desiring to become a party to this proceeding should file a motion to intervene at *Electricity.Exports@hq.doe.gov* in accordance with FERC Rule 214 (18 CFR 385.214).

Comments and other filings concerning EES No. 6's Application should be clearly marked with GDO Docket No. EA-391-B. Additional copies are to be provided directly to Keith Sutherland, Vice President, Legal & Regulatory Affairs, Emera Energy, Inc., 5151 Terminal Road, Halifax, NS B3J 1A1, Canada, *keith.sutherland@emeraenergy.com*, Jeffrey Jakubiak, Vinson & Elkins LLP, 1114 Avenue of the Americas, 32nd Floor, New York, NY 10036, *JJakubiak@velaw.com*, and Jennifer Mansh, Vinson & Elkins LLP, 2200 Pennsylvania Avenue NW, Suite 500 West, Washington, DC 20037, *JMansh@velaw.com*.

A final decision will be made on the requested authorization after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after DOE evaluates whether the proposed action will have an adverse impact on the sufficiency of supply or reliability of the United States electric power supply system.

Copies of this Application will be made available, upon request, by accessing the program website at <https://www.energy.gov/gdo/pending-applications-0> or by emailing *Electricity.Exports@hq.doe.gov*.

**Signing Authority:** This document of the Department of Energy was signed on December 19, 2023, by Maria Robinson, Director, Grid Deployment Office, 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. 2023-28478 Filed 12-26-23; 8:45 am]

**BILLING CODE 6450-01-P**

**DEPARTMENT OF ENERGY**

**[GDO Docket No. EA-464-A]**

**Application for Renewal of  
Authorization To Export Electric  
Energy; Boston Energy Trading and  
Marketing LLC**

**AGENCY:** Grid Deployment Office,  
Department of Energy.

**ACTION:** Notice of application.

**SUMMARY:** Boston Energy Trading and Marketing, LLC (the Applicant or BETM) has applied for renewed authorization to transmit electric energy from the United States to Mexico pursuant to the Federal Power Act.

**DATES:** Comments, protests, or motions to intervene must be submitted on or before January 26, 2024.

**ADDRESSES:** Comments, protests, motions to intervene, or requests for more information should be addressed by electronic mail to  
*Electricity.Exports@hq.doe.gov*.

**FOR FURTHER INFORMATION CONTACT:**  
Christina Gomer, (240) 474-2403,  
*Electricity.Exports@hq.doe.gov*.

**SUPPLEMENTARY INFORMATION:** The United States Department of Energy (DOE) regulates electricity exports from the United States to foreign countries in accordance with section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)) and regulations thereunder (10 CFR 205.300 *et seq.*). Sections 301(b) and 402(f) of the DOE Organization Act (42 U.S.C. 7151(b) and 7172(f)) transferred this regulatory authority, previously exercised by the now-defunct Federal Power Commission, to DOE.

Section 202(e) of the FPA provides that an entity which seeks to export electricity must obtain an order from DOE authorizing that export. (16 U.S.C. 824a(e)). On April 10, 2023, the authority to issue such orders was delegated to the DOE's Grid Deployment Office (GDO) by Delegation Order No. S1-DEL-S3-2023 and Redelegation Order No. S3-DEL-GD1-2023.

On December 19, 2018, DOE issued Order No. EA-464 authorizing BETM to transmit electric energy from the United States to Mexico as a power marketer. On November 14, 2023, BETM filed an application with DOE (Application or

App.) for renewal of their export authority for an additional five-year term. App. at 1.

BETM is a California limited liability company that is a wholly owned subsidiary of Diamond Energy Trading and Marketing, LLC. *Id.* at 1–2. BETM represents that it is a power marketer authorized to sell wholesale electric energy, capacity and ancillary services outside of the Electric Reliability Council of Texas at market-based rates pursuant to authority granted by the Federal Energy Regulatory Commission (FERC) under a wholesale power sales tariff currently on file with FERC. *Id.* at 2. BETM states that as a power marketer, it “does not own any electric generation or transmission facilities and does not hold a franchise or service territory or native load obligation.” *Id.* at 4. Further, BETM represents that “none of BETM’s U.S.-based affiliates or subsidiaries own any electric transmission facilities other than generating facility interconnection facilities necessary to connect individual generating facilities to the grid[,] and BETM is not affiliated with an entity that holds a franchise or service territory in the U.S.” *Id.* BETM represents that because it neither owns, operates nor controls an electric power supply transmission and/or distribution system, “its exports cannot have any adverse impact on the reliability, stability, or sufficiency of supply on a franchised electric supply system or the electric power supply within the U.S.” *Id.* at 5.

The existing international transmission facilities to be utilized by the Applicant have been previously authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties. See App. at Exhibit C.

**Procedural Matters:** Any person desiring to be heard in this proceeding should file a comment or protest to the Application at [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov). Protests should be filed in accordance with Rule 211 of FERC’s Rules of Practice and Procedure (18 CFR 385.211). Any person desiring to become a party to this proceeding should file a motion to intervene at [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov) in accordance with FERC Rule 214 (18 CFR 385.214).

Comments and other filings concerning BETM’s Application should be clearly marked with GDO Docket No. EA–464–A. Additional copies are to be provided directly to BETM Contract Administrator, Boston Energy Trading and Marketing LLC, One International Place, 9th Floor, Boston, MA 02110, [BETMContractAdmin@betm.com](mailto:BETMContractAdmin@betm.com), and

Catherine McCarthy, Partner, Bracewell LLP, 2001 M Street NW, Suite 900, Washington, DC 20036, [cathy.mccarthy@bracewell.com](mailto:cathy.mccarthy@bracewell.com).

A final decision will be made on the requested authorization after the environmental impacts have been evaluated pursuant to DOE’s National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after DOE evaluates whether the proposed action will have an adverse impact on the sufficiency of supply or reliability of the United States electric power supply system.

Copies of this Application will be made available, upon request, by accessing the program website at <https://www.energy.gov/gdo/pending-applications-0> or by emailing [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**Signing Authority:** This document of the Department of Energy was signed on December 19, 2023, by Maria Robinson, Director, Grid Deployment Office, 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. 2023–28479 Filed 12–26–23; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

[GDO Docket No. EA–392–B]

### Application for Renewal of Authorization To Export Electric Energy; Emera Energy Services Subsidiary No. 7 LLC

**AGENCY:** Grid Deployment Office, Department of Energy.

**ACTION:** Notice of application.

**SUMMARY:** Emera Energy Services Subsidiary No. 7 LLC (the Applicant or EES No. 7) has applied for renewed authorization to transmit electric energy from the United States to Canada pursuant to the Federal Power Act.

**DATES:** Comments, protests, or motions to intervene must be submitted on or before January 26, 2024.

**ADDRESSES:** Comments, protests, motions to intervene, or requests for more information should be addressed by electronic mail to [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**FOR FURTHER INFORMATION CONTACT:**

Christina Gomer, (240) 474–2403, [Electricity.Exports@hq.doe.gov](mailto:Electricity.Exports@hq.doe.gov).

**SUPPLEMENTARY INFORMATION:** The United States Department of Energy (DOE) regulates electricity exports from the United States to foreign countries in accordance with section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)) and regulations thereunder (10 CFR 205.300 *et seq.*). Sections 301(b) and 402(f) of the DOE Organization Act (42 U.S.C. 7151(b) and 7172(f)) transferred this regulatory authority, previously exercised by the now-defunct Federal Power Commission, to DOE.

Section 202(e) of the FPA provides that an entity which seeks to export electricity must obtain an order from DOE authorizing that export. (16 U.S.C. 824a(e)). On April 10, 2023, the authority to issue such orders was delegated to the DOE’s Grid Deployment Office (GDO) by Delegation Order No. S1–DEL–S3–2023 and Redelegation Order No. S3–DEL–GD1–2023.

In May 2014, DOE issued Order No. EA–392, authorizing EES No. 7 to transmit electric energy from the United States to Canada as a power marketer for a five-year term. This authority was renewed in 2019 (Order No. EA–392–A). On November 9, 2023, EES No. 7 filed an application with DOE (Application or App) for renewal of their export authority for another five-year term. App. at 1.

In its Application, EES No. 7 states that it is a “wholly-owned subsidiary of Emera Incorporated (‘Emera’), a Nova Scotia company that is a publicly-traded diversified energy and services company.” *Id.* at 1. EES No. 7 states that it “is currently authorized to export electric energy from the United States to Canada and has also received market-based rate authority from the Federal Energy Regulatory Commission (‘FERC’).” *Id.* at 1–2. According to the Application, the Applicant’s parent company, Emera, “owns other energy concerns.” *Id.* at 2. However, the Applicant states EES No. 7 itself “does not own or control any electric power generation or transmission facilities and does not have a franchised electric power service area.” *Id.* at 6.

The existing international transmission facilities to be utilized by

the Applicant have been previously authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties. See App. at Exhibit C.

**Procedural Matters:** Any person desiring to be heard in this proceeding should file a comment or protest to the Application at the *Electricity.Exports@hq.doe.gov*. Protests should be filed in accordance with Rule 211 of FERC's Rules of Practice and Procedure (18 CFR 385.211). Any person desiring to become a party to this proceeding should file a motion to intervene at *Electricity.Exports@hq.doe.gov* in accordance with FERC Rule 214 (18 CFR 385.214).

Comments and other filings concerning EES No. 7's Application should be clearly marked with GDO Docket No. EA-392-B. Additional copies are to be provided directly to Keith Sutherland, Vice President, Legal & Regulatory Affairs, Emera Energy, Inc., 5151 Terminal Road, Halifax, NS B3J 1A1, Canada, *keith.sutherland@emeraenergy.com*, Jeffrey Jakubiak, Vinson & Elkins LLP, 1114 Avenue of the Americas, 32nd Floor, New York, NY 10036, *JJakubiak@velaw.com*, and Jennifer Mansh, Vinson & Elkins LLP, 2200 Pennsylvania Avenue NW, Suite 500 West, Washington, DC 20037, *JMansh@velaw.com*.

A final decision will be made on the requested authorization after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR part 1021) and after DOE evaluates whether the proposed action will have an adverse impact on the sufficiency of supply or reliability of the United States electric power supply system.

Copies of this Application will be made available, upon request, by accessing the program website at <https://www.energy.gov/gdo/pending-applications-0> or by emailing *Electricity.Exports@hq.doe.gov*.

**Signing Authority:** This document of the Department of Energy was signed on December 19, 2023, by Maria Robinson, Director, Grid Deployment Office, 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. 2023-28464 Filed 12-26-23; 8:45 am]

**BILLING CODE 6450-01-P**

## DEPARTMENT OF ENERGY

### National Nuclear Security Administration

#### Secretarial Determination of No Adverse Material Impact on the Domestic Uranium Mining, Conversion, and Enrichment Industries To Support Mo-99 Production

**AGENCY:** National Nuclear Security Administration (NNSA), Department of Energy (DOE).

**ACTION:** Notice.

**SUMMARY:** On November 22, 2023, the Secretary of Energy issued a Secretarial Determination (hereafter "determination") covering the sale, lease, or transfer of up to 750 kilograms uranium (kgU) of high-assay low-enriched uranium (HALEU) (above 5, but less than 20 weight percent (wt.-%) uranium-235) per year during the two-year period following signature of the determination to support molybdenum-99 (Mo-99) production. For the reasons set forth in the Department's "Analysis of Potential Impacts of Certain Uranium Transactions on the Domestic Uranium Mining, Conversion, and Enrichment Industries," which is incorporated into the determination, the Secretary determined that these transactions will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industries.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information may be sent to Peter Rocco:

*officeofconversion@nnsa.doe.gov* or (202) 287-1018.

#### SUPPLEMENTARY INFORMATION:

##### Authority and Background

The Department of Energy ("the Department") holds limited inventories of uranium in various forms and quantities that have been declared as excess and are not dedicated to U.S. national security missions. Within DOE, the National Nuclear Security Administration (NNSA) manages these inventories to carry out critical missions, including minimizing the use of highly enriched uranium (HEU) in

civilian applications. NNSA down-blends excess HEU from these inventories to high-assay, low-enriched uranium (HALEU)—a subset of low enriched uranium (LEU) enriched above the commercial level of 5 wt.-% and below 20 wt.-% of the isotope U-235—to be used as fuel for research reactors and target material for the production of critical medical isotopes.

This notice involves the sale, lease, or transfer of HALEU to support molybdenum-99 (Mo-99) producers. Leases covered by this determination fulfill a directive in the American Medical Isotopes Production Act of 2012 (Pub. L. 112-239, Division C, Title XXXI, Subtitle F, 42 U.S.C. 2065) for the Department to establish a program to make HALEU available, through lease contracts, for the production of Mo-99 for medical uses. The sales, leases, or transfers covered by this determination also support U.S. nuclear nonproliferation initiatives by down-blending HEU and encouraging the use of HALEU in civilian applications in lieu of HEU.

These sales, leases, or transfers are conducted in accordance with the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*, "AEA"), as amended, and other applicable laws. Specifically, title I, chapters 6 and 14 of the AEA authorize DOE to sell or transfer special nuclear material, including HALEU. The USEC Privatization Act (Pub. L. 104-134, 42 U.S.C. 2297h *et seq.*), however, places certain limitations on DOE's authority to sell or transfer uranium from its excess uranium inventory. Specifically, under section 3112(d)(2) of the USEC Privatization Act (42 U.S.C. 2297h-10(d)(2)), DOE may make certain sales or transfers of natural uranium or LEU if the Secretary determines that the sales "will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry, taking into account the sales of uranium under the Russian HEU Agreement and the Suspension Agreement."

On November 22, 2023, the Secretary of Energy issued a determination covering the sale, lease, or transfer of up to 750 kgU of HALEU per year during the two-year period following signing of the determination to support Mo-99 production. For the reasons set forth in the Department's "Analysis of Potential Impacts of Certain Uranium Transactions on the Domestic Uranium Mining, Conversion, and Enrichment Industries," which is incorporated into the determination, the Secretary determined that these transactions will not have an adverse material impact on the domestic uranium mining,

conversion, or enrichment industries. In accordance with section 306(a) of Division D, Title III of the *Consolidated and Further Continuing Appropriations Act, 2015* (Pub. L. 113–235), this determination is valid for no more than two calendar years following the date of the determination.

#### Signing Authority

This document of the Department of Energy was signed on December 18, 2023, by Corey Hinderstein, Deputy Administrator for Defense Nuclear Nonproliferation, pursuant to delegated authority from the Secretary of Energy. The 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 21, 2023.

**Treena V. Garrett,**

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

Set forth below is the full text of the Secretarial Determination.

#### Secretarial Determination for the Sale, Lease, or Transfer of Certain High-Assay, Low-Enriched Uranium for the Next Two Years

I determine that the sale, lease, or transfer of up to 750 kilograms uranium (kgU) of high-assay low-enriched uranium (above 5, but less than 20 weight percent uranium-235) per calendar year subsequent to signing this determination to support molybdenum-99 production will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industries. I base my conclusions on the Department's *Analysis of Potential Impacts of Certain Uranium Transactions on the Domestic Uranium Mining, Conversion, and Enrichment Industries*, which is incorporated herein. I have considered, *inter alia*, the requirements of the *USEC Privatization Act of 1996* (42 U.S.C. 2297h *et seq.*), the nature of uranium markets, and the current status of the domestic uranium industries. I have also taken into account the sales of uranium under the *Agreement Between the Government of the United States of America and the Government of the*

*Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons* ("Russian HEU Agreement") and the *Agreement Suspending the Antidumping Investigation on Uranium From the Russian Federation* ("Suspension Agreement").

Jennifer Granholm

Date: November 22, 2023

Set forth below is the full text of the *Analysis of Potential Impacts of Certain Uranium Transactions on the Domestic Uranium Mining, Conversion, and Enrichment Industries*.

#### Analysis of Potential Impacts of Certain Uranium Transactions on the Domestic Uranium Mining, Conversion, and Enrichment Industries

##### I. Introduction

###### A. Legal Authority

The Department of Energy (DOE) manages its excess uranium inventory in accordance with the *Atomic Energy Act of 1954* (42 U.S.C. 2011 *et seq.*, "AEA"), as amended, and other applicable laws. Specifically, Title I, Chapters 6 and 14 of the AEA authorize DOE to sell or transfer special nuclear material. Low-enriched uranium (LEU) is a type of special nuclear material.

The *USEC Privatization Act* (Pub. L. 104–134, 42 U.S.C. 2297h *et seq.*) places certain limitations on DOE's authority to sell or transfer uranium from its excess uranium inventory. Specifically, under section 3112(d)(2)(B) of the *USEC Privatization Act* (42 U.S.C. 2297h 10(d)(2)(B)), DOE may make certain sales or transfers of natural uranium or LEU<sup>1</sup> if:

(A) The President determines that the material is not necessary for national security needs;

(B) The Secretary determines that the sale of the material will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry, taking into account the sales of uranium under the Russian HEU Agreement and the Suspension Agreement; and,

<sup>1</sup> Section 3102 of the *USEC Privatization Act* defines "low-enriched uranium" as "uranium enriched to less than 20 percent of the uranium-235 isotope, including that which is derived from highly enriched uranium." 42 U.S.C. 2297h(5). Section 3112A of the *USEC Privatization Act* also provides a definition of LEU: "a uranium product in any form, including uranium hexafluoride (UF<sub>6</sub>) and uranium oxide (UO<sub>2</sub>), in which the uranium contains less than 20 percent uranium-235, including natural uranium, without regard to whether the uranium is incorporated into fuel rods or complete fuel assemblies." 42 U.S.C. 2297h–10a(5). Both definitions encompass HALEU, which is U–235 enriched between 5%–20%. Thus, HALEU is a form of LEU and falls within the Secretarial Determination requirement.

(C) The price paid to the Secretary will not be less than the fair market value of the material.

Regarding condition (A): for purposes of section 3112(d)(2)(A) of the *USEC Privatization Act*, DOE has historically treated material not included in the Nuclear Weapons Stockpile Memorandum (a memorandum signed by the President that identifies uranium necessary for defense needs) as being excess to national security needs. None of the material included in the proposed transactions was included in the most recent Nuclear Weapons Stockpile Memorandum.

This analysis focuses on condition B above.

Regarding condition (C): the price paid to the Secretary will not be less than the fair market value of the LEU sold, transferred, or leased. Specifically, for HALEU leased under the ULTB Program, the lease contracts contain a pricing mechanism to ensure that the Department receives the prevailing market value for its material, as required by AMIPA. For other HALEU sales or transfers, the contracts will require cash payment for the fair market value of the HALEU sold. Accordingly, all sale or lease transactions will comply with section 3112(d)(2)(C), and the fair market value will be determined at the time of the transaction.

The validity of any determination under this section is limited to no more than two calendar years subsequent to the determination.<sup>2</sup> The *USEC Privatization Act* also permits sales or transfers of enriched uranium for governmental purposes under section 3112(e), which are not subject to the limitations imposed by section 3112(d).

###### B. Transactions Considered in This Analysis

Two types of potential transactions are considered in this analysis: (1) the lease of LEU for the production of molybdenum-99 (Mo–99) pursuant to the *American Medical Isotopes Production Act of 2012* (AMIPA);<sup>3</sup> and (2) the sale or transfer of LEU to producers for use in medical isotope development and production, which would enable the material to be used for Mo–99 production outside of AMIPA requirements. The exact uses of LEU under these transactions and designs of facilities in which the LEU would be utilized vary by producer, but fission-based production usually involves fabrication or preparation of uranium

<sup>2</sup> See section 306(a) of Division D, Title III of the *Consolidated and Further Continuing Appropriations Act, 2015* (Pub. L. 113–235).

<sup>3</sup> Public Law 112–239, Division C, Title XXXI, Subtitle F, 42 U.S.C. 2065.

for irradiation, followed by chemical processing to extract the Mo-99 for packaging into a generator and delivery to a radiopharmacy.

The first type of transaction would be under AMIPA. These transfers would support the Uranium Lease and Take Back (ULTB) program, was established under AMIPA and enables DOE to lease LEU to produce Mo-99 in the United States without the use of highly enriched uranium (HEU).

The second type of transaction considered in this analysis is a sale or transfer of LEU to producers for use in medical isotope development and production processes, including Mo-99, that are not under the ULTB program and do not meet the criteria of section 3112(e)(3) of the *USEC Privatization Act* for governmental purposes.

Both types of transactions require a Secretarial Determination under section 3112(d)(2)(B) of the *USEC Privatization Act* as well as meeting the other criteria of section 3112(d)(2).

The materials considered in this analysis would be sold, leased, or transferred during the two-year period following the signing of the Secretarial Determination and would consist of no more than 750 kgU of HALEU in any year. Based on semi-annual HALEU demand surveys conducted to determine producers' material needs, DOE's National Nuclear Security Administration (DOE/NNSA) assessed 750 kgU of HALEU for each year covered by this determination.

Assuming a tails assay of 0.20 wt.-% U-235, this quantity would be equivalent to approximately 28,700 kgU of natural uranium hexafluoride and approximately 33,850 separative work units ("SWU") to produce 750 kgU of HALEU at 19.75 weight-% U-235.<sup>4</sup>

## II. Analytical Approach

The analytical approach relied on for previous Secretarial Determinations covering the sale, transfer, or lease of excess uranium for Mo-99 development and production (80 FR 65728, Oct. 27, 2015), the ULTB program (81 FR 1409, Jan. 12, 2016), and the Secretarial Determinations for the Sale, Lease or Transfer of Uranium (signed and dated Nov. 26, 2019 and Nov. 23, 2021, respectively) is repeated here and updated to the extent necessary.

<sup>4</sup> The calculation is based on the Y-12 Standard Specification for LEU Metal Supply for Mo-99 Isotope Production, which assumes deliveries of quantities of 19.75 wt.-% LEU. If any sale, lease, or transfer includes material at an assay other than 19.75 wt.-%, the amount will be converted so that the total amount in any year covered by this Determination is equivalent to no more than 750 kgU at 19.75 wt.-%.

This analysis evaluates the state of the domestic uranium industries and the relevant impacts if DOE goes forward with these potential transactions. DOE has developed a set of factors that this analysis considers in assessing whether DOE's uranium sales and transfers will have an "adverse material impact" on the domestic uranium mining, conversion, or enrichment industry:

1. Prices
2. Production at existing facilities
3. Employment levels in the industry
4. Changes in capital improvement plans and development of future facilities
5. Long-term viability and health of the industry
6. *Russian HEU Agreement* and *Russian Suspension Agreement*

While no single factor is dispositive of the issue, DOE believes that these factors are representative of the types of impacts that the proposed sale, lease, or transfer may have on the domestic uranium industries. Not every factor will necessarily be relevant on a given occasion or to a particular industry; DOE intends this list of factors only as a guide to its analysis.

## III. Assessment of Potential Impacts

### 1. Prices

There is currently no domestic commercial supplier for HALEU. Therefore, there is no established market price for HALEU. DOE sets a price for HALEU based on a combination of commercial market price components for LEU, plus a charge for the separative work above the 5% LEU limit reflecting the historical cost to DOE to produce this material. Through the end of 2022, the market value of 4.95% enriched LEU rose 200% from its low point in October 2017. The market price rose 90% from December 2020 through December 2022. Industry analysts forecast a continued increase in the market value of LEU.<sup>5</sup> The relatively small quantities of HALEU provided by DOE have not impacted the price increases in this market, and DOE does not expect that they would impact price in the future.

Further, with no domestic commercial provider for HALEU, the DOE sales and leases of HALEU would not displace production or affect prices among the commercial domestic uranium mining, conversion, or enrichment industries. Even if it did, the amount would be so small that the effects would be minimal.

<sup>5</sup> Energy Resources International, Inc. (ERI), *Nuclear Fuel Cycle Supply and Price Report*, ERI-2006-2202/December 2022.

### 2. Production at Existing Facilities

An analysis of the impact of the proposed sales and leases based on an assessment of production at existing facilities is straightforward. There is currently no domestic commercial supplier of HALEU in the United States. Due to the lack of a sufficient near-term market, owners and operators of enrichment facilities have not developed HALEU enrichment capability to produce uranium enriched to 19.75 wt.-% U-235. With the closing of the Paducah Gaseous Diffusion Plant in 2013, the only uranium enrichment facility in the United States operating at commercial scale is the URENCO USA facility operated by Louisiana Energy Services, LLC (LES), in Eunice, New Mexico, which is currently licensed by the Nuclear Regulatory Commission (NRC) to possess uranium only up to 5.5 wt. % U 235.<sup>6</sup>

Further, it is not feasible for commercial Mo-99 producers to use commercially available assays of LEU (*i.e.*, LEU enriched to 5.5 wt.-% U-235 or less) instead of HALEU. Given the specialized uses, designs, and regulatory requirements of these isotope producers, the use of commercial-assay LEU would prevent the facility or target from achieving the same performance or efficiency and thus from being used for their intended purposes.

Although the DOE sales and leases of HALEU would not displace production among the commercial domestic uranium mining, conversion, or enrichment industries, even if it did, the amount would be so small that the effects would be minimal. With respect to these industries, to produce the amount of HALEU in the proposed sales and leases from primary production would require approximately 75,000 pounds of uranium concentrates (U3O8), 28,700 kgU of conversion services, and 33,800 SWU of enrichment services. By comparison, the entire domestic fleet of nuclear reactors in 2020 required approximately 43 million pounds of U3O8, 16.2 million kgU of conversion services, and about 14.8 million SWU.<sup>7</sup> Therefore, the feed, conversion, and SWU content of the DOE material represents 0.17%, 0.17%, and 0.22% of annual domestic requirements, respectively.

The domestic conversion industry consists of only one facility that

<sup>6</sup> U.S. Nuclear Regulatory Commission, *Materials License*. License Number SNM-2010, Amendment 57, Docket Number 70-3103.

<sup>7</sup> The global requirements information comes from an analysis prepared by Energy Resources International, Inc. (ERI), *Nuclear Fuel Cycle Supply and Price Report*, ERI-2006-2101/June 2021.

historically produced between 10 million kgU and 12 million kgU per year and reduced its capability to 7 million kgU in 2017. Honeywell, the owner of that facility, suspended operation in 2018, but resumed operation in July 2023 at 7 million kgU per year. Thus, although there has been no conversion occurring in the United States for several years, there are signs of the market improving given Honeywell's recent restart. As mentioned above, there is only one currently operating commercial enrichment facility, URENCO USA's subsidiary, LES, in the United States. The total capacity of that facility is 4.9 million SWU.

In October 2023, American Centrifuge Operating, LLC (ACO), a subsidiary of the U.S. company, Centrus Energy Corp. (Centrus), began enrichment operations on a demonstration basis at DOE's facility in Piketon, Ohio.<sup>8</sup> The initial production goal is 20 kgU 19.75% HALEU. ACO/Centrus is discussed at length in Section 4 below.

### 3. Employment Levels in the Industry

As stated above, DOE sales and leases of HALEU would not displace production among the commercial domestic uranium mining, conversion, or enrichment industries, and therefore will not affect employment levels in these industries.

### 4. Changes in Capital Improvement Plans and Development of Future Facilities

Although there is currently no domestic uranium enrichment capability to produce HALEU, there have been recent noteworthy developments. In 2019, the Department entered into a cost-shared contract for a HALEU Demonstration Program with ACO to deploy a 16-machine cascade of AC-100 M centrifuges in Piketon, Ohio to produce 19.75 wt.-% U-235 with U.S.-origin enrichment technology that will result in a small quantity of HALEU. In June 2021, the NRC approved ACO's license amendment request to produce HALEU with an enrichment assay of up to 20 wt.-% U-235 at the Piketon facility. In November 2022, DOE announced another cost-shared award with ACO, equating to approximately \$150 million and including a \$30 million cost share during the first year to start up and operate the 16 centrifuges at the Piketon facility. In June 2023, ACO received NRC approval to introduce uranium hexafluoride into its cascade following

completion of an operational readiness review.<sup>9</sup> As part of the 2022 award, ACO must produce 20 kilograms of 19.75% enriched HALEU by December 31, 2023. Following completion of the demonstration, the contract calls for production at an annual rate of 900 kg of HALEU in 2024 with additional options to produce more material under the contract in future years, all subject to appropriations.<sup>10</sup>

Additionally, URENCO USA provided a notice to the NRC in April 2021 of its intent to amend the URENCO USA license to increase the enrichment level up to 10 wt.-% U-235.<sup>11</sup> URENCO USA expects to have capability to deliver HALEU up to 10 wt.-% U-235 in 2024. URENCO USA also has longer term plans to produce up to 19.75 wt.-% U-235.

However, the relatively small amounts of material covered by this Determination have no impact on capital improvement plans and development of future facilities including mines, conversion facilities, and enrichment plants.

### 5. Long-Term Viability and Health of the Industry

There is currently no commercial supplier of HALEU in the United States. Therefore, there is no long-term industry impact to assess. During the period covered by this Determination, Centrus/ACO may begin producing up to 900 kgU annually in both 2024 and 2025. However, DOE providing a maximum of 750 kgU annually over the same time period to a specific subset of end users—Mo-99 producers—would not displace production by Centrus/ACO, given DOE's own estimate of extant HALEU demand (up to 40 metric tons by 2029–30).<sup>12</sup>

### 6. Russian HEU Agreement and Russian Suspension Agreement

The Russian HEU Agreement ended in December 2013. The *Suspension Agreement* was extended on October 5, 2020 (85 FR 64112) and remains in force through 2040 with annual export limits on Russian enriched uranium product

sold to U.S. utilities at commercially available assays (e.g., 5 wt.-% U-235).<sup>13</sup> The *Suspension Agreement* allows for the sale of up to the following amounts of U-235 per year in 2023, 2024, and 2025 respectively: 25,471 kg, 20,968 kg, and 20,697 kg. The relatively small amount of material covered by this Determination is minimal compared to domestic needs for LEU and imports from the Russian Federation.

### IV. Conclusion

With respect to the six factors listed above to assess market impacts:

1. The relatively small amounts of material covered by this Determination have no impact on the price of HALEU, for which there is currently no domestic commercial market price.

2. There are new developments in the industry, but production timelines will not be impacted in the timeframe for this Determination.

3. The relatively small amounts of material covered by this Determination have no impact on employment levels in the mining, conversion, or enrichment industries.

4. New market developments will not mature during this Determination period to a point where the market could be impacted by DOE sales, leases, or transfers.

5. The relatively small amounts of material covered by this Determination have no impact on the long-term viability and health of the mining, conversion, and enrichment industries.

6. The *Russian HEU Agreement* and *Suspension Agreement* are not factors because there is no HALEU currently being imported from Russia to the United States.

Thus, DOE concludes that the sale, lease, or transfer of up to 750 kgU of HALEU per year to support the development and production of Mo-99 will not have an adverse material impact on the domestic uranium mining, conversion, or enrichment industry, taking into account the ended Russian HEU Agreement and extended Russian Suspension Agreement.

[FR Doc. 2023–28501 Filed 12–26–23; 8:45 am]

**BILLING CODE 6450-01-P**

<sup>13</sup> 2020 Amendment to the Agreement Suspending the Antidumping Investigation on Uranium From the Russian Federation, **Federal Register**/Vol. 85, No. 197/Friday, October 9, 2020/Notices <https://www.federalregister.gov/documents/2020/10/09/2020-22431/2020-amendment-to-the-agreementsuspending-the-antidumping-investigation-on-uranium-from-the-russian>.

<sup>8</sup> HALEU Demonstration Project Starts Enrichment Operations in Ohio | Department of Energy.

<sup>9</sup> “Centrus gets NRC's okay to introduce uranium in HALEU demonstration cascade.” <https://www.ans.org/news/article-5092/centrus-gets-nrcs-okay-to-introduce-uranium-in-haleu-demonstration-cascade/>.

<sup>10</sup> American Centrifuge Plant and HALEU, from an analysis prepared by Energy Resources International, Inc. (ERI), *Nuclear Fuel Cycle Supply and Price Report*, ERI-2006–2202/December 2022.

<sup>11</sup> Louisiana Energy Services, LLC, dba Urenco USA, Submittal of License Amendment Request for Revision for MCNP6 Validation Report (LAR 21–03) (nrc.gov).

<sup>12</sup> U.S. Department of Energy to Acquire High-Assay Low-Enriched Uranium Material | Department of Energy.

**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:* PR24–25–000.  
*Applicants:* Enterprise Texas Pipeline LLC.

*Description:* § 284.123(g) Rate Filing: SOC Update to be effective 4/1/2024.  
*Filed Date:* 12/20/23.

*Accession Number:* 20231220–5087.  
*Comment Date:* 5 p.m. ET 1/10/24.  
§ 284.123(g) Protest: 5 p.m. ET 2/20/24.

*Docket Numbers:* PR24–26–000.  
*Applicants:* Acadian Gas Pipeline System.

*Description:* § 284.123(g) Rate Filing: SOC Update 2023 to be effective 4/1/2024.

*Filed Date:* 12/20/23.  
*Accession Number:* 20231220–5112.  
*Comment Date:* 5 p.m. ET 1/10/24.  
§ 284.123(g) Protest: 5 p.m. ET 2/20/24.

*Docket Numbers:* PR24–27–000.  
*Applicants:* Enterprise Intrastate LLC.

*Description:* § 284.123(g) Rate Filing: SOC Update to be effective 4/1/2024.  
*Filed Date:* 12/20/23.  
*Accession Number:* 20231220–5122.  
*Comment Date:* 5 p.m. ET 1/10/24.  
§ 284.123(g) Protest: 5 p.m. ET 2/20/24.

*Docket Numbers:* RP24–257–000.  
*Applicants:* Columbia Gas Transmission, LLC.

*Description:* § 4(d) Rate Filing: Discount Type Adjustments, Revision to GT&C Section 46 to be effective 1/20/2024.

*Filed Date:* 12/20/23.  
*Accession Number:* 20231220–5169.  
*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:* RP23–991–001.  
*Applicants:* Viking Gas Transmission Company.

*Description:* Report Filing: Compliance Filing to Implement EPCRA to be effective 1/1/2024.

*Filed Date:* 12/20/23.

*Accession Number:* 20231220–5040.

*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 5:00 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/fercensearch.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: <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](mailto:OPP@ferc.gov).

Dated: December 20, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–28542 Filed 12–26–23; 8:45 am]

**BILLING CODE 6717–01–P**

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

**[Project No. 7987–016]**

**Up Property 2, LLC; Notice of Application for Surrender of Exemption Accepted for Filing, Soliciting Comments, Motions To Intervene, and Protests**

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Application for surrender of exemption.

b. *Project No:* P–7987–016.

c. *Date Filed:* October 5, 2023, as supplemented on October 20, 2023, November 3, 2023, and November 13, 2023.

d. *Applicant:* UP Property 2, LLC.

e. *Name of Project:* High Falls Hydroelectric Project.

f. *Location:* The project is located on the Deep River, in Moore County, North Carolina. The project does not include federal lands.

g. *Filed Pursuant to:* Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2705, 2708.

h. *Applicant Contact:* Christine Pickens, Ph.D., Science Director, Unique Places to Save, P.O. Box 1183, Chapel Hill, NC 27514–1183. Phone (225) 931–2073 or [cpickens@uniqueplacetosave.org](mailto:cpickens@uniqueplacetosave.org).

i. *FERC Contact:* Shana High, (202) 502–8674, [shana.high@ferc.gov](mailto:shana.high@ferc.gov).

j. *Cooperating agencies:* With this notice, the Commission is inviting federal, state, local, and Tribal agencies with jurisdiction and/or special expertise with respect to environmental issues affected by the proposal, that wish to cooperate in the preparation of any environmental document, if applicable, to follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of any environmental document cannot also intervene. See 94 FERC ¶ 61,076 (2001).

k. *Water Quality Certification:* The applicant must file no later than 60 days following the date of issuance of this notice: (1) a copy of the water quality certification for the proceeding before the Commission; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

l. *Deadline for filing comments, motions to intervene, and protests:* January 19, 2023.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426.

Submissions sent via any other carrier must be addressed to: Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number P-7987-016. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

m. *Description of Request:* The applicant proposes to surrender its exemption for the project. In September 2018, flooding associated with Hurricane Florence affected the project and filled the turbines and generators with mud and debris and caused the project to become inoperable. The applicant proposes to remove High Falls Dam and the impounded reservoir behind the dam. The removal of the dam would restore habitat in the Deep River for a variety of aquatic species, including the federally endangered Cape Fear Shiner and federally threatened Atlantic Pigtoe and return the Deep River to its historic channel and bed conditions. The applicant has been consulting with federal and state agencies including the U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, National Oceanic and Atmospheric Administration, North Carolina Wildlife Resources Commission, North Carolina Department of Environmental Quality, and North Carolina Historic Preservation Office.

n. *Locations of the Application:* 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. You may also register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1-866-208-3676 or email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), for TTY, call (202) 502-8659. Agencies may obtain copies of the application directly from the applicant.

o. Individuals desiring to be included on the Commission's mailing list should

so indicate by writing to the Secretary of the Commission.

p. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

q. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE" as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

r. 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](mailto:OPP@ferc.gov).

Dated: December 20, 2023.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2023-28535 Filed 12-26-23; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. FA21-5-000]

#### Commonwealth Edison Company; Notice of Designation of Commission Staff as Non-Decisional

With respect to an order issued by the Commission on December 8, 2023, in the above-captioned docket, with the exceptions noted below, the staff of the Office of Enforcement (OE) are designated as non-decisional in deliberations by the Commission in this docket.<sup>1</sup> Accordingly, pursuant to 18 CFR 385.2202 (2022), they will not serve as advisors to the Commission or take part in the Commission's review of any offer of settlement. Likewise, as non-decisional staff, pursuant to 18 CFR 385.2201 (2022), they are prohibited from communicating with advisory staff concerning any deliberations in this docket.

Exceptions to this designation of OE staff as non-decisional are:

Jennifer Gordon  
Laura Vallance  
Olga Anguelova  
Kim Horner  
Todd Kuzniewski  
Nkosi Brooks

Dated: December 20, 2023.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2023-28543 Filed 12-26-23; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Project No. 3633-044]

#### KC Brighton LLC; Notice of Application for Surrender of License Accepted for Filing, Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

- a. *Application Type:* Surrender of License.
- b. *Project No:* 3633-044.
- c. *Date Filed:* December 29, 2022.
- d. *Applicant:* KC Brighton LLC.
- e. *Name of Project:* Brighton Project.
- f. *Location:* The project is located on the Patuxent River in Howard and

<sup>1</sup> *Commonwealth Edison Company*, 185 FERC ¶ 61,179 (2023).

Montgomery counties, Maryland. The project does not occupy any Federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Jonathan DiCesare, Regulatory Manager, 10 Roberts Lane, Suite 201, Ridgefield, CT 06877, 518–657–9012.

i. *FERC Contact:* Diana Shannon, (202) 502–6136, [diana.shannon@ferc.gov](mailto:diana.shannon@ferc.gov).

j. *Cooperating agencies:* With this notice, the Commission is inviting Federal, State, local, and Tribal agencies with jurisdiction and/or special expertise with respect to environmental issues affected by the proposal, that wish to cooperate in the preparation of any environmental document, if applicable, to follow the instructions for filing such requests described in item m below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of any environmental document cannot also intervene. See 94 FERC ¶ 61,076 (2001).

k. *Deadline for filing comments, motions to intervene, and protests:* January 19, 2024.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number P–3633–044. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the

official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

l. *Description of Request:* During relicensing consultation with interested parties which began in 2020, the licensee determined that the cost of relicensing the project, as well as anticipated mitigation measures, would render the project uneconomic. Thus, the licensee proposes to surrender its license. The licensee proposes to remove all generating equipment, including the equipment diverging from the main penstocks including the turbine, generator, gate valve, and elbow for each unit. The electrical conduit in the powerhouse, the motor controllers, and the generation cables up to the interconnection point would also be removed. Surrender activities would be confined to the powerhouse. No changes to the dam, which is owned by Washington Suburban Sanitary Commission (WSSC), are proposed. The primary use of WSSC's dam and reservoir is to provide a water source to surrounding counties. No changes to this water supply are proposed as part of surrender. The licensee is not proposing any ground disturbing activities or any changes to the environment in the project area.

m. *Locations of the Application:* 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. You may also register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), for TTY, call (202) 502–8659. Agencies may obtain copies of the application directly from the applicant.

n. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

o. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those

who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

p. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE" as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

q. 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](mailto:OPP@ferc.gov).

Dated: December 20, 2023.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2023–28539 Filed 12–26–23; 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 rate filings:

*Docket Numbers:* ER24–181–000.  
*Applicants:* Frankland Road Solar, LLC.

*Description:* Supplement to October 23, 2023 Frankland Road Solar, LLC tariff filing.

*Filed Date:* 12/15/23.

*Accession Number:* 20231215–5230.

*Comment Date:* 5 p.m. ET 12/26/23.  
*Docket Numbers:* ER24–706–000.  
*Applicants:* Northern Orchard Solar PV, LLC.  
*Description:* Baseline eTariff Filing: Market Based Rate to be effective 12/19/2023.  
*Filed Date:* 12/19/23.  
*Accession Number:* 20231219–5223.  
*Comment Date:* 5 p.m. ET 1/9/24.  
*Docket Numbers:* ER24–707–000.  
*Applicants:* Quartz Solar, LLC.  
*Description:* Baseline eTariff Filing: Market Based Rate to be effective 2/19/2024.  
*Filed Date:* 12/20/23.  
*Accession Number:* 20231220–5000.  
*Comment Date:* 5 p.m. ET 1/10/24.  
*Docket Numbers:* ER24–708–000.  
*Applicants:* Transource Oklahoma, LLC, Southwest Power Pool, Inc.  
*Description:* Compliance filing: Transource Oklahoma, LLC submits tariff filing per 35: AEP on behalf of affiliate Transource Oklahoma Order 864 Compliance Filing to be effective 2/20/2024.  
*Filed Date:* 12/20/23.  
*Accession Number:* 20231220–5069.  
*Comment Date:* 5 p.m. ET 1/10/24.  
*Docket Numbers:* ER24–709–000.  
*Applicants:* Duke Energy Carolinas, LLC.  
*Description:* § 205(d) Rate Filing: Joint OATT Ministerial Clean-up Filing (2023) to be effective 11/17/2021.  
*Filed Date:* 12/20/23.  
*Accession Number:* 20231220–5115.  
*Comment Date:* 5 p.m. ET 1/10/24.  
*Docket Numbers:* ER24–710–000.  
*Applicants:* New York Independent System Operator, Inc.  
*Description:* § 205(d) Rate Filing: NYISO 205: NYISO Ravenswood Fuel Oil Implementation Agreement, SA2827 to be effective 1/1/2024.  
*Filed Date:* 12/20/23.  
*Accession Number:* 20231220–5117.  
*Comment Date:* 5 p.m. ET 1/10/24.  
*Docket Numbers:* ER24–711–000.  
*Applicants:* Valley Electric Association, Inc.  
*Description:* § 205(d) Rate Filing: Annual TRBAA Filing for 2024 to be effective 1/1/2024.  
*Filed Date:* 12/20/23.  
*Accession Number:* 20231220–5145.  
*Comment Date:* 5 p.m. ET 1/10/24.  
*Docket Numbers:* ER24–712–000.  
*Applicants:* PJM Interconnection, L.L.C.  
*Description:* § 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 5979; Queue No. AD2–085/AE2–247/AF1–017 to be effective 2/19/2024.  
*Filed Date:* 12/20/23.  
*Accession Number:* 20231220–5161.

*Comment Date:* 5 p.m. ET 1/10/24.  
*Docket Numbers:* ER24–713–000.  
*Applicants:* Alabama Power Company, Georgia Power Company, Mississippi Power Company.  
*Description:* § 205(d) Rate Filing: Alabama Power Company submits tariff filing per 35.13(a)(2)(iii): Pinewood Solar LGIA Filing to be effective 12/9/2023.  
*Filed Date:* 12/20/23.  
*Accession Number:* 20231220–5166.  
*Comment Date:* 5 p.m. ET 1/10/24.  
*Docket Numbers:* ER24–714–000.  
*Applicants:* Alabama Power Company, Georgia Power Company, Mississippi Power Company.  
*Description:* § 205(d) Rate Filing: Alabama Power Company submits tariff filing per 35.13(a)(2)(iii): Zurisol (Rockdale Storage) LGIA Filing to be effective 12/8/2023.  
*Filed Date:* 12/20/23.  
*Accession Number:* 20231220–5167.  
*Comment Date:* 5 p.m. ET 1/10/24.  
*Docket Numbers:* ER24–715–000.  
*Applicants:* Midcontinent Independent System Operator, Inc.  
*Description:* § 205(d) Rate Filing: 2023–12–20 SA 4218 Union Electric-Grain Belt TCA (H104 H105) to be effective 2/19/2024.  
*Filed Date:* 12/20/23.  
*Accession Number:* 20231220–5202.  
*Comment Date:* 5 p.m. ET 1/10/24.  
*Docket Numbers:* ER24–716–000.  
*Applicants:* PJM Interconnection, L.L.C.  
*Description:* § 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 6232; Queue No. AE1–071 to be effective 2/19/2024.  
*Filed Date:* 12/20/23.  
*Accession Number:* 20231220–5207.  
*Comment Date:* 5 p.m. ET 1/10/24.  
*Docket Numbers:* ER24–717–000.  
*Applicants:* PJM Interconnection, L.L.C.  
*Description:* § 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 6220; Queue No. AB2–037 to be effective 2/19/2024.  
*Filed Date:* 12/20/23.  
*Accession Number:* 20231220–5238.  
*Comment Date:* 5 p.m. ET 1/10/24.  
*Docket Numbers:* ER24–718–000.  
*Applicants:* Oklahoma Gas and Electric Company.  
*Description:* § 205(d) Rate Filing: Normal filing 2023 Dec to be effective 11/12/2010.  
*Filed Date:* 12/20/23.  
*Accession Number:* 20231220–5245.  
*Comment Date:* 5 p.m. ET 1/10/24.  
 The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercensearch.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](mailto:OPP@ferc.gov).

Dated: December 20, 2023.

**Kimberly D. Bose,**  
 Secretary.

[FR Doc. 2023–28544 Filed 12–26–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Project No. 2197–144]

#### **Cube Yadkin Generation, LLC; Notice of Application for a Non-Capacity Amendment of License Accepted for Filing, Soliciting Comments, Motions To Intervene, and Protests**

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-Capacity Amendment of License.

b. *Project No.:* 2197–144.

c. *Date Filed:* June 20, 2023, and supplemented on August 18, 2023, and December 1, 2023.

d. *Applicant:* Cube Yadkin Generation, LLC.

e. *Name of Project:* Yadkin Hydroelectric Project.

f. *Location:* The project is located on the Yadkin River in Davie, Davidson,

Montgomery, Rowan, and Stanly counties, North Carolina. The project does not include Federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Jody Smet, Vice President, Engineering and Regulatory Affairs, 7315 Wisconsin Avenue, Suite 1100W, Bethesda, Maryland 20814, (240) 482–2700, [Jody.Smet@eaglecreekre.com](mailto:Jody.Smet@eaglecreekre.com).

i. *FERC Contact:* Aneela Mousam, (202) 502–8357, [aneela.mousam@ferc.gov](mailto:aneela.mousam@ferc.gov).

j. *Cooperating agencies:* With this notice, the Commission is inviting Federal, State, local, and Tribal agencies with jurisdiction and/or special expertise with respect to environmental issues affected by the proposal, that wish to cooperate in the preparation of any environmental document, if applicable, to follow the instructions for filing such requests described in item m below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of any environmental document cannot also intervene. *See* 94 FERC ¶ 61,076 (2001).

k. *Water Quality Certification:* The applicant must file no later than 60 days following the date of issuance of this notice: (1) a copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification."

m. *Deadline for filing comments, motions to intervene, and protests:* January 19, 2024.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue,

Rockville, Maryland 20852. The first page of any filing should include the docket number P–2197–144. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

l. *Description of Request:* Cube Yadkin Generation, LLC (licensee) requests Commission approval to replace the Unit 1 turbine-generator at the Falls Development. The new turbine-generator unit would be placed in the same location as the existing turbine-generator unit. The proposed upgrades would increase the Falls Development's installed capacity from 31.13 megawatt (MW) to 35.56 MW. The maximum hydraulic capacity would increase from 8,855 cubic feet per second (cfs) to 9,270 cfs (4.7% increase). The licensee does not anticipate any adverse effect to environmental resources as a result of the proposed amendment.

m. *Locations of the Application:* 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. You may also register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), for TTY, call (202) 502–8659. Agencies may obtain copies of the application directly from the applicant.

n. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

o. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in

accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

p. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE" as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

q. 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](mailto:OPP@ferc.gov).

Dated: December 20, 2023.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2023–28537 Filed 12–26–23; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Project Nos. 6055–006, 6055–007, 6055–008]

#### Jeffersonville Hydroelectric Co.; Notice of Application for Surrender of Exemption, Soliciting Comments, Motions To Intervene, and Protests and Notice of Effectiveness of Withdrawal of Application To Surrender Exemption

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type*: Application for surrender of exemption.

b. *Project No*: 6055–006, 6055–007, and 6055–008.

c. *Date Filed*: January 3, 2023, and supplemented May 23, 2023, August 18, 2023, September 19, 2023, and November 6, 2023.

d. *Applicant*: Jeffersonville Hydroelectric Co. (exemptee).

e. *Name of Project*: Lake Jefferson Project.

f. *Location*: The project is located on the East Branch Callicoon Creek, in Sullivan County, New York, and does not occupy federal lands.

g. *Filed Pursuant to*: Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2705, 2708.

h. *Applicant Contact*: Kevin J. Gref, Jeffersonville Hydroelectric Co., 4759 State Route 52, Jeffersonville, NY 12748, 845–701–9422 [jeffhydro@gmail.com](mailto:jeffhydro@gmail.com).

i. *FERC Contact*: Jeremy Jessup, (202) 502–6779, [Jeremy.Jessup@ferc.gov](mailto:Jeremy.Jessup@ferc.gov).

j. *Cooperating agencies*: With this notice, the Commission is inviting federal, state, local, and Tribal agencies with jurisdiction and/or special expertise with respect to environmental issues affected by the proposal, that wish to cooperate in the preparation of any environmental document, if applicable, to follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of any environmental document cannot also intervene. See 94 FERC ¶ 61,076 (2001).

k. *Water Quality Certification*: The applicant must file no later than 60 days following the date of issuance of this notice: (1) a copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification."

l. *Deadline for filing comments, motions to intervene, and protests*: January 19, 2024.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), (866) 208–3676 (toll free), or (202) 502–8659

(TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426.

Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number P–6055–008. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

m. *Description of Request*: The exemptee proposes to surrender the exemption by: (1) Leaving the turbines and all generating equipment disconnected from the grid and (2) Securing the power generation area of the powerhouse/residence by means of a locked barricade. The exemptee filed the surrender application in response to an ongoing compliance proceeding for the project. The exemptee has been working with the U.S. Fish and Wildlife Service and American Rivers to develop its surrender application.

In its January 3, 2023 filing, the exemptee requested to withdraw the surrender application filed in Docket No. P–6055–007 on February 3, 2020. No motion in opposition to the exemptee's request 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 (18 CFR 385.216(b) (2022)) the withdrawal of the surrender application became effective on January 18, 2023, and the proceeding is hereby terminated.

n. *Locations of the Application*: 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. You may also register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via email of new filings and issuances

related to this or other pending projects. For assistance, call 1–866–208–3676 or email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), for TTY, call (202) 502–8659. Agencies may obtain copies of the application directly from the applicant.

o. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

p. *Comments, Protests, or Motions to Intervene*: Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

q. *Filing and Service of Documents*: Any filing must (1) bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE" as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

r. 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](mailto:OPP@ferc.gov).

Dated: December 20, 2023.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2023–28540 Filed 12–26–23; 8:45 am]

BILLING CODE 6717–01–P

## ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2023–0075; FRL–11533–01–OCSPP]

### Product Cancellation Order for Certain Pesticide Registrations

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces EPA's order for the cancellations, voluntarily requested by the registrants and accepted by the Agency, of the products listed in Table 1 of Unit II, pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). This cancellation order follows an April 24, 2023, **Federal Register** Notice of Receipt of Requests from the registrants listed in Table 2 of Unit II, to voluntarily cancel these product registrations. In the April 24, 2023, notice, EPA indicated that it would issue an order implementing the cancellations, unless the Agency received substantive comments within the 180-day comment period that would merit its further review of these

requests, or unless the registrants withdrew their requests. The Agency received one general comment on the notice, but none merited its further review of the requests. Further, the registrants did not withdraw their requests. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellations. Any distribution, sale, or use of the products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

**DATES:** The cancellations are effective December 27, 2023.

**FOR FURTHER INFORMATION CONTACT:** Christopher Green, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–2707; email address: [green.christopher@epa.gov](mailto:green.christopher@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. General Information

###### A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since

others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

###### B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2023–0075, is available at <https://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (202) 566–1744. Please review the visitor instructions and additional information about the docket available at <https://www.epa.gov/dockets>.

##### II. What action is the agency taking?

This notice announces the cancellation, as requested by registrants, of products registered under FIFRA section 3 (7 U.S.C. 136a). These registrations are listed in sequence by registration number in Table 1 of this unit.

TABLE 1—PRODUCT CANCELLATIONS

| Registration No. | Company No. | Product name                                             | Active ingredients               |
|------------------|-------------|----------------------------------------------------------|----------------------------------|
| 264–328 .....    | 264         | Sevin Brand 80% Dust Base .....                          | Carbaryl (056801/63–25–2)—(80%). |
| 432–885 .....    | 432         | Sevin Brand Granular Carbaryl Insecticide .....          | Carbaryl (056801/63–25–2)—(7%).  |
| 432–1213 .....   | 432         | Sevin Granules (1% Sevin) Ant, Flea, Tick & Grub Killer. | Carbaryl (056801/63–25–2)—(1%).  |
| 432–1226 .....   | 432         | Sevin 80 WSP Carbaryl Insecticide .....                  | Carbaryl (056801/63–25–2)—(80%). |

The registrants of the products listed in Table 1 of Unit II, have requested 18-months after cancellation to sell existing stocks.

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Table 1 of this unit, in sequence by EPA company

number. This number corresponds to the first part of the EPA registration numbers of the products listed in Table 1 of this unit.

TABLE 2—REGISTRANTS OF CANCELLED PRODUCTS

| EPA company No. | Company name and address                                                                                                |
|-----------------|-------------------------------------------------------------------------------------------------------------------------|
| 264 .....       | Bayer CropScience, LP, Agent Name: Bayer CropScience, LLC, 801 Pennsylvania Avenue, Suite 900, Washington, DC 20004     |
| 432 .....       | Bayer Environmental Science, A Division of Bayer CropScience, LP, 700 Chesterfield Parkway West, Chesterfield, MO 63017 |

### III. Summary of Public Comments Received and Agency Response to Comments

The agency received one general comment regarding pesticides in

general, not pertaining to any specific registrations in the notice, which EPA acknowledges. For this reason, the Agency does not believe that the comments submitted during the

comment period merit further review or a denial of the requests for voluntary cancellation.

#### IV. Cancellation Order

Pursuant to FIFRA section 6(f) (7 U.S.C. 136d(f)), EPA hereby approves the requested cancellations of the registrations identified in Table 1 of Unit II. Accordingly, the Agency hereby orders that the product registrations identified in Table 1 of Unit II, are canceled. The effective date of the cancellations that are the subject of this notice is December 27, 2023. Any distribution, sale, or use of existing stocks of the products identified in Table 1 of Unit II, in a manner inconsistent with any of the provisions for disposition of existing stocks set forth in Unit VI, will be a violation of FIFRA.

#### V. What is the Agency's authority for taking this action?

Section 6(f)(1) of FIFRA (7 U.S.C. 136d(f)(1)) provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the EPA Administrator may approve such a request. The notice of receipt for this action was published for comment in the **Federal Register** of April 24, 2023 (88 FR 24790) (FRL-10887-01-OCSP). The comment period closed on October 23, 2023.

#### VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States, and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. The existing stocks provisions for the products subject to this order are as follows.

*For: 264-328, 432-885, 432-1213, and 432-1226*

For 264-328, 432-885, 432-1213, and 432-1226, listed in Table 1 of Unit II, the registrants have requested 18-months after cancellation to sell existing stocks. The registrants may continue to sell and distribute existing stocks of the products listed in Table 1 of Unit II, until June 27, 2025, a period of 18 months after publication of the cancellation order in this **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing

the pesticides identified in Table 1 of Unit II, except for export in accordance with FIFRA section 17 (7 U.S.C. 136o), or proper disposal. Persons other than the registrants may sell, distribute, or use existing stocks of products listed in Table 1 of Unit II, until existing stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

*Authority:* 7 U.S.C. 136 *et seq.*

Dated: December 21, 2023.

**Charles Smith,**

*Director, Registration Division, Office of Pesticide Programs.*

[FR Doc. 2023-28557 Filed 12-26-23; 8:45 am]

**BILLING CODE 6560-50-P**

#### ENVIRONMENTAL PROTECTION AGENCY

**[EPA-HQ-OPP-2023-0074; FRL-11590-01-OCSP]**

#### Cancellation Order for Certain Pesticide Registrations and Amendments To Terminate Uses

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces EPA's order for the cancellations and/or amendments to terminate uses, voluntarily requested by the registrants, and accepted by the Agency, of the products listed in Table 1, Table 1A & Table 2 of Unit II, pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). This cancellation order follows an October 16, 2023, **Federal Register** Notice of Receipt of Requests from the registrants listed in Table 3 of Unit II, to voluntarily cancel and/or amend to terminate uses of certain product registrations. In the October 16, 2023, notice, EPA indicated that it would issue an order implementing the cancellations and/or amendments to terminate uses, unless the Agency received substantive comments within the 30-day comment period that would merit its further review of these requests, or unless the registrants withdrew their requests. The Agency did not receive any comments on the notice. Further, the registrants did not withdraw their requests. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellations and/or amendments to terminate uses. Any

distribution, sale, or use of the products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

**DATES:** The cancellations and/or amendments are effective December 27, 2023.

#### FOR FURTHER INFORMATION CONTACT:

Christopher Green, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; telephone number: (202) 566-2707; email address: [green.christopher@epa.gov](mailto:green.christopher@epa.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. General Information

##### A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

##### B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA-HQ-OPP-2023-0074, is available at <https://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460-0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPP Docket is (202) 566-1744. Please review the visitor instructions and additional information about the docket available at <https://www.epa.gov/dockets>.

##### II. What action is the agency taking?

This notice announces the cancellations and/or amendments to terminate uses, as requested by registrants, of products registered under FIFRA section 3 (7 U.S.C. 136a). These registrations are listed in sequence by registration number in Table 1, Table 1A and Table 2 of this unit.

TABLE 1—PRODUCT CANCELLATIONS

| Registration No. | Company No. | Product name                            | Active ingredients                                                                                                                                                       |
|------------------|-------------|-----------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 4–122 .....      | 4           | Bonide A Complete Fruit Tree Spray.     | Captan (081301/133–06–2)—(11.76%), Carbaryl (056801/63–25–2)—(.3%), Malathion (NO INERT USE) (057701/121–75–5)—(6%).                                                     |
| 4–412 .....      | 4           | Bonide Malathion Insect Spray           | Malathion (NO INERT USE) (057701/121–75–5)—(55%).                                                                                                                        |
| 100–935 .....    | 100         | Helix Xtra Insecticide with Fungicides. | Difenoconazole (128847/119446–68–3)—(1.25%), Fludioxonil (071503/131341–86–1)—(.13%), Metalaxyl-M (113502/70630–17–0)—(.4%), Thiamethoxam (060109/153719–23–4)—(20.7%).  |
| 100–973 .....    | 100         | Helix Insecticide with Fungicides.      | Difenoconazole (128847/119446–68–3)—(1.24%), Fludioxonil (071503/131341–86–1)—(.13%), Metalaxyl-M (113502/70630–17–0)—(.39%), Thiamethoxam (060109/153719–23–4)—(10.3%). |
| 100–1305 .....   | 100         | Cruiser Maxx Cereals .....              | Difenoconazole (128847/119446–68–3)—(3.36%), Metalaxyl-M (113502/70630–17–0)—(.56%), Thiamethoxam (060109/153719–23–4)—(2.8%).                                           |
| 279–3563 .....   | 279         | Report Extra Herbicide .....            | Chlorsulfuron (118601/64902–72–3)—(62.5%), Metsulfuron (122010/74223–64–6)—(12.5%).                                                                                      |
| 5481–485 .....   | 5481        | 90% Dimethyl-T .....                    | DCPA (078701/1861–32–1)—(90%).                                                                                                                                           |
| 5481–486 .....   | 5481        | Dacthal 1.92F .....                     | DCPA (078701/1861–32–1)—(20.7%).                                                                                                                                         |
| 5481–491 .....   | 5481        | Dacthal W–75 .....                      | DCPA (078701/1861–32–1)—(75%).                                                                                                                                           |
| 87373–131 .....  | 87373       | Arg Spiromesifen Technical ...          | Spiromesifen (024875/283594–90–1)—(98.6%).                                                                                                                               |
| 91234–275 .....  | 91234       | A1100.02 .....                          | Spiromesifen (024875/283594–90–1)—(23.1%).                                                                                                                               |
| 91234–276 .....  | 91234       | A1100.03 .....                          | Spiromesifen (024875/283594–90–1)—(45.2%).                                                                                                                               |
| 91234–277 .....  | 91234       | A1100.04 .....                          | Spiromesifen (024875/283594–90–1)—(45.2%).                                                                                                                               |
| ID–080012 .....  | 91411       | Dupont Mankocide Fungicide              | Copper hydroxide (023401/20427–59–2)—(46.1%), Mancozeb (014504/8018–01–7)—(15%).                                                                                         |
| MI–110002 .....  | 62719       | Instinct .....                          | Nitrapyrin (069203/1929–82–4)—(17.67%).                                                                                                                                  |
| NC–130001 .....  | 69969       | Avipel (Dry) Corn Seed Treatment.       | Anthraquinone (122701/84–65–1)—(50%).                                                                                                                                    |
| OH–110003 .....  | 62719       | Instinct .....                          | Nitrapyrin (069203/1929–82–4)—(17.67%).                                                                                                                                  |

TABLE 1A—PRODUCT CANCELLATIONS

| Registration No. | Company No. | Product name                 | Active ingredients             |
|------------------|-------------|------------------------------|--------------------------------|
| 5481–490 .....   | 5481        | Dacthal W–75 Herbicide ..... | DCPA (078701/1861–32–1)—(75%). |

The registrant requested only 6 months to sell existing stocks of the

registration 5481–490, identified in Table 1A of Unit II.

TABLE 2—PRODUCT REGISTRATION AMENDMENTS TO TERMINATE USES

| Registration No. | Company No. | Product name                              | Active ingredient                                                               | Uses to be terminated                                                |
|------------------|-------------|-------------------------------------------|---------------------------------------------------------------------------------|----------------------------------------------------------------------|
| 228–660 .....    | 228         | Nufarm Ethephon 2 Plant Growth Regulator. | Ethephon (099801/16672–87–0)—(21.7%).                                           | Non-golf turf uses; sod farms, commercial turf & golf course roughs. |
| 11556–155 .....  | 11556       | PNR1427 Insecticide .....                 | Flumethrin (036007/69770–45–2)—(4.5%), Imidacloprid (129099/138261–41–3)—(10%). | Cat uses.                                                            |
| 34688–85 .....   | 34688       | Triameen Y12D .....                       | 1,3-Propanediamine, N-(3-aminopropyl)-N-dodecyl- (067300/2372–82–9)—(91.4%).    | Oil Field Water Flood Systems and Metalworking Fluid uses.           |
| 34688–86 .....   | 34688       | Triameen Y12D Preservative                | 1,3-Propanediamine, N-(3-aminopropyl)-N-dodecyl- (067300/2372–82–9)—(91.4%).    | Oil Field Water Flood Systems and Metalworking Fluid uses.           |

Table 3 of this unit includes the names and addresses of record for all registrants of the products in Table 1,

Table 1A and Table 2 of this unit, in sequence by EPA company number. This number corresponds to the first

part of the EPA registration numbers of the products listed in Table 1, Table 1A and Table 2 of this unit.

TABLE 3—REGISTRANTS OF CANCELLED AND/OR AMENDED PRODUCTS

| EPA company No. | Company name and address                                                                                                      |
|-----------------|-------------------------------------------------------------------------------------------------------------------------------|
| 4 .....         | Bonide Products, LLC, Attn: Audra Star, 6301 Sutliff Road, Oriskany, NY 13424.                                                |
| 100 .....       | Syngenta Crop Protection, LLC, 410 Swing Road, P.O. Box 18300, Greensboro, NC 27419–8300.                                     |
| 228 .....       | NuFarm Americas, Inc., Agent Name: NuFarm Americas, Inc., 4020 Aerial Center Pkwy., Ste. 101, Morrisville, NC 27560.          |
| 279 .....       | FMC Corporation, 2929 Walnut Street, Philadelphia, PA 19104.                                                                  |
| 5481 .....      | Amvac Chemical Corporation, 4695 Macarthur Court, Suite 1200, Newport Beach, CA 92660–1706.                                   |
| 11556 .....     | Elanco US, Inc., 2500 Innovation Way, Greenfield, IN 46140.                                                                   |
| 34688 .....     | Nouryon Surface Chemistry, LLC, 100 Matsonford Road, Building 5, Radnor, PA 19087.                                            |
| 62719 .....     | Corteva Agriscience, LLC, 9330 Zionsville Road, Indianapolis, IN 46268.                                                       |
| 69969 .....     | Arkion Life Sciences, LLC, Agent Name: Wagner Regulatory Associates, Inc., P.O. Box 640, Hockessin, DE 19707.                 |
| 87373 .....     | Argite, LLC, Agent Name: Pyxis Regulatory Consulting, Inc., 4110 136th Street Ct. NW, Gig Harbor, WA 98332.                   |
| 91234 .....     | Atticus, LLC, Agent Name: Pyxis Regulatory Consulting, Inc., 4110 136th Street Ct. NW, Gig Harbor, WA 98332–9122.             |
| 91411 .....     | Cosaco, LLC, Agent Name: Wagner Regulatory Associates, Inc., 7217 Lancaster Pike, Suite A, P.O. Box 640, Hockessin, DE 19707. |

### III. Summary of Public Comments Received and Agency Response to Comments

During the public comment period provided, EPA received no comments in response to the **Federal Register** notice of October 16, 2023 (88 FR 71356) (FRL–11443–01–OCSPP) announcing the Agency's receipt of the requests for voluntary cancellations and/or amendments to terminate uses of products listed in Table 1, Table 1A and Table 2 of Unit II.

### IV. Cancellation Order

Pursuant to FIFRA section 6(f) (7 U.S.C. 136d(f)(1)), EPA hereby approves the requested cancellations and/or amendments to terminate uses of certain product registrations identified in Table 1, Table 1A and Table 2 of Unit II. Accordingly, the Agency hereby orders that the product registrations identified in Table 1, Table 1A and Table 2 of Unit II, are canceled and/or amended to terminate the affected uses. The effective date of the cancellations that are subject of this notice is [INSERT DATE OF PUBLICATION IN THE **Federal Register**]. Any distribution, sale, or use of existing stocks of the products identified in Table 1, Table 1A and Table 2 of Unit II, in a manner inconsistent with any of the provisions for disposition of existing stocks set forth in Unit VI, will be a violation of FIFRA.

### V. What is the Agency's authority for taking this action?

Section 6(f)(1) of FIFRA (7 U.S.C. 136d(f)(1)) provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following

the public comment period, the EPA Administrator may approve such a request. The notice of receipt for this action was published for comment in the **Federal Register** of October 16, 2023 (88 FR 71356) (FRL–11443–01–OCSPP). The comment period closed on November 15, 2023.

### VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States, and which were packaged, labeled, and released for shipment prior to the effective date of the action. The existing stocks provision for the products subject to this order is as follows.

#### For: 5481–490

For 581–490, listed in Table 1A of Unit II, the registrant requested only 6-months after the effective date of the cancellation to sell existing stocks, which will be the date of publication of the cancellation order in the **Federal Register**. The registrant may continue to sell and distribute existing stocks of the product listed in Table 1A until June 27, 2024, which is 6 months after publication of this cancellation order in the **Federal Register**. Thereafter, the registrant will be prohibited from selling or distributing the products identified in Table 1A of Unit II, except for export consistent with FIFRA section 17 (7 U.S.C. 136o) or for proper disposal.

For all other voluntary cancellations listed in Table 1 of Unit II, the registrants may continue to sell and distribute existing stocks of products listed in Table 1 of Unit II, until December 27, 2024, which is 1 year after publication of this cancellation order in the **Federal Register**. Thereafter, the registrants are prohibited from selling or distributing products listed in Table 1 of Unit II, except for export in accordance with FIFRA section 17 (7 U.S.C. 136o) or for proper disposal.

Now that EPA has approved product labels reflecting the requested amendments to terminate uses, registrants are permitted to sell or distribute products listed in Table 2 of Unit II, under the previously approved labeling until June 27, 2025, a period of 18 months after publication of the cancellation order in this **Federal Register**, unless other restrictions have been imposed. Thereafter, registrants will be prohibited from selling or distributing the products whose labels include the terminated uses identified in Table 2 of Unit II, except for export consistent with FIFRA section 17 or for proper disposal.

Persons other than the registrant may sell, distribute, or use existing stocks of canceled products and/or products whose labels include the terminated uses until supplies are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products and/or terminated uses.

*Authority:* 7 U.S.C. 136 *et seq.*

Dated: December 21, 2023.

**Charles Smith,**

*Director, Registration Division, Office of Pesticide Programs.*

[FR Doc. 2023–28547 Filed 12–26–23; 8:45 am]

**BILLING CODE 6560–50–P**

### FEDERAL COMMUNICATIONS COMMISSION

[DA 23–1164; FR ID 192423]

### Disability Advisory Committee; Announcement of Meeting

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** In this document, the Commission announces the third meeting of the fifth term of its Disability

Advisory Committee (DAC or Committee).

**DATES:** Tuesday, January 30, 2024. The meeting will come to order at 9:00 a.m. Eastern Time.

**ADDRESSES:** The DAC meeting will be held in the Commission Meeting Room at FCC Headquarters, located at 45 L Street NE, Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Joshua Mendelsohn, Designated Federal Officer, Federal Communications Commission, (202) 559-7304, or email: [dac@fcc.gov](mailto:dac@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This meeting is open to members of the general public. The meeting will be webcast with sign language interpreters and open captioning at: [www.fcc.gov/live](http://www.fcc.gov/live). In addition, a reserved amount of time will be available on the agenda for comments and inquiries from the public. Members of the public may comment or ask questions of presenters via [livequestions@fcc.gov](mailto:livequestions@fcc.gov). Requests for other reasonable accommodations or for materials in accessible formats for people with disabilities should be submitted via email to: [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or by calling the Consumer and Governmental Affairs Bureau at (202) 418-0530. Such requests should include a detailed description of the accommodation needed and a way for the FCC to contact the requester if more information is needed to fill the request. Requests should be made as early as possible; last minute requests will be accepted but may not be possible to accommodate.

*Proposed Agenda:* At this meeting, the DAC is expected to (1) discuss a working group report and recommendation on the transmittal of audio description files to Internet Protocol programming; (ii) receive updates on two working group reports and recommendations on best practices for quality Telecommunications Relay Services for individuals with multiple disabilities, and best practices on the use of artificial intelligence to caption live video programming; and (iii) any other topics relevant to the DAC's work.

Federal Communications Commission.

**Suzanne Singleton,**

*Chief, Disability Rights Office, Consumer and Governmental Affairs Bureau.*

[FR Doc. 2023-28463 Filed 12-26-23; 8:45 am]

**BILLING CODE 6712-01-P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Notice of Meeting Held With Less Than Seven Days Advance Notice

**TIME AND DATE:** 2:00 p.m. on December 20, 2023.

**PLACE:** The meeting was held in the FDIC Board Room, 550 17th Street NW, Washington, DC, and was webcast to the public.

**MATTERS TO BE CONSIDERED:** Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors met in open session at 2:00 p.m. on Wednesday, December 20, 2023 to consider the following matters:

#### Summary Agenda

Disposition of Minutes of a Board of Directors' Meeting Previously Distributed.

Summary report of actions taken pursuant to authority delegated by the Board of Directors.

#### Discussion Agenda

Memorandum and resolution re: Proposed 2024 FDIC Operating Budget.

Memorandum and resolution re: Final Rule on FDIC Official Signs and Advertising Requirements, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo.

**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 at Washington, DC, on December 20, 2023.

Federal Deposit Insurance Corporation.

**James P. Sheesley,**

*Assistant Executive Secretary.*

[FR Doc. 2023-28471 Filed 12-26-23; 8:45 am]

**BILLING CODE 6714-01-P**

## FEDERAL LABOR RELATIONS AUTHORITY

### Privacy Act of 1974; System of Records

**AGENCY:** Federal Labor Relations Authority.

**ACTION:** Notice of a modified system of records.

**SUMMARY:** The "Freedom of Information Act Request and Appeal Files" is the system that the Federal Labor Relations Authority (FLRA) uses to provide the public with a single location to submit

and track Freedom of Information Act (FOIA) requests and appeals filed with the FLRA, to manage internal FOIA administration activities, and to collect data for annual reporting requirements to the Department of Justice. FLRA's prior system, FOIAOnline, was recently decommissioned. Under the Privacy Act of 1974, FLRA's Chief FOIA Officer proposes to update the system of records, titled "Freedom of Information Act Request and Appeal Files," with information about FLRA's new FOIA system, FOIAXPress. This notice replaces the notice FLRA published on October 27, 2017 at 82 FR 49813.

**DATES:** This notice action shall be applicable immediately, which will become effective January 26, 2024.

*Comments will be accepted on or before:* January 26, 2024.

**ADDRESSES:** You may send comments, which must include the caption "SORN Notice," by one of the following methods:

*Email:* [SolMail@flra.gov](mailto:SolMail@flra.gov). Include "SORN Notice" in the subject line of the message.

*Mail:* Thomas Tso, Chief FOIA Officer, Federal Labor Relations Authority, 1400 K Street NW, Washington, DC 20424-0001.

*Instructions:* Do not mail written comments if they have been submitted via email. Interested persons who mail written comments must submit an original and 4 copies of each written comment, with any enclosures, on 8½ x 11 inch paper. Do not deliver comments by hand.

**FOR FURTHER INFORMATION CONTACT:** If you have any questions, please contact Thomas Tso, Solicitor, Chief FOIA Officer, at (771) 444-5779.

**SUPPLEMENTARY INFORMATION:** Apart from some minor technical corrections and updates, the only substantive change to the prior notice relates to the replacement of FOIAOnline with FOIAXPress, a commercial off-the-shelf product, for managing FLRA's FOIA program. FOIAXPress will shift storage of records to a FedRAMP-certified third-party cloud environment.

#### SYSTEM NAME AND NUMBER:

Freedom of Information Act Request and Appeal Files, FLRA/Internal-17.

#### SECURITY CLASSIFICATION:

Not applicable.

#### SYSTEM LOCATION:

FLRA Headquarters, Office of the Solicitor.

#### SYSTEM MANAGER(S):

Chief FOIA Officer, Office of the Solicitor, Federal Labor Relations

Authority, 1400 K St. NW, Washington, DC 20424.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Freedom of Information Act, 5 U.S.C. 552.

**PURPOSE(S) OF THE SYSTEM:**

To provide the public with a single location to submit and track FOIA requests and appeals filed with the FLRA, to manage internal FOIA administration activities, and to collect data for annual reporting requirements to the Department of Justice.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

All persons requesting information or filing appeals under the Freedom of Information Act.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

A copy of each Freedom of Information Act (FOIA) request received by the FLRA and a copy of all correspondence related to the request, including the requesters' names, mailing addresses, email addresses, phone numbers, Social Security Numbers, dates of birth, any aliases used by the requesters, alien numbers assigned to travelers crossing national borders, requesters' parents' names, user names and passwords for registered users, FOIA tracking numbers, dates requests are submitted and received, related appeals, and agency responses. Records also include communications with requesters, internal FOIA administrative documents (e.g., billing invoices) and responsive records.

**RECORD SOURCE CATEGORIES:**

Information in this system of records is provided by FLRA employees and FOIA requesters.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:**

In addition to the disclosure generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information in these records may be used pursuant to 5 U.S.C. 552a(b)(3):

a. To disclose pertinent information to the appropriate Federal, State, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, when the FLRA becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation.

b. To provide information to a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of that individual.

c. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body, when the FLRA determines that the records are arguably relevant to the proceeding, or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

d. To a Federal, State, local, or foreign agency or entity for the purpose of consulting with that agency or entity to enable the FLRA to make a determination as to the propriety of access to or correction of information, or for the purpose of verifying the identity of an individual or the accuracy of information submitted by an individual who has requested access to or amendment of information.

e. To a Federal agency or entity that furnished the record or information for the purpose of permitting that agency or entity to make a decision as to access to or correction of the record or information, or to a Federal agency or entity for purposes of providing guidance or advice regarding the handling of particular requests.

f. To a submitter or subject of a record or information in order to obtain assistance to the FLRA in making a determination as to access or amendment.

g. To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

h. To disclose information to the National Archives and Records Administration, the Office of Government Information Services (OGIS), to the extent necessary to fulfill its responsibilities in 5 U.S.C. 552(h), to review administrative agency policies, procedures and compliance with FOIA, and to facilitate OGIS's offering of mediation services to resolve disputes between persons making FOIA requests and administrative agencies.

i. To appropriate agencies, entities, and persons when (1) the FLRA suspects or has confirmed that there has been a breach of the system of records; (2) the FLRA has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the FLRA (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the FLRA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

j. To another Federal agency or Federal entity, when the FLRA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

k. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the federal government, when necessary to accomplish an agency function related to this system of records.

l. To such recipients and under such circumstances and procedures as are mandated by federal statute, regulation, or treaty.

**POLICIES AND PRACTICES FOR STORAGE OF RECORDS:**

Records received using FOIAXPress, a commercial off-the-shelf product, are maintained in a secure, password-protected FedRAMP-certified third-party cloud environment, which utilizes security hardware and software, including multiple firewalls, active intruder detection, and role-based accessed controls. The contracts are maintained by FLRA at 1400 K Street NW, Washington, DC 20424. Any paper records are stored in secure FLRA offices and/or lockable file cabinets.

**POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:**

Requests are retrieved from the FLRA's FOIAXPress system by numerous data elements and key word searches, including name, agency, dates, subject, FOIA tracking number, and other information retrievable with full-text searching capability.

**POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:**

FOIA records are maintained for three years or longer, in accordance with item 001 of General Records Schedule 4.2, as approved by the Archivist of the United States. Disposal is by shredding and/or by deletion of the electronic record.

**ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:**

Computer records are maintained in a secure, password-protected computer system. Paper records are maintained in secure offices or lockable file cabinets. All records are maintained in secure, access-controlled areas or buildings.

**RECORD ACCESS PROCEDURES:**

Individuals wishing access to records about them should contact the System Manager. Individuals must furnish the following information for their records to be located and identified: a. Full name.

b. Approximate date of FOIA request or appeal.

Individuals requesting access must comply with the FLRA's Privacy Act regulations regarding access to records (5 CFR 2412).

**CONTESTING RECORD PROCEDURES:**

Individuals wishing to request amendment of records about them should contact the System Manager. Individuals must furnish the following information for their records to be located and identified:

a. Full name.

b. Approximate date of FOIA request or appeal.

Individuals requesting amendment must follow the FLRA's Privacy Act regulations regarding amendment of records (5 CFR 2412).

**NOTIFICATION PROCEDURES:**

Individuals wishing to determine whether this system of records contains information about them should contact the System Manager. Individuals must furnish the following for their records to be located and identified:

a. Full name.

b. Approximate date of FOIA request or appeal.

Individuals making inquiries must comply with the FLRA's Privacy Act regulations regarding the existence of records (5 CFR 2412).

**EXEMPTIONS PROMULGATED FOR THE SYSTEM:**

None.

**HISTORY:**

This system of records was last published at 82 FR 49813 (October 27, 2017).

**Thomas Tso,**

*Solicitor, Federal Register Liaison, and Chief FOIA Officer, Federal Labor Relations Authority.*

[FR Doc. 2023-28553 Filed 12-26-23; 8:45 am]

**BILLING CODE 7627-01-P**

**FEDERAL MEDIATION AND CONCILIATION SERVICE****Notice of FMCS Convening Policy**

**AGENCY:** Federal Mediation and Conciliation Service (FMCS).

**ACTION:** Notice.

**SUMMARY:** The Federal Mediation and Conciliation Service (FMCS) is issuing

this notice to inform the public of FMCS's intent to convene parties who are currently in a work stoppage.

**DATES:** December 27, 2023.

**FOR FURTHER INFORMATION CONTACT:** Beth Schindler, [bschindler@fmcs.gov](mailto:bschindler@fmcs.gov), (206) 553-5801.

**SUPPLEMENTARY INFORMATION:** On December 7, 2023, 29 CFR part 1406 became effective. This rule provides that "FMCS may convene the parties for a threatened or actual work stoppage whenever in its judgment such dispute threatens to cause a substantial interruption of commerce" and that "FMCS will determine the date, time, place, and manner (virtual, in-person, or hybrid) of services." 29 CFR 1406.1 (b) and (c). FMCS hereby provides notice that FMCS intends to convene parties involved in private sector work stoppages for the purposes of mediating the dispute. FMCS will convene parties for work stoppages that proceed unabated for 30 continuous calendar days or fewer, if the parties are in certain critical industries. Exceptions will apply if the work stoppage does not threaten to cause a substantial interruption of commerce. Parties will be provided written notice of the date, time, place, and manner (virtual, in-person, or hybrid) of the mediation. The parties will continue to be convened at regular intervals until the work stoppage is resolved.

Dated: December 20, 2023.

**Anna Davis,**

*General Counsel.*

[FR Doc. 2023-28460 Filed 12-26-23; 8:45 am]

**BILLING CODE 6732-01-P**

**FEDERAL RESERVE SYSTEM****Formations of, Acquisitions by, and Mergers of Bank Holding Companies**

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

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 the BHC Act (12 U.S.C. 1842(c)).

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 26, 2024.

*A. Federal Reserve Bank of Chicago* (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414.

Comments can also be sent electronically to

[Comments.applications@chi.frb.org](mailto:Comments.applications@chi.frb.org):

1. *SolvTrust Financial Corporation, Melrose Park, Illinois*; to become a bank holding company by acquiring American Bancorp of Illinois, Oak Brook, Illinois, and thereby indirectly acquiring Pan American Bank and Trust, Melrose Park, Illinois.

Board of Governors of the Federal Reserve System.

**Michele Taylor Fennell,**

*Deputy Associate Secretary of the Board.*

[FR Doc. 2023-28541 Filed 12-26-23; 8:45 am]

**BILLING CODE 6210-01-P**

**GENERAL SERVICES ADMINISTRATION**

[Notice-MA-2023-10; Docket No. 2023-0002, Sequence No. 43]

**Calendar Year (CY) 2024 Privately Owned Vehicle (POV) Mileage Reimbursement Rates; CY 2024 Standard Mileage Rate for Moving Purposes**

**AGENCY:** Office of Government-wide Policy (OGP), General Services Administration (GSA).

**ACTION:** Notice.

**SUMMARY:** GSA is updating the mileage reimbursement rate for privately owned automobiles (POA), airplanes, and motorcycles as required by statute. This information will be available in FTR Bulletin 24-03, which can be found on GSA's website at <https://gsa.gov/ftbulletins>.

**DATES:** *Applicability date:* This notice applies to travel and relocation

performed on or after January 1, 2024 through December 31, 2024.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, please contact Mrs. Autumn King, Policy Analyst, Office of Government-wide Policy, Office of Asset and Transportation Management, at 803-944-6487, or by email at [travelpolicy@gsa.gov](mailto:travelpolicy@gsa.gov). Please cite Notice of FTR Bulletin 24-03.

**SUPPLEMENTARY INFORMATION:** GSA is required by statute to set the mileage reimbursement rate for privately owned automobiles (POA) as the single standard mileage rate established by the Internal Revenue Service (IRS). The IRS mileage rate for medical or moving purposes is used to determine the POA rate when a Government-furnished automobile is available and authorized and also represents the privately owned vehicle (POV) standard mileage reimbursement rate for official relocation.

Finally, GSA conducts independent reviews of the cost of travel and the operation of privately owned airplanes and motorcycles on an annual basis to determine their corresponding mileage reimbursement rates. These reviews evaluate various factors, such as the cost of fuel, depreciation of the original vehicle cost, maintenance and insurance, state and Federal taxes, and consumer price index data. FTR Bulletin 24-03 establishes and announces the new CY 2024 POV mileage reimbursement rates for official temporary duty and relocation travel.

This notice is the only notification to agencies of revisions to the POV mileage rates for official travel and relocation, in addition to the changes posted on GSA's website at <https://gsa.gov/mileage>.

**Krystal J. Brumfield,**  
Associate Administrator, Office of  
Government-wide Policy.

[FR Doc. 2023-28563 Filed 12-26-23; 8:45 am]

**BILLING CODE 6820-14-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Agency for Healthcare Research and Quality

#### Notice of Meetings

**AGENCY:** Agency for Healthcare Research and Quality (AHRQ), Department of Health and Human Services (HHS).

**ACTION:** Notice of five AHRQ subcommittee meetings.

**SUMMARY:** The subcommittees listed below are part of AHRQ's Health Services Research Initial Review Group

(IRG) Committee. Grant applications are to be reviewed and discussed at these meetings. Each subcommittee meeting will be closed to the public.

**DATES:** See below for dates of meetings:

1. *Healthcare Effectiveness and Outcomes Research (HEOR)*  
Date: February 7-8, 2024
2. *Healthcare Safety and Quality Improvement Research (HSQR)*  
Date: February 7-8, 2024
3. *Health System and Value Research (HSVR)*  
Date: February 13-14, 2024
4. *Healthcare Research Training (HCRT)*  
Date: February 15-16, 19, 2024
5. *Healthcare Information Technology Research (HITR)*  
Date: February 29-March 1, 2024

**ADDRESSES:** Agency for Healthcare Research and Quality (Virtual Review), 5600 Fishers Lane, Rockville, Maryland, 20857.

**FOR FURTHER INFORMATION CONTACT:** (to obtain a roster of members, agenda or minutes of the non-confidential portions of the meetings.)

Jenny Griffith, Committee Management Officer, Office of Extramural Research Education and Priority Populations, Division of Policy, Coordination and Analysis, Agency for Healthcare Research and Quality (AHRQ), 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 427-1557.

**SUPPLEMENTARY INFORMATION:** In accordance with section 10 (a)(2) of the Federal Advisory Committee Act (5 U.S.C. app. 2), AHRQ announces meetings of the above-listed scientific peer review groups, which are subcommittees of AHRQ's Health Services Research Initial Review Group Committee. The subcommittee meetings will be closed to the public in accordance with the provisions set forth in 5 U.S.C. app. 2 section 10(d), 5 U.S.C. 552b(c)(4), and 5 U.S.C. 552b(c)(6). 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.

Agenda items for these meetings are subject to change as priorities dictate.

Dated: December 20, 2023.

**Marquita Cullom,**  
Associate Director.

[FR Doc. 2023-28506 Filed 12-26-23; 8:45 am]

**BILLING CODE 4160-90-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket Nos. FDA-2022-E-0931 and FDA-2022-E-0936]

#### Determination of Regulatory Review Period for Purposes of Patent Extension; ZOKINVY

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for ZOKINVY and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of patents which claims that human drug product.

**DATES:** Anyone with knowledge that any of the dates as published (see

**SUPPLEMENTARY INFORMATION)** are incorrect may submit either electronic or written comments and ask for a redetermination by February 26, 2024. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by June 24, 2024. See "Petitions" in the **SUPPLEMENTARY INFORMATION** section for more information.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 26, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

#### 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 Nos. FDA-2022-E-0931 and FDA-2022-E-0936 for "Determination of Regulatory Review Period for Purposes of Patent Extension; ZOKINVY." Received comments, those filed in a timely manner (see **ADDRESSES**), 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 § 10.20 (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.

**FOR FURTHER INFORMATION CONTACT:** Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301-796-3600.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100-670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biologic product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the

Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product ZOKINVY (lonafarnib). ZOKINVY is indicated in patients 12 months of age and older with a body surface area of 0.39 m<sup>2</sup> and above to reduce risk of mortality in Hutchinson-Gilford Progeria Syndrome; and for treatment of processing-deficient Progeroid Laminopathies with either Heterozygous *LMNA* mutation with progerin-like protein accumulation or Homozygous or compound heterozygous *ZMPSTE24* mutations.

Subsequent to this approval, the USPTO received a patent term restoration application for ZOKINVY (U.S. Patent Nos. 7,838,531 and 8,828,356) from the Government of the United States of America as represented by the Department of Health and Human Services; the Regents of the University of Michigan; Progeria Research Foundation, Inc.; and the University of North Carolina at Chapel Hill, and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated November 9, 2022, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of ZOKINVY represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

##### II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for ZOKINVY is 5,023 days. Of this time, 4,777 days occurred during the testing phase of the regulatory review period, while 246 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(i)) became effective:* February 21, 2007. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on February 21, 2007.

2. *The date the application was initially submitted with respect to the human drug product under section 505 of the FD&C Act:* March 20, 2020. FDA has verified the applicant's claim that

the new drug application (NDA) for ZOKINVY (NDA 213969) was initially submitted on March 20, 2020.

3. *The date the application was approved:* November 20, 2020. FDA has verified the applicant's claim that NDA 213969 was approved on November 20, 2020.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 1,255 days or 1,948 days of patent term extension.

### III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to <https://www.regulations.gov> at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: December 21, 2023.

**Lauren K. Roth,**

*Associate Commissioner for Policy.*

[FR Doc. 2023–28511 Filed 12–26–23; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA–2022–E–2035]

#### Determination of Regulatory Review Period for Purposes of Patent Extension; PONVORY

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for PONVORY and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

**DATES:** Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect may submit either electronic or written comments and ask for a redetermination by February 26, 2024. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by June 24, 2024. See “Petitions” in the **SUPPLEMENTARY INFORMATION** section for more information.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 26, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

#### 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–2022–E–2035 for “Determination of Regulatory Review Period for Purposes of Patent Extension; PONVORY.” Received comments, those filed in a timely manner (see **ADDRESSES**), 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 § 10.20 (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.

**FOR FURTHER INFORMATION CONTACT:** Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301-796-3600.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100-670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biological product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product’s regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for

example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA’s determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product, PONVORY (ponesimod). PONVORY is indicated for the treatment of relapsing forms of multiple sclerosis, to include clinically isolated syndrome, relapsing-remitting disease, and active secondary progressive disease, in adults. Subsequent to this approval, the USPTO received a patent term restoration application for PONVORY (U.S. Patent No. RE43728) from Actelion Pharmaceuticals Ltd. and the USPTO requested FDA’s assistance in determining the patent’s eligibility for patent term restoration. In a letter dated September 13, 2022, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of PONVORY represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product’s regulatory review period.

##### **II. Determination of Regulatory Review Period**

FDA has determined that the applicable regulatory review period for PONVORY is 4,459 days. Of this time, 4,092 days occurred during the testing phase of the regulatory review period, while 367 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(i)) became effective:* January 4, 2009. FDA has verified the applicant’s claim that the date the investigational new drug application became effective was on January 4, 2009.

2. *The date the application was initially submitted with respect to the human drug product under section 505 of the FD&C Act:* March 18, 2020. FDA has verified the applicant’s claim that the new drug application (NDA) for PONVORY (NDA 213498) was initially submitted on March 18, 2020.

3. *The date the application was approved:* March 18, 2021. FDA has verified the applicant’s claim that NDA 213498 was approved on March 18, 2021.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several

statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 5 years of patent term extension.

##### **III. Petitions**

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to <https://www.regulations.gov> at Docket No. FDA-2013-S-0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: December 21, 2023.

**Lauren K. Roth,**

*Associate Commissioner for Policy.*

[FR Doc. 2023-28509 Filed 12-26-23; 8:45 am]

**BILLING CODE 4164-01-P**

#### **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

##### **Food and Drug Administration**

**[Docket No. FDA-2022-E-2225]**

##### **Determination of Regulatory Review Period for Purposes of Patent Extension; SCEMBLIX**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for SCEMBLIX and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and

Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

**DATES:** Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect may submit either electronic or written comments and ask for a redetermination by February 26, 2024. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by June 24, 2024. See "Petitions" in the **SUPPLEMENTARY INFORMATION** section for more information.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 26, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

#### 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-2022-E-2225 for "Determination of Regulatory Review Period for Purposes of Patent Extension; SCEMBLIX." Received comments, those filed in a timely manner (see **ADDRESSES**), 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 § 10.20 (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.

**FOR FURTHER INFORMATION CONTACT:** Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301-796-3600.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98-417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100-670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biological product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product, SCEMBLIX (asciminib hydrochloride). SCEMBLIX is indicated for the treatment of adult patients with:

- Philadelphia chromosome-positive chronic myeloid leukemia (Ph+CML) in chronic phase (CP), previously treated with two or more tyrosine kinase inhibitors. This indication is approved under accelerated approval based on major molecular response. Continued approval for this indication may be contingent upon verification and description of clinical benefit in a confirmatory trial(s).

- Ph+ CML in CP with the T315I mutation.

Subsequent to this approval, the USPTO received a patent term restoration application for SCEMBLIX (U.S. Patent No. 8,829,195) from Novartis AG, and the USPTO requested FDA's assistance in determining the patent's eligibility for patent term restoration. In a letter dated January 10, 2023, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of SCEMBLIX represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

## II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for SCEMBLIX is 2,845 days. Of this time, 2,717 days occurred during the testing phase of the regulatory review period, while 128 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(i)) became effective:* January 16, 2014. The applicant claims December 17, 2013, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was January 16, 2014, which was 30 days after FDA receipt of the IND.

2. *The date the application was initially submitted with respect to the human drug product under section 505 of the FD&C Act:* June 24, 2021. FDA has verified the applicant's claim that the new drug application (NDA) for SCEMBLIX (NDA 215358) was initially submitted on June 24, 2021.

3. *The date the application was approved:* October 29, 2021. FDA has verified the applicant's claim that NDA 215358 was approved on October 29, 2021.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 899 days of patent term extension.

## III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**).

Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to <https://www.regulations.gov> at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: December 21, 2023.

**Lauren K. Roth,**

*Associate Commissioner for Policy.*

[FR Doc. 2023–28519 Filed 12–26–23; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA–2022–E–0926]

### Determination of Regulatory Review Period for Purposes of Patent Extension; CYTALUX

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or the Agency) has determined the regulatory review period for CYTALUX and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

**DATES:** Anyone with knowledge that any of the dates as published (see **SUPPLEMENTARY INFORMATION**) are incorrect may submit either electronic or written comments and ask for a redetermination by February 26, 2024. Furthermore, any interested person may

petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by June 24, 2024. See “Petitions” in the **SUPPLEMENTARY INFORMATION** section for more information.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The <https://www.regulations.gov> electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 26, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

### 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–

2022-E-0926 for “Determination of Regulatory Review Period for Purposes of Patent Extension; CYTALUX.” Received comments, those filed in a timely manner (see **ADDRESSES**), 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 § 10.20 (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.

**FOR FURTHER INFORMATION CONTACT:** Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug or biologic product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product’s regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: a testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA’s determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product, CYTALUX (pafolacianine), which is indicated in adult patients with ovarian cancer as an adjunct for intraoperative identification of malignant lesions. Subsequent to this approval, the USPTO received a patent term restoration application for CYTALUX (U.S. Patent No. 9,061,057) from Purdue Research Foundation, and the USPTO requested FDA’s assistance in determining the patent’s eligibility for patent term restoration. In a letter dated September 21, 2022, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of CYTALUX represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product’s regulatory review period.

## II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for CYTALUX is 2,610 days. Of this time, 2,274 days occurred during the testing phase of the regulatory review period, while 336 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(i)) became effective:* October 9, 2014. The applicant claims September 5, 2014, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was October 9, 2014, which was the first date after receipt of the IND that the investigational studies were allowed to proceed.

2. *The date the application was initially submitted with respect to the human drug product under section 505 of the FD&C Act:* December 29, 2020. FDA has verified the applicant’s claim that the new drug application (NDA) for CYTALUX (NDA 214907) was initially submitted on December 29, 2020.

3. *The date the application was approved:* November 29, 2021. FDA has verified the applicant’s claim that NDA 214907 was approved on November 29, 2021.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 825 days of patent term extension.

## III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and, under 21 CFR 60.24, ask for a redetermination (see **DATES**). Furthermore, as specified in § 60.30 (21 CFR 60.30), any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must comply with all the requirements of § 60.30, including but not limited to: must be timely (see **DATES**), must be filed in accordance with § 10.20, must contain sufficient facts to merit an FDA investigation, and must certify that a true and complete copy of the petition has been served upon the patent applicant. (See H. Rept. 857, part 1, 98th

Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to <https://www.regulations.gov> at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: December 21, 2023.

**Lauren K. Roth,**

*Associate Commissioner for Policy.*

[FR Doc. 2023–28507 Filed 12–26–23; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA–2023–F–5500]

#### **Kemin Industries, Inc.; Filing of Food Additive Petition (Animal Use); Chromium Propionate; Correction**

**AGENCY:** Food and Drug Administration, HHS

**ACTION:** Notification of petition; correction.

**SUMMARY:** The Food and Drug Administration is correcting a notice entitled “Kemin Industries, Inc.; Filing of Food Additive Petition (Animal Use)” that appeared in the **Federal Register** of July 27, 2023. The document announced that we filed a petition, submitted by Kemin Industries, Inc., proposing that the food additive regulations be amended to provide for the safe use of chromium propionate to be used as a source of chromium in turkey feed. The document was published with an incorrect docket number. This document corrects that error.

#### **FOR FURTHER INFORMATION CONTACT:**

Wasima Wahid, Center for Veterinary Medicine (HFV–221), Food and Drug Administration, 12225 Wilkins Ave., Rockville, MD 20852, 240–402–5857, [wasima.wahid@fda.hhs.gov](mailto:wasima.wahid@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of Thursday, July 27, 2023 (88 FR 48406) in FR Doc. 2023–15913, the following correction is made:

On page 48406, in the first column, in the header of the document, “Docket No. FDA–2023–F–2415” is corrected to read “Docket No. FDA–2023–F–5500”.

Dated: December 21, 2023.

**Lauren K. Roth,**

*Associate Commissioner for Policy.*

[FR Doc. 2023–28512 Filed 12–26–23; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### **National Institute of Nursing Research; 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 Nursing Research Special Emphasis Panel; NRRC Member Conflict Meeting.

*Date:* February 2, 2024.

*Time:* 1:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institute of Nursing Research, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Nisan Bhattacharyya, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Nursing Research, NIH, 6701 Democracy Boulevard, Suite 668, Bethesda, MD 20892, 301–451–2405, [nisan.bhattacharyya@nih.gov](mailto:nisan.bhattacharyya@nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: December 21, 2023.

**Victoria E. Townsend,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–28566 Filed 12–26–23; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### **National Institute on Deafness and Other Communication Disorders; 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 on Deafness and Other Communication Disorders Special Emphasis Panel; Initiation of NIDCD Hearing and Balance Translational Application.

*Date:* January 22, 2024.

*Time:* 1:00 p.m. to 3:00 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:* Shiguang Yang, DVM, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Room 8349 Bethesda, MD 20892, 301–496–8683, [yangshi@nidcd.nih.gov](mailto:yangshi@nidcd.nih.gov).

*Name of Committee:* National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Review of NIDCD Research Grant Applications for Translating Basic Research in Voice, Speech, and Language into Clinical Tools.

*Date:* January 29, 2024.

*Time:* 2:30 p.m. to 4:30 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:* Sonia Elena Nanescu, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Suite 8300, Bethesda, MD 20892, (301) 496–8683, [sonia.nanescu@nih.gov](mailto:sonia.nanescu@nih.gov).

*Name of Committee:* National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Clinical Research Center Grant (P50) Review.

*Date:* January 31, 2024.

*Time:* 1:30 p.m. to 3:30 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:* Kausik Ray, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Blvd., Rockville, MD 20852, 301–402–3587, [rayk@nidcd.nih.gov](mailto:rayk@nidcd.nih.gov).

*Name of Committee:* Communication Disorders Review Committee

*Date:* February 1–2, 2024.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Delta Hotels by Marriott at Anaheim-Garden Grove, Anaheim, CA 92840.

*Contact Person:* Katherine Shim, Ph.D., Scientific Review Officer, Division of

Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Bethesda, MD 20892, 301-496-8683, [shimk@nidcd.nih.gov](mailto:shimk@nidcd.nih.gov).

*Name of Committee:* National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Chemical Senses Fellowship Review.

*Date:* February 8, 2024.

*Time:* 11:00 a.m. to 2:00 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:* Shiguang Yang, DVM, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Room 8349, Bethesda, MD 20892, 301-496-8683, [yangshi@nidcd.nih.gov](mailto:yangshi@nidcd.nih.gov).

*Name of Committee:* National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Voice Speech and Language Fellowship Review.

*Date:* February 9, 2024.

*Time:* 11:00 a.m. to 3:00 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:* Sonia Elena Nanescu, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Suite 8300, Bethesda, MD 20892, (301) 496-8683, [sonia.nanescu@nih.gov](mailto:sonia.nanescu@nih.gov).

*Name of Committee:* National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Hearing and Balance Fellowship Review.

*Date:* February 13, 2024.

*Time:* 10:00 a.m. to 5:00 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:* Kausik Ray, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Blvd., Rockville, MD 20852, 301-402-3587, [rayk@nidcd.nih.gov](mailto:rayk@nidcd.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: December 21, 2023.

**Victoria E. Townsend,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023-28572 Filed 12-26-23; 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 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:* Risk, Prevention and Health Behavior Integrated Review Group; Biobehavioral Medicine and Health Outcomes Study Section.

*Date:* January 29–30, 2024.

*Time:* 9:00 a.m. to 7:00 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:* Mark A. Vosvick, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3110, Bethesda, MD 20892, (301) 402-4128, [mark.vosvick@nih.gov](mailto:mark.vosvick@nih.gov).

*Name of Committee:* Cell Biology Integrated Review Group; Cellular Signaling and Regulatory Systems Study Section.

*Date:* January 29–30, 2024.

*Time:* 10:00 a.m. to 8:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* David Balasundaram, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5189, MSC 7840, Bethesda, MD 20892, 301-435-1022, [balasundaramd@csr.nih.gov](mailto:balasundaramd@csr.nih.gov).

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; RFA-OD-23-051 Emergency Award: RADx-UP Dissemination and Implementation (D&I) Research on COVID-19 Testing Interventions among Underserved and Vulnerable Populations.

*Date:* January 31, 2024.

*Time:* 10:00 a.m. to 6:00 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:* Jessica Bellinger, Ph.D., Scientific Review Administrator, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, Bethesda, MD 20892, 301-827-4446, [bellingerjd@csr.nih.gov](mailto:bellingerjd@csr.nih.gov).

(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 21, 2023.

**Victoria E. Townsend,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023-28531 Filed 12-26-23; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Government Owned Inventions

**AGENCY:** National Institutes of Health, HHS.

**ACTION:** Notice.

**SUMMARY:** The invention listed below is directed to a T cell receptor (TCR) that specifically targets the Kita-Kyushu Lung Cancer Antigen 1 (KK-LC-1). This TCR may be used to develop novel immunotherapies against several common and aggressive epithelial cancers. It may also be possible to use portions of the KK-LC-1 TCR in chimeric proteins for cancer therapy and/or for antigen detection assays. This technology was discovered and is being developed by the National Cancer Institute (NCI). The NCI is currently seeking a licensee and/or collaborator to further develop this technology.

#### FOR FURTHER INFORMATION CONTACT:

Inquiries related to this licensing and collaboration opportunity should be directed to: Suna Gulay French, Technology Transfer Manager, NCI Technology Transfer Center, 9609 Medical Center Drive, RM 1E530 MSC 9702, Bethesda, MD 20892-9702 (for business mail), Rockville, MD 20850-9702; Telephone: (240) 276-5530; Facsimile: (240) 276-5504; Email: [suna.gulay@nih.gov](mailto:suna.gulay@nih.gov). A signed Confidential Disclosure Agreement will be required to receive copies of unpublished information related to this invention.

**SUPPLEMENTARY INFORMATION:** The following patent applications are available for licensing and/or collaboration under a Cooperative Research and Development Agreement (CRADA):

1. U.S. Provisional Application No. 62/327,529;

2. PCT Application No. PCT/US17/027865;  
 3. U.S. Patent No. 11,352,410;  
 4. Australia Patent Application No. 2017258745;  
 5. Canada Patent Application No. 3021898; and  
 6. European Patent No. 17733120.4, validated in Switzerland, Germany, Belgium, Denmark, Spain, Finland, France, United Kingdom, Ireland, Italy, The Netherlands, Norway, Sweden.  
 Achieving expeditious commercialization of federally funded research and development is consistent with the goals of the Bayh-Dole Act, codified as 35 U.S.C. 200–212.

### Background and Description of Technology

Metastatic cancers are the cause of up to 90% of cancer deaths, yet few treatment options exist for patients with metastatic disease. Adoptive transfer of T cells that express tumor-reactive T-cell receptors (TCRs) has been shown to mediate regression of metastatic cancers in some patients. However, identification of antigens that are expressed solely by cancer cells and not normal tissues has been a major challenge for the development of TCR-based immunotherapies. Researchers at the National Cancer Institute (NCI) have developed a TCR that specifically targets the Kita-Kyushu Lung Cancer Antigen 1 (KK-LC-1) 52–60 epitope. KK-LC-1 antigen (encoded by the CT83 gene) is highly expressed in several common and aggressive epithelial tumor types. Importantly, KK-LC-1 is expressed at very low levels in normal tissues and is not expressed in life-essential tissues. This expression profile makes KK-LC-1 an attractive target for TCR-based anti-cancer therapies. This TCR may be used to genetically modify peripheral blood lymphocytes from eligible patients. After expansion, these genetically modified lymphocytes can be used to treat patients. This technology is currently being evaluated in clinical trials at the NCI and at Rutgers Cancer Institute of New Jersey.

### Potential Commercial Applications

T cell receptor (TCR)-based immunotherapies and/or therapeutic products against several common and aggressive epithelial tumor types.

### Competitive Advantages

—This TCR has been preclinically validated and is currently being evaluated in the clinic;  
 —Differential expression profile of KK-LC-1 in cancers versus normal tissues suggests that therapy with a specific KK-LC-1 TCR would be cancer-

specific and would not damage life-essential tissues;  
 —Thousands of cancer patients each year with otherwise untreatable disease may be eligible for treatment with this TCR.

### Development Stage

Clinical development.

Dated: December 20, 2023.

**Richard U. Rodriguez,**

*Associate Director, Technology Transfer Center, National Cancer Institute.*

[FR Doc. 2023–28481 Filed 12–26–23; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Government-Owned Inventions; Availability for Licensing

**AGENCY:** National Institutes of Health, HHS.

**ACTION:** Notice.

**SUMMARY:** The invention listed below is owned by an agency of the U.S. Government and is available for licensing to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

**FOR FURTHER INFORMATION CONTACT:** Brian Bailey at 301–201–9217, 240–669–5128, or [bbailey@mail.nih.gov](mailto:bbailey@mail.nih.gov). Licensing information may be obtained by communicating with the Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases, 5601 Fishers Lane, Rockville, MD 20852; tel. 301–496–2644. A signed Confidential Disclosure Agreement will be required to receive copies of unpublished information related to the invention.

**SUPPLEMENTARY INFORMATION:** Technology description follows: Immortalized Rhesus macaque Bcl-6/Bcl-xL Stable B Cell Lines as Tools for HIV Antibody Discovery.

### Description of Technology

Scientists at NIAID have developed two immortalized stable B cell lines from rhesus macaques that can have value as research tools for the discovery of neutralizing antibodies of simian origin against HIV and that may have value in the development of an HIV vaccine. These B cell lines encode human Bcl-6 and Bcl-xL proteins, which

are major regulators of apoptosis. These B cell lines are derived from the lymph node of a rhesus macaque (RM) that was infected with SHIV.CH505. It was discovered that, unlike in humans, rhesus macaque B cells from lymph nodes are more effectively immortalized than B cells from Peripheral Blood Mononuclear Cells (PBMCs).

After sample collection and cryopreservation, pro B cells were isolated, sorted by flow cytometry for populations of interest, then activated with CD40 ligand and RM IL-2 followed by transduction with a retroviral vector encoding Bcl-6, Bcl-xL, and green fluorescent protein (GFL), thereby creating immortalized clonal lines. Two clones were down selected for their *in vitro* neutralizing ability against HIV pseudovirus CH505.

This technology is available for licensing for commercial development in accordance with 35 U.S.C. 209 and 37 CFR part 404, as well as for further development and evaluation under a research collaboration.

### Potential Commercial Applications

- Bcl-6 and Bcl-xL immortalization is a valuable and flexible tool for HIV antibody discovery in rhesus macaques.
- Contributes to pre-clinical therapeutic and vaccine development.

### Competitive Advantages

- The cell lines have been characterized and are readily expandable for bulk applications as well as for making high-throughput clonal cultures with or without antigen probes in 384-well plates.

### Development Stage

- Research Materials

**Inventors:** Jakob Samsel, Ph.D.; Richard Koup, MD; Kristin Boswell, Ph.D.; all of NIAID.

**Publications:** Samsel, Jakob, et al. “Rhesus macaque bcl-6/bcl-XL B cell immortalization: Discovery of HIV-1 neutralizing antibodies from lymph node.” *Journal of Immunological Methods*, vol. 516, May 2023, p. 113445, <https://doi.org/10.1016/j.jim.2023.113445>.

**Intellectual Property:** HHS Reference No. E-196–2023–0–EIR-00.

**Licensing Contact:** To license this technology, please contact Brian Bailey at 301–201–9217, 240–669–5128, or [bbailey@mail.nih.gov](mailto:bbailey@mail.nih.gov), and reference E-196–2023.

Dated: December 20, 2023.

**Surekha Vathyam,**

*Deputy Director, Technology Transfer and Intellectual Property Office, National Institute of Allergy and Infectious Diseases.*

[FR Doc. 2023–28474 Filed 12–26–23; 8:45 am]

**BILLING CODE 4140–01–P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**National Institutes of Health**

**National Institute on Drug Abuse; 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 on Drug Abuse Special Emphasis Panel; JCOIN Methodology Center (MAARC) and JCOIN Coordination Center (CTC).

*Date:* February 16, 2024.

*Time:* 12:00 p.m. to 2:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892, (Virtual Meeting).

*Contact Person:* Soyoun Cho, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC, 6021 Bethesda, MD 20892, (301) 594–9460, [Soyoun.cho@nih.gov](mailto:Soyoun.cho@nih.gov).

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; NIDA Research Center of Excellence Grant Program and NIDA Core “Center of Excellence” Grant Program.

*Date:* February 26–27, 2024.

*Time:* 11:00 a.m. to 5:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892, (Virtual Meeting).

*Contact Person:* Soyoun Cho, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC, 6021 Bethesda, MD 20892, (301) 594–9460, [Soyoun.cho@nih.gov](mailto:Soyoun.cho@nih.gov).

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; Research at Minority Serving Institutions on Neurocognitive Mechanisms Underlying the Impact of Structural Racism on the Substance Use Trajectory.

*Date:* March 14, 2024.

*Time:* 1:30 p.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892, (Virtual Meeting).

*Contact Person:* Shareen Amina Iqbal, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC, 6021 Bethesda, MD 20892, (301) 443–4577, [shareen.iqbal@nih.gov](mailto:shareen.iqbal@nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: December 21, 2023.

**Lauren A. Fleck,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–28574 Filed 12–26–23; 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 Stillbirth 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) Stillbirth Working Group of Council is charged with identifying current knowledge on stillbirth and prevention, areas of improvement for data collection, current resources for families impacted by stillbirth, and next steps to gather data and lower the rate of stillbirth in the United States.

**DATES:** The Virtual Meeting will be held on January 24, 2024, from 9 a.m. to 3:30 p.m. EST.

**ADDRESSES:** The meeting will be open to the public. Individuals who need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The session will be

videocast and can be accessed from the NIH Videocasting website (<http://videocast.nih.gov/>).

**FOR FURTHER INFORMATION CONTACT:** For information concerning this meeting, Dr. Natasha H. Williams, Branch Chief, Office of Legislation and Public Policy NICHD, NIH, 6710B Rockledge Drive, Bethesda, MD 20892–7510, [natasha.williams2@nih.gov](mailto:natasha.williams2@nih.gov), (240) 551–4985.

**SUPPLEMENTARY INFORMATION:** This notice is pursuant to 42 U.S.C. 285g. 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. 2023–28444 Filed 12–26–23; 8:45 am]

**BILLING CODE 4140–01–P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**National Institutes of Health**

**National Center for Advancing Translational 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 Center for Advancing Translational Sciences Special Emphasis Panel; CTSA Small Grant Program.

*Date:* February 13, 2024.

*Time:* 11:00 a.m. to 1:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Blvd., Room 1073, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* M. Lourdes Ponce, Ph.D., Scientific Review Officer, Office of Scientific Review, National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Blvd., Room 1073, Bethesda, MD 20892, 301-435-0810, [lourdes.ponce@nih.gov](mailto:lourdes.ponce@nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: December 20, 2023.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023-28476 Filed 12-26-23; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

[Docket No. FWS-HQ-IA-2023-0253; FXIA16710900000-234-FF09A30000]

### Foreign Endangered Species; Receipt of Permit Applications

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of receipt of permit applications; request for comments.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, invite the public to comment on applications to conduct certain activities with foreign species that are listed as endangered under the Endangered Species Act (ESA). With some exceptions, the ESA prohibits activities with listed species unless Federal authorization is issued that allows such activities. The ESA also requires that we invite public comment before issuing permits for any activity otherwise prohibited by the ESA with respect to any endangered species.

**DATES:** We must receive comments by January 26, 2024.

#### ADDRESSES:

*Obtaining Documents:* The applications, application supporting materials, and any comments and other materials that we receive will be available for public inspection at <https://www.regulations.gov> in Docket No. FWS-HQ-IA-2023-0253.

*Submitting Comments:* When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. You may submit comments by one of the following methods:

- *Internet:* <https://www.regulations.gov>.

Search for and submit comments on Docket No. FWS-HQ-IA-2023-0253.

- *U.S. Mail:* Public Comments

Processing, Attn: Docket No. FWS-HQ-IA-2023-0253; U.S. Fish and Wildlife Service Headquarters, MS: PRB/3W; 5275 Leesburg Pike; Falls Church, VA 22041-3803.

For more information, see Public Comment Procedures under **SUPPLEMENTARY INFORMATION**.

#### FOR FURTHER INFORMATION CONTACT:

Timothy MacDonald, by phone at 703-358-2185 or via email at [DMAFR@fws.gov](mailto:DMAFR@fws.gov). 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:

##### I. Public Comment Procedures

##### A. How do I comment on submitted applications?

We invite the public and local, State, Tribal, and Federal agencies to comment on these applications. Before issuing any of the requested permits, we will take into consideration any information that we receive during the public comment period.

You may submit your comments and materials by one of the methods in **ADDRESSES**. We will not consider comments sent by email or to an address not in **ADDRESSES**. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**).

When submitting comments, please specify the name of the applicant and the permit number at the beginning of your comment. Provide sufficient information to allow us to authenticate any scientific or commercial data you include. The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) those that include citations to, and analyses of, the applicable laws and regulations.

##### B. May I review comments submitted by others?

You may view and comment on others' public comments at <https://www.regulations.gov> unless our allowing so would violate the Privacy Act (5 U.S.C. 552a) or Freedom of Information Act (5 U.S.C. 552).

##### C. Who will see my comments?

If you submit a comment at <https://www.regulations.gov>, your entire comment, including any personal identifying information, will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, such as your address, phone number, or email address, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Moreover, all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

## II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(c) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), we invite public comments on permit applications before final action is taken. With some exceptions, the ESA prohibits certain activities with listed species unless Federal authorization is issued that allows such activities. Permits issued under section 10(a)(1)(A) of the ESA allow otherwise prohibited activities for scientific purposes or to enhance the propagation or survival of the affected species. Service regulations regarding prohibited activities with endangered species, captive-bred wildlife registrations, and permits for any activity otherwise prohibited by the ESA with respect to any endangered species are available in title 50 of the Code of Federal Regulations in part 17.

## III. Permit Applications

We invite comments on the following applications.

*Applicant:* San Diego Zoo Wildlife Alliance, San Diego, CA; Permit No. PER5681188.

The applicant requests a permit to import one wild Fiji crested iguana (*Brachylophus vitiensis*) and five wild Fiji banded iguanas (*Brachylophus fasciatus*) from Spain for the purpose of enhancing the propagation or survival of

the species. This notification is for a single import.

**Applicant:** Southeastern Louisiana University, Hammond, LA; Permit No. PER5352294.

The applicant requests authorization to import biological samples of free ranging and captive-held loggerhead sea turtles (*Caretta caretta*), green sea turtles (*Chelonia mydas*), leatherback sea turtles (*Dermochelys coriacea*) and hawksbill sea turtles (*Eretmochelys imbricata*) from multiple locations for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

**Applicant:** International Crane Foundation, Baraboo, WI; Permit No. 85311C.

The applicant requests to renew a captive-bred wildlife registration under 50 CFR 17.21(g) for the following species, to enhance the propagation or survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

| Common name            | Scientific name            |
|------------------------|----------------------------|
| black-necked crane ... | <i>Grus nigricollis</i> .  |
| hooded crane .....     | <i>Grus monacha</i> .      |
| red-crowned crane .... | <i>Grus japonensis</i> .   |
| Siberian crane .....   | <i>Grus leucogeranus</i> . |
| White-naped crane .... | <i>Grus vipio</i> .        |

**Applicant:** Harkey Ranch, El Dorado, TX; Permit No. PER6026464.

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the red ruffed lemur (*Varecia rubra*) and the black-and-white ruffed lemur (*Varecia variegata*), to enhance the propagation or survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

**Applicant:** The Amphibian and Reptile Diversity Research Center of the University of Texas at Arlington, Arlington, TX; Permit No. PER5691074.

The applicant requests authorization to export and re-import nonliving museum specimens of endangered species previously accessioned into the applicant's collection for scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

#### Multiple Trophy Applicants

The following applicants request permits to import sport-hunted trophies of male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancing the propagation or survival of the species.

- George Wulff, Sacramento, CA; Permit No. PER5581670
- James Warren, Atlanta, GA; Permit No. 67283D
- Gregory West, Dallas, TX; Permit No. PER5991794

#### IV. Next Steps

After the comment period closes, we will make decisions regarding permit issuance. If we issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**. You may locate the notice announcing the permit issuance by searching <https://www.regulations.gov> for the permit number listed above in this document. For example, to find information about the potential issuance of Permit No. 12345A, you would go to [regulations.gov](https://www.regulations.gov) and search for "12345A".

#### V. Authority

We issue this notice under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and its implementing regulations.

**Timothy MacDonald,**

*Government Information Specialist, Branch of Permits, Division of Management Authority.*

[FR Doc. 2023-28470 Filed 12-26-23; 8:45 am]

**BILLING CODE 4333-15-P**

#### INTERNATIONAL TRADE COMMISSION

[Investigation. No. 337-TA-1383]

#### Certain Electronic Eyewear Products and Components Thereof; Notice of Institution of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 20, 2023, under section 337 of the Tariff Act of 1930, as amended, on behalf of Ingeniospec, LLC of San Jose, California. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic eyewear products and components thereof by reason of the infringement of certain claims of U.S. Patent No. 8,770,742 ("the '742 patent"); U.S. Patent No. 10,310,296 ("the '296 patent"); U.S. Patent No. 11,762,224 ("the '224 patent"); and 11,803,069 ("the '069 patent"). The complaint further alleges that an industry in the

United States exists, or is in the process of being established, as required by the applicable Federal Statute. The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

**ADDRESSES:** The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email [EDIS3Help@usitc.gov](mailto:EDIS3Help@usitc.gov). Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205-2000. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>.

#### FOR FURTHER INFORMATION CONTACT:

Katherine Hiner, The Office of Docket Services, U.S. International Trade Commission, telephone (202) 205-1802.

#### SUPPLEMENTARY INFORMATION:

**Authority:** The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2023).

**Scope of Investigation:** Having considered the complaint, the U.S. International Trade Commission, on December 20, 2023, ORDERED THAT—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claim 18 of the '742 patent; claims 1-18, 20-25, 28-37, 40, and 42 of the '296 patent; claims 27-42 and 44-48 of the '224 patent; and claims 1-14 and 16 of the '069 patent, and whether an industry in the United States exists, or is in the process of being established, as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the

investigation, is “eyewear products containing electronic components in the frames or lenses, and associated components”;

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is:

Ingeniospec, LLC, 4010 Moorpark Avenue, Suite 211, San Jose, CA 95129.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Ampere LLC, 8 The Green, Suite A, Dover, DE 19901.

Ampere Technologies, Inc., 8 The Green, Suite A, Dover, DE 19901.

GGTR LLC, 8 The Green, Suite A, Dover, DE 19901.

Gogotoro LLC, 60 Broadway, 10M, Brooklyn, NY 11249.

Zhuhai Wicue Technology Co., Ltd., Room 113, Building 19B, No. 1889 East, Huandao Road, Hengqin District, Zhuhai, Guangdong, China.

Bose Corporation, 100 The Mountain Road, Framingham, MA 01701.

Epson America, Inc., 3131 Katella Avenue, Los Alamitos, CA 90720.

Seiko Epson Corporation, 3–3–5 Owa, Suwa-shi, Nagano 392–8502, Japan.

Everysight Ltd., Building 3, Floor 4, Andrei Sakharov St 9, Haifa, Israel.

Everysight US Inc., 101 Avenue of the Americas, 8th & 9th Floors, New York, NY 10013.

Quanta Computer Incorporated, No. 211, Wenhua 2nd Road, Guishan District, Taoyuan City, Taiwan.

Lenovo (United States), Inc., 8001 Development Drive, Morrisville, NC 27560.

Lenovo Group Limited, 23rd Floor, Lincoln House, Taikoo Place, 979 King’s Road, Quarry Bay, Hong Kong, S.A.R. of China.

Lenovo Information Products (Shenzhen) Co., Ltd., 2F, No. 1 Plant, Lenovo Innovation Park, Lidu Road, Loucun Community, Xinhua Street, Guangming District, 518107 Shenzhen, China.

Lucyd Ltd., 12 New Fetter Lane, London, United Kingdom, EC4A 1JP.

Innovative Eyewear, Inc., 11900 Biscayne Blvd., Suite 630, North Miami, FL 33181.

Luxottica Group S.p.A., Piazzale Luigi Cadorna 3 Milano, Milan, 20123 Italy.

Luxottica of America, Inc., 4000 Luxottica Place, Mason, OH 45040.

Magic Leap, Inc., 7500 W. Sunrise Boulevard, Plantation, FL 33322.

Razer Inc., 9 Pasteur, Suite 100, Irvine, CA 92618.

Razer USA Ltd., 9 Pasteur, Suite 100, Irvine, CA 92618.

TCL Technology Group Corporation, No. 17, Huifeng Third Road, Zhongkai High-tech Zone, Huizhou, Guangdong, China 516006.

TCL Electronics Holdings Limited, 5th Floor, Building 22E, 22 Science Park East Avenue, Hong Kong Science Park, Shatin, New Territories, Hong Kong.

Falcon Innovation Technology, (Shenzhen) Co., Ltd., A501, Bldg. D4, 1001 Zhongshanyuan Rd., Shenzhen, Guangdong China 518000.

ThirdEye Gen, Inc., 300 Alexander Park, Suite 206, Princeton, NJ 08540.

Vuzix Corporation, 25 Hendrix Road, West Henrietta, NY 14586.

XREAL, Inc., 440 N. Wolfe Road, Sunnyvale, CA 94085.

EXREAL Technology Limited, RM 1901, 19/F Lee Garden One, 33 Hysan Avenue, Causeway Bay, Hong Kong.

Matrixed Reality Technology Co., Ltd., No. 6, Xingchuang 2nd Road, Xinwu District, Wuxi, Jiangsu, China 214029; and

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

The Office of Unfair Import Investigations is not participating as a party to this investigation.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission’s Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainant of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as

alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: December 20, 2023.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2023–28455 Filed 12–26–23; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1346]

### Certain Marine Air Conditioning Systems, Components Thereof, and Products Containing the Same; Notice of Request for Submissions on the Public Interest

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that on December 8, 2023, the presiding administrative law judge (“ALJ”) issued an Initial Determination on Violation of Section 337. The ALJ also issued a Recommended Determination on remedy and bonding should a violation be found in the above-captioned investigation. The Commission is soliciting submissions on public interest issues raised by the recommended relief should the Commission find a violation. This notice is soliciting comments from the public and interested government agencies only.

**FOR FURTHER INFORMATION CONTACT:** Namo Kim, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3459. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email [EDIS3Help@usitc.gov](mailto:EDIS3Help@usitc.gov). General information concerning the Commission may also be obtained by accessing its internet server at <https://www.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:** Section 337 of the Tariff Act of 1930 provides that, if the Commission finds a violation, it shall exclude the articles

concerned from the United States unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. (19 U.S.C. 1337(d)(1)). A similar provision applies to cease and desist orders. (19 U.S.C. 1337(f)(1)).

The Commission is soliciting submissions on public interest issues raised by the recommended relief should the Commission find a violation, specifically: a limited exclusion order directed to certain marine air conditioning systems, components thereof, and products containing same imported, sold for importation, and/or sold after importation by respondents Citimarine L.L.C., Mabru Power Systems, Inc., Shanghai Hopewell Industrial Co., Ltd., and Shanghai Hehe Industrial Co., Ltd.; and cease and desist orders directed to Citimarine L.L.C., Mabru Power Systems, Inc. Parties are to file public interest submissions pursuant to 19 CFR 210.50(a)(4).

The Commission is interested in further development of the record on the public interest in this investigation. Accordingly, members of the public and interested government agencies are invited to file submissions of no more than five (5) pages, inclusive of attachments, concerning the public interest in light of the ALJ's Recommended Determination on Remedy and Bonding issued in this investigation on December 8, 2023. Comments should address whether issuance of the recommended remedial orders in this investigation, should the Commission find a violation, 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 recommended remedial orders are used in the United States;
- (ii) identify any public health, safety, or welfare concerns in the United States relating to the recommended 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 recommended orders within a commercially reasonable time; and

(v) explain how the recommended orders would impact consumers in the United States.

Written submissions must be filed no later than by close of business on Friday, January 19, 2024.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (Mar. 19, 2020). Submissions should refer to the investigation number ("Inv. No. 337-TA-1346") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, [https://www.usitc.gov/secretary/fed\\_reg\\_notices/rules/handbook\\_on\\_electronic\\_filing.pdf](https://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf)). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy the request procedure set forth in Rules 201.6(b) and 210.5(e)(2) (19 CFR 201.6(b) & 210.5(e)(2)). Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. Any non-party wishing to submit comments containing confidential information must serve those comments on the parties to the investigation pursuant to the applicable Administrative Protective Order. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing and must be served in accordance with Commission Rule 210.4(f)(7)(ii)(A) (19 CFR 210.4(f)(7)(ii)(A)). 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, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: December 20, 2023.

**Lisa Barton,**

*Secretary to the Commission.*

[FR Doc. 2023-28449 Filed 12-26-23; 8:45 am]

**BILLING CODE 7020-02-P**

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## DEPARTMENT OF LABOR

### Revised Final Tribal Consultation Policy

**AGENCY:** Office of Congressional and Intergovernmental Affairs (OCIA), Department of Labor.

**ACTION:** Final policy; Response to comments on proposed policy.

**SUMMARY:** The Department of Labor (DOL) is issuing its revised final Tribal Consultation Policy. The Tribal Consultation Policy (hereinafter referred to as the "policy") establishes standards for improved consultation with federally recognized Indian Tribes to the extent that no conflict exists with applicable Federal laws or regulations. The policy applies to any Department action that affects federally recognized Indian Tribes and requires that the Department's government-to-government consultation involve appropriate Tribal and Departmental Officials. These revisions are set forth as the final policy in response to comments from the April 14, 2021, Tribal consultation meeting.

**DATES:** This Revised Final Policy is effective October 10, 2023.

**FOR FURTHER INFORMATION CONTACT:** For information on the Department of Labor's (DOL) Tribal Consultation Policy, contact Jack Jackson, Tribal Liaison, Office of Congressional and Intergovernmental Affairs, [Jackson.Jack.C@dol.gov](mailto:Jackson.Jack.C@dol.gov), (202) 431-7710. Individuals with hearing or speech impairments may access the telephone via TTY by calling 7-1-1 Federal Relay Telecommunications Access.

**SUPPLEMENTARY INFORMATION:**

## I. Discussion of Comments on the Proposed Draft Tribal Consultation Policy

On April 14, 2021, the Department conducted a Tribal Consultation meeting and received comments from a broad spectrum of interested parties representing Indian Tribes, Alaska Native Corporations, and tribal advocacy groups. They raised a variety of concerns with specific provisions of the proposed policy. After reviewing these comments thoughtfully and systemically, the Department has updated several provisions of its policy.

Comments related to the following provisions are discussed in detail below.

### A. Section I—Streamlining Tribal Consultation Policy

Several commenters proposed adopting a uniform tribal consultation policy that broadly and consistently applies to agencies. One commenter suggested using the Department of the Interior's (DOI) Tribal Consultation Policy as a starting point, as DOI engages with Tribal Governments more frequently than most other agencies. Another commenter recommended that DOL and DOI work together to revive the Native One-Stop resource for tribes and tribal organizations that was initiated during the Obama Administration and to ensure that it is sustainable into the future.

The Department continues to engage with the White House Council on Native American Affairs to seek guidance and recommendations for tribal consultation and engagement. During the 2022 Tribal Nations Summit, the DOI Secretary announced the launch of the first Secretary's Tribal Advisory Committee (STAC). The goal of the committee is to facilitate intergovernmental discussions and modernize DOI's tribal consultation plan. The STAC is comprised of a primary representative and alternate member from each of the 12 Bureau of Indian Affairs (BIA) Regions. The Department will request to engage with the committee on DOL related policy and guidance with tribal implications.

Additionally, on November 30, 2022, President Biden signed the Presidential Memorandum on Uniform Standards for Tribal Consultation, which establishes uniform minimum standards to be implemented across all agencies regarding how tribal consultations are to be conducted. The Department continues to work with our Federal agency partners and the White House Council on Native American Affairs to improve and streamline the consultation process for both tribes and Federal

participants, and ensure more consistency in how agencies initiate, provide notice for, conduct, record, and report on tribal consultations.

Regarding reviving the Native One-Stop, the Department recommends tribes utilize the Career-One Stop website at <https://www.careeronestop.org/> to find employment opportunities in their local area. The site is owned by DOL and is updated nightly. Another commenter suggested that OMB provide a standardized set of basic regulatory consultation standards that apply across all Federal agencies, in order to provide a minimum standard baseline that all tribes could rely upon regardless of what agency they are interacting with. This should include a provision that OMB can determine whether a consultation conducted by an agency meets the standard established by E.O. 13175.

The Department notes that OMB has established a set of nine specific consultation standards which DOL incorporated in its policy.

A commenter recommended the creation of consultation policies that persist from administration to administration, so that tribes do not have to repeat their consultation feedback to every new administration.

The Department agrees and notes that the 2012 Tribal Consultation Policy published in the **Federal Register** serves as the foundation for the Department. It is a best practice for each new administration to consult with tribal officials on proposed policies and guidance that have tribal implications. Just as the White House administration changes, so does the leadership of tribal nations. Therefore, it is necessary to periodically request feedback from tribal officials. Consultation and feedback from tribal officials are key to the implementation and success of new initiatives.

A commenter suggested cooperating with other Federal agencies where tribal issues overlap, so that tribes do not have to work individually with multiple agencies. For example, DOL should meet with the Treasury and their Tribal Advisory Committee, which is working on the need for tribal input when defining Tribal Government and commercial functions.

The Department agrees and notes that its goal is to engage and partner with Federal agencies when issues with tribal implications overlap. The DOL Tribal Liaison serves on several White House Council for Native American Affairs (WHCNA) working groups to collaborate on implementing agency related initiatives.

A commenter proposed creating a website that would provide a cohesive platform that tribes can access that consolidates all information tribes may need including consultation policies.

The Department notes that the Department of the Interior has created a website specifically for Federal agencies to post tribal consultations and engagement meetings with tribal officials.

A commenter suggested coordinating among agencies to ensure that multiple tribal consultations are not scheduled at the same time. Consider holding consultations during tribal gatherings like conferences and summits when large number of tribal representatives are gathering.

The Department recognizes the time and resources required for one tribe to participate in simultaneous consultation sessions and notes that the WHCNA and National Congress of American Indians (NCAI) have created websites to post tribal consultations and briefing sessions to ensure overlap does not occur. DOL looks for opportunities to participate in tribal consultations hosted by other Federal agencies and will participate in tribal consultation during conferences and summits with tribal leaders.

### B. Section II—Definitions

Several commenters would like the definition of consultation to be updated in accordance with E.O. 13175 and the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP). They suggested implementing a requirement of obtaining “free, prior, and informed consent” from tribes in accordance with Article 19 of UNDRIP. Also, they ask that any stated purpose has wide consensus among tribal nations before making the policy official.

The Department follows the definition of consultation specified in Section 5 of E.O. 13175 and Section 1 of the Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation relationships.

### C. Section III—Inclusion and Expectations of Involved Parties

A commenter suggested also doing consultations with national organizations that advocate on behalf of tribes on native workforce development, such as the Native American Employment and Training Council and NCAI. However, another commenter noted that consultation with official Tribal Governments should not replace consultation with national organizations since many organizations advocate on behalf of Indian Country, but they do not represent all tribes.

The Department determines the audience prior to any session that has tribal implications. DOL agrees that consultation with tribal officials is the preferred method when policies or guidance require input on the impact it has on tribes. DOL regularly meets with its Native American Employment and Training Council Advisory Committee and considers such advisory committee meetings as additions to, rather than replacements for, consultation with Tribal Governments. From time-to-time, DOL may invite tribal officials and national organizations to participate in meetings and in consultations but will defer to tribal officials for formal comment.

A commenter would like the option for authorized proxies to speak on behalf of tribal leaders during tribal consultations. Another commenter would like tribal leaders to have the ability to include and confer with their expert staff during every consultation. The Department values the input from tribal leaders, and we will defer to them to determine who is authorized to speak on their behalf. Tribal leaders are encouraged to invite subject matter experts to consultation sessions to confer with them as needed. If requested, we will offer time during the session for tribal leaders to deliberate with their experts.

A commenter advised against delegating consultations to third party entities (e.g., nonprofits, corporations, hired consultants and contractors, non-tribal archaeologists and anthropologists) in order to ensure that tribal interests are not adversely impacted. The Department agrees with this comment as our priority is to consult with tribal officials.

A commenter asks that DOL ensure that consultation includes all the Alaska Native entities that provide services to the Alaska Native and American Indian people of Alaska. The Department uses the definition of "Indian Tribes" which includes Alaska Native Tribes and includes Alaska Native leaders when invites are dispersed.

Several commenters would like Federal officials at all levels of the consultation process to undergo training on U.S.-Tribal relations and the Federal trust obligation. The training should be designed in consultation with tribal nations. The commenters suggested hiring staff who have worked in Indian Country, engaging tribal members to help train additional staff, ensuring additional training for Federal officials most commonly involved in Tribal Government consultation, and making training materials public so that tribal

nations can comment on them and offer suggestions for their improvement.

The Department notes that Section 8 of the November 30, 2022, Presidential Memorandum provides that the head of each agency must require annual training of agency employees who work with tribal nations or who work on matters with tribal implications. The new Presidential Memorandum also directs the Secretary of the Interior and the Director of the Office of Personnel Management, in consultation with tribal nations, to establish training modules regarding Tribal consultation. These modules will be available to all government employees who work with tribal nations, including agency decisionmakers who work on any policies or programs with tribal implications. DOL will provide training and make these modules available to agency decisionmakers and staff who work with tribal nations on policies or programs with tribal implications.

Several commenters requested that high-level officials, not junior staff be involved in all consultations.

The Department makes every effort to include high-level officials (Secretary, Deputy Secretary, Assistant Secretaries, and Deputy Assistant Secretaries), and career staff who are subject matter experts to participate in tribal consultation.

Several commenters recommended creating a mechanism to ensure that tribal nations can allege violations of DOL's consultation procedures and remedies for possible violations. The Tribes would like the right to seek judicial review of consultation when Federal Government has failed to consult appropriately.

The Department is committed to making a good faith effort to following tribal consultation procedures outlined in E.O. 13175 and the 2021 Presidential Memorandum.

#### *D. Section IV—Logistical Amendments to Tribal Consultation Process*

One commenter recommended formalizing the notice and comment period, timeline, and process in the tribal consultation plan. Specifically, they suggested publishing notice of tribal consultations in the **Federal Register** and transmitting official letters from Federal agencies to tribal leadership informing each Tribal Government of the date of tribal consultation, deadlines for submitting written comments, and the meeting agenda and questions to be addressed during consultation. They would like this information to be shared once the notice for tribal consultation is published, not days or hours before

consultation. Another commenter requested that they are provided no less than a 30-day deadline to submit written comments after the last consultation is held.

The Department will follow the guidance outlined in E.O. 13175, the 2021 Presidential Memorandum, OMB, and the **Federal Register** guidance.

A commenter suggested increasing the time allotted for consultation (both the duration of sessions and number of days available in the consultation window) and initiating the process as early as possible.

The Department will determine the duration of consultation sessions based on the complexity of the proposed rule and implications the rule has on tribes. Several commenters requested that a report be sent to all Tribal Governments at the conclusion of each tribal consultation, sharing a summary of what took place, how Tribal Government input was considered in reaching decisions, and what next steps in the consultation process look like. Justifications should be provided when Tribal Government feedback is not incorporated into the final response.

If formal consultation is based on a Notice of Proposed Rulemaking, the Department is required to have a record of tribal consultation, the written comments it received, and a response to the issues raised in written comments. The issues raised in comments will be addressed in the agency's rationale for its final rule, which will be published in the **Federal Register** and included in the rulemaking docket on *Regulations.gov*.

A commenter requested that Federal agencies sponsor at least one annual tribal consultation and recommends working with Tribal Governments at the local level when possible (i.e., regional offices of Federal agencies regularly engaging with tribes so issues can be resolved locally with individual tribes). Another commenter suggested holding periodic check-in consultations, in addition to the annual consultations, budget consultation, and planning meetings prior to consultations.

The Department recognizes tribal officials have limited resources to participate in the numerous tribal consultations by Federal agencies. To be mindful of the time needed to participate, the Department will conduct tribal consultation on any proposed rule with tribal implications. Most of the Department's programs have regional and district staff who engage with tribes, and OSHA agrees that addressing local issues through local or regional engagement can be useful. Agency leadership is regularly informed

of issues with tribal implications, including regional or more local issues.

Several commenters recommended that DOL budget requests include funding to support tribal consultation, so that tribal nations can use funds to fully participate in consultations. This means remunerating tribes for the costs of providing access to technical expertise, attending consultations, conducting studies, and producing reports.

The Department notes that tribal consultation sessions are conducted virtually or in person, and all technical assistance requests received by the Department from tribal officials are free of charge.

Several commenters requested that all information be provided in **Federal Register** notices and that notices are ensured to reach tribal leaders at every affected tribe. When an agency sends notice to a tribe for consultation, it should provide sufficient background information about the proposed action, outline the process by which the agency will consult with tribes, and include a timeline.

The Department appreciates this comment and plans to announce future tribal consultation meetings in the **Federal Register**.

A commenter proposed allowing tribes to initiate consultation rather than making them wait for agencies to initiate.

The Department agrees with this comment and welcomes tribes to initiate consultation with the Department by directing all inquiries related to tribal consultation to [TribalConsultation@dol.gov](mailto:TribalConsultation@dol.gov).

Several commenters recommended providing various communication options for consultation, including face-to-face dialogue, written communication, telephonic communication, and video teleconferences to allow tribal leaders with a wide array of opportunities to participate in the consultation process. A commenter suggested including live-stream of in-person consultations or holding separate in-person consultations and virtual consultations and giving tribes the option to attend whichever format they prefer. The commenter also requested recording consultations and making transcripts available so if tribes are unable to attend, they can refer to recordings.

Depending on the nature of the tribal engagement or consultation, meaning it has implications for all tribes, tribes in a certain region, or is comprised of a small group of tribal grantees, the Department will determine the most efficient method for conducting

engagement and consultation. In most cases, DOL will conduct a hybrid meeting to ensure options for attending virtually or in person. The Department will also accommodate all individuals who need assistance in participating. Advanced notice will be given if the Department plans to record an engagement or consultation session.

A commenter proposed implementing a certification process at completion of consultation whereby both parties agree that meaningful consultation occurred.

The Department notes that there are no requirements in E.O. 13175 or the 2021 Presidential Memorandum for certifying a consultation session. The Department will create a record of the consultation session, including the tribal officials, their input, and the Department's response.

#### *E. Section V—Amendments to Specific Acts, Laws, or Programs*

Several commenters asked that DOL, and the Employee Benefits Security Administration (EBSA) in particular, work in good faith with tribes instead of effectively regulating by conducting enforcement actions without tribal input. DOL should not use the “enforcement exception” in its current policy to render the entire policy optional. The commenters requested a review of DOL's litigation position in *White Mountain Apache Tribe v. EBSA*, CV 20–1409, in which EBSA has posted that there is no need to consult with tribes in defining essential governmental functions or tribal commercial activities.

The Department believes this is a matter that is outside the scope of revising the tribal consultation policy.

A commenter asked that the current Memorandum of Agreement (MOA) be amended to comply with statutory provisions of Public Law 115–93 Indian Employment, Training and Related Services Consolidation Act of 2017. Additionally, the commenter would like funding for tribes to build tribal capacity on DOL programs with the MOA provision.

The Department notes that since the time of this comment, the Department of Interior's Bureau of Indian Affairs initiated discussions with tribes and Federal agencies, and renegotiated the MOA that implements the Indian Employment, Training and Related Services Consolidation Act of 2017. See [https://www.bia.gov/sites/default/files/dup/inline-files/477\\_moa\\_signed.pdf](https://www.bia.gov/sites/default/files/dup/inline-files/477_moa_signed.pdf).

A commenter would like consultation to be a procedural guarantee for tribes, where there should be a dispute resolution process other than litigation.

The Department will follow the guidance outlined in E.O. 13175, the 2021 Presidential Memorandum, OMB, and the **Federal Register** guidance.

A commenter suggested looking to other DOL programs in addition to DINAP that can be included in DOI's 477 Plan.

The Department notes that tribes may currently request the inclusion of other DOL programs in the Department of Interior's “477 Plan” under the Indian Employment, Training and Related Services Consolidation Act of 2017. The Department of Interior's Bureau of Indian Affairs led discussions with Tribes and Federal agencies to reconsider the MOA that implements that Act. The revised MOA streamlines plan approval procedures and re-affirms the decisional authority of the Secretary of the Interior in approving plans and is available at [https://www.bia.gov/sites/default/files/dup/inline-files/477\\_moa\\_signed.pdf](https://www.bia.gov/sites/default/files/dup/inline-files/477_moa_signed.pdf).

A commenter requested that agencies respect the Division of Indian and Native American Programs (DINAP) structure and give weight to policy recommendations that arise from it.

The Department notes that as a part of DOL, DINAP regularly provides information to senior officials within the Department where necessary and applicable.

Several commenters asked DOL to consider how E.O. 13175, Section 3 can be better operationalized and consistently applied throughout the Federal Government. They would like any ambiguities in law to be interpreted in favor of tribal nations.

The Department's Tribal consultation policy addresses how DOL implements E.O. 13175, but DOL also participates in the White House Council on Native Affairs which includes as one of its goals consistent interactions with tribal nations across the Federal Government.

A commenter suggested revisiting E.O. 13175, Section 6, which encourages the Federal Government to facilitate and streamline tribal applications for waivers of statutory and regulatory requirements. This section should be more actively implemented across the Federal Government.

The Department will promptly review any waiver request submitted by a Tribal Nation where the relevant statute or regulation allows for such waivers. Certain laws that DOL administers, such as the Workforce Innovation and Opportunity Act, include a specific waiver provision.

A commenter requested the modification of requirements of the Youth Build program to allow grantees to focus on target populations within

geographies, rather than on geography demographics as a factor. The current requirements have limited their tribe's ability to deploy the program in their community because the people they serve are spread out throughout the geography, which may or may not meet economic guidelines.

The Department will take this into consideration, alongside the statutory and regulatory requirements for the Youth Build program including work sites and supervision. All grant requirements for Youth Build are described in Funding Opportunity Announcements published on [www.grants.gov](http://www.grants.gov).

A commenter would like increased assistance with developing pre-apprentice & apprenticeship programs for in-demand jobs, e.g., growing fields in health care and home care for aging populations.

The Department's Office of Apprenticeship (OA) has been working with tribes throughout the United States to expand apprenticeship opportunities for Native Americans. OA also held a listening session for tribes on registered apprenticeships in 2021. OA encourages tribes and Tribal Organizations to contact our office and to visit [apprenticeship.gov](http://apprenticeship.gov) for assistance and information with setting up pre-apprenticeships and apprenticeships programs for health care and other industries. ETA has also announced plans to issue a Funding Opportunity Announcement (FOA) this year that includes a focus on youth apprenticeship, equity/pre-apprenticeship partnerships, and apprenticeship HUBs that provide an opportunity for tribes and Tribal Organizations to seek funding for pre-apprenticeship and Registered Apprenticeship programs.

#### F. Section VI—Other Demands

Several commenters would like a Tribal Advisory Committee to be established at the Secretariat level, tasked with ensuring that Federal agencies properly incorporate considerations of Indian Country as they execute their duties. This committee should advise the head of agency on how agency activities impact Tribal Governments and ensure inclusion of Tribal Governments in relevant policy proposals. Committee should consist of representatives from each region of the United States so the agency understands the unique needs of different tribes. The names and contacts of the individuals on this Advisory Council should be published.

The Department notes that in November 2022, the Department of the

Interior Secretary announced the launch of its Secretary's Tribal Advisory Committee.

One commenter requested that data on Alaska Native and American Indian labor force participation and unemployment be presented monthly to the President, Congress, and Federal agencies and released to the public as part of the same document DOL releases for all other ethnic groups.

The Department notes that the Bureau of Labor Statistics publishes monthly labor force data from the Current Population Survey by races and ethnicity where sample sizes are large enough to produce statistically accurate estimates. Effective with the release of January, 2022, data in February, 2022, employment status data on American Indians and Alaska Natives were produced on a monthly and quarterly basis. BLS produces a more detailed race and ethnicity report yearly based on a larger or aggregated sample.

A commenter recommended preparing for consultation that must be accelerated due to emergency legislation.

The Department makes every effort to provide sufficient time for consultation and recognizes there are situations when consultation sessions must be scheduled with short notice.

A commenter would like DOL to allow tribes the opportunity to discuss how DOL intends to carry out the American Jobs Plan.

The Department notes that since the time of this comment, Congress passed the Bipartisan Infrastructure Act, the CHIPS and Science Act, and the Inflation Reduction Act, all of which invest in U.S. infrastructure, manufacturing, and the economy. The Department of Labor has collaborated with other Federal agencies to set clear priorities for the good jobs created by these investments to benefit all Americans, particularly historically marginalized populations. The Departments of Labor and Commerce developed Good Jobs Principles that are shaping Federal investments and their implementation; see <https://www.dol.gov/general/good-jobs/principles>.

A commenter would like DOL to advise tribes of upcoming funding opportunities that may benefit them and provide technical assistance in completing the application process, e.g., a Federal-Tribal partnership on data quality to publish an Indian Labor Force Report, a Youth Build funding opportunity.

The Department launched a new website for Grant opportunities at <https://www.dol.gov/grants> that advises

the public of upcoming funding opportunities. The Department also held a webinar on April 13, 2023, *Preview of DOL Grants—Spring 2023: Learn What is Available to Tribes and Tips for Applying*.

A commenter requested that the Native American Employment and Training Council be elevated to the Secretary's Office, as is the case with the Secretary's Tribal Advisory Committee at HHS.

The Department notes that the Native American Employment and Training Council, like all committees organized under the Federal Advisory Committee Act, currently reports to the Secretary of Labor. Pursuant to Workforce Innovation and Opportunity Act Section 166(i)(4)(C), the purpose of the Council is to advise the Secretary on the operation and administration of the Indian and Native American programs authorized under Section 166 of WIOA. In addition, the Council advises the Secretary on the implementation of other programs providing services to Indian and Native American youth and adults under WIOA.

A commenter requested that Federal contractors notify tribes of upcoming projects and employment opportunities for tribal members that are within their usual and accustomed boundaries.

The Department notes that the Office of Federal Contract Compliance Programs (OFCCP) holds those who do business with the Federal Government (contractors and subcontractors) responsible for complying with the legal requirement to take affirmative action and not discriminate on the basis of race, color, sex, sexual orientation, gender identity, religion, national origin, disability, or status as a protected veteran. Prime contractors should notify tribes of the upcoming projects during the pre-construction bid process.

#### G. Section VII—Comments Beyond the Scope of the E.O. and Tribal Consultation Policy

DOL values the input from tribal representatives and will address comments and suggestions outside the scope of the revised DOL Tribal Consultation Policy in this section.

A commenter suggested modernizing treatment of tribes and tribal programs authorized under the Workforce Innovation and Opportunity Act. Specifically, agencies should request full funding needs for tribal programs rather than relying on outdated numbers and streamline reporting requirements for non-477 tribal grantees.

The Department believes this is beyond the scope of the E.O. and the tribal consultation policy. However, the

Department requested increased funding from Congress in the FY 2022, 2023, and 2024 Budgets for the Workforce Innovation and Opportunity Act Indian and Native American (INA) Program.

A commenter asked that DOL inform tribes of the appropriations plan for the Workforce Innovation and Opportunity Act for fiscal years that start in 2022 and DOL's plan to update the funding formula for appropriations based on the most recent census.

The Department believes this is beyond the scope of the E.O. and the tribal consultation policy. The Administration informs all members of the public on requested levels of appropriation annually in the Congressional Budget Justification, available at [www.dol.gov/budget/](http://www.dol.gov/budget/). The Department is also working with the Bureau of the Census to obtain updated population information for calculating the INA formula, in consultation with the Native American Employment and Training Council. The Department is also working with the Bureau of the Census to obtain updated population information for calculating the INA formula, in consultation with the Native American Employment and Training Council.

A commenter suggested coordinating among agencies to ensure that multiple tribal consultations are not scheduled at the same time. Consider holding consultations during tribal gatherings like conferences and summits when large number of tribal representatives are gathering.

The Department recognizes the time and resources required for one tribe to participate in simultaneous consultation sessions. The WHCNA and NCAI have created websites to post tribal consultations and briefing sessions to ensure overlap does not occur. DOL is also looking for opportunities to participate in Tribal consultations hosted by other Federal agencies, and the American Indian Higher Education Consortium.

## II. Final Tribal Consultation Policy

### U.S. Department of Labor

#### Tribal Consultation Policy

##### I. Background and Purpose

A. Executive Order 13175 and the Department of Labor's Relationship With Indian Tribes

B. Referenced Authorities

##### II. Guiding Principles

A. Government-to-Government Relationship and Tribal Self-Determination

B. Open Communications and Respect for Cultural Values and Traditions

C. Ensuring Consultation Is Meaningful

##### III. Policy Statement

A. Departmental Consultation Policy Generally

B. Implementation Responsibilities of DOL Operating Agencies

##### IV. Regulations

V. Unfunded Mandates

VI. Flexibility and Waivers

VII. Consultation Process Guidelines

VIII. Performance and Accountability

IX. Designated Officials and Points of Contact

A. Designated Departmental Official

B. Point of Contact for Each DOL Agency

X. Definitions

XI. Supplemental Terms and Effective Date

Appendix A—Executive Order 13175

## I. Background and Purpose

### A. Executive Order 13175 and DOL's Relationship with Indian Tribes

The United States has a unique legal and political relationship with Indian Tribal Governments, established through and confirmed by the Constitution of the United States, treaties, statutes, Executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications and are responsible for strengthening the government-to-government relationship between the United States and Indian Tribes.

The Department of Labor (DOL) has collaborated extensively with American Indians and Alaska Natives (AI/AN) for many years in advancing its mission of fostering job opportunities, improving working conditions, and assuring work-related benefits and rights of workers and retirees in the United States. In recent years, senior DOL officials have conducted many site visits in Indian country and regularly engage with Indian tribes and their representatives, including the National Congress of American Indians. The Department's collaboration with Indian tribes encompasses a broad range of DOL matters affecting tribes, including joint efforts to improve tribal program management, rulemaking, regulations, policies, waivers and flexibility, grant programs, contracting opportunities, and regulatory guidance.

The Department's Employment and Training Administration (ETA), for example, regularly includes Indian and Native American entities as eligible for employment and training programs, which can improve tribal economic self-sufficiency by ensuring that tribal workers have the skills to build and operate new infrastructure and facilities at the tribal community level and

facilitate the creation of new business opportunities in Indian country. ETA's Division of Indian and Native American Programs (DINAP) administers employment and training services grants to tribal communities in ways that are consistent with the traditional cultural values and beliefs of the people they are designed to serve, including youth and at-risk populations facing employment barriers. ETA works closely with the Native American Employment and Training Council (NAETC), a Federal advisory committee comprised of representatives of Indian tribes, tribal organizations, Alaska Native entities, Indian-controlled organizations serving Indians, or Native Hawaiian organizations appointed by the Secretary of Labor. The NAETC provides advice to the Secretary regarding the overall operation and administration of tribal programs authorized under section 166 of the Workforce Innovation and Opportunity Act, as well as the implementation of other DOL Tribal programs and services.

The Department's Women's Bureau (WB) develops policies and standards and conducts inquiries to safeguard the interests of working women; to advocate for their equality and economic security for themselves and their families; and to promote quality work environments. It has ongoing relationships with organizations that represent Native American women. The WB is also part of a network of Native American women organizations that collaborate on finding ways to end domestic violence and abuse.

The Department's Office of Federal Contract Compliance Programs (OFCCP) works with Federal contractors to expand recruitment and employment opportunities to AI/ANs by linking contractors with tribal workforce development and Tribal Employment Rights Organizations (TERO).

The Department's Office of Disability Employment Policy (ODEP) provides national leadership on disability employment policy by developing and influencing the use of evidence-based disability employment policies and practices, building collaborative partnerships, and delivering credible data designed to improve the employment outcomes for people with disabilities. It has partnered with tribal colleges and universities to advance the rights of individuals with disabilities. ODEP has partnered with OFCCP to develop a series of webinars focused on providing resources and tools to boost recruitment, hiring, and retention of underrepresented groups, including people with disabilities in employment. The targeted audience includes tribal

entities, Federal contractors, employers, workforce boards, community-based organizations, and related stakeholder groups. The ODEP-sponsored technical assistance provider, “National Center on Leadership for the Employment and Economic Advancement of People with Disabilities” (LEAD Center), in collaboration with the Employment Training Administration’s (ETA) Division of Indian and Native American Programs (DINAP), will host two webinars focused on promising practices to assist DINAP grantees better serve program participants with disabilities.

The Department’s Wage and Hour Division (WHD) regularly engages with Tribal Governments, tribal communities, and other tribal stakeholders, including, recently, as a part of the Essential Worker, Essential Protections initiative. WHD’s past experiences make clear that outreach to tribal officials and tribal stakeholder’s play an important role in WHD policy initiatives. Many of WHD’s regulatory and sub regulatory actions affect the public at large without a particularized impact on Tribal governments; nonetheless, WHD recognizes the importance of engaging Tribal Governments and other tribal entities and stakeholders in these processes. Additionally, WHD welcomes tribal officials to submit input and engage in dialogue with staff on policies they believe may have tribal implications. WHD anticipates conducting outreach to tribal officials and other stakeholders on a variety of regulations, sub regulatory guidance, and other policies, including, for example, the modernization of the Davis-Bacon and Related Acts, overtime regulations, misclassification, and the implementation of the Bipartisan Infrastructure Law, as well as the CHIPS and Science Act. As WHD works towards its goal of promoting equity and reducing barriers to accessing WHD resources for historically marginalized groups, including Native Americans, WHD will continue to work with Tribal Governments and stakeholders to ensure that their concerns over preserving their culture, traditions, lands, and sovereignty are addressed in an inclusive manner.

The Department’s Occupational Safety and Health Administration (OSHA) has interacted with tribal communities mostly through enforcement operations. However, efforts are underway to provide training, compliance assistance and consultative services with tribal entities that are interested in learning about the laws OSHA enforces. OSHA is also looking forward to designating compliance

assistance staff members to work directly with tribes. The goal is to have a dedicated point of contact for tribes, to share more on OSHA’s compliance assistance and cooperative programs, and to develop a good working relationship with tribal leaders before any enforcement action may occur. OSHA’s cooperative engagements to promote safety and health in tribal workplaces and communities could serve as models for other OSHA regions to replicate over the next year. For example, the Arizona OTI Ed Center has had a longstanding relationship with the Navajo Nation and has received Harwood grant funding in the past to develop safety and health trainings geared towards tribal workers and employers. The Navajo Nation’s Safety and Health division has used the Ed Center as a technical resource, taking classes offered and collaborating on providing 10- and 30-hour OSHA certification trainings to interested workers and employers. In Nebraska, OSHA engages with tribal communities through its On-Site Consultation program and a partnership with the Wichita Area Office. Nebraska’s Department of Labor administers OSHA’s On-Site Consultation program and has engaged with TCUs to provide consultation services. Before the COVID-19 pandemic, OSHA’s Wichita Area Office participated in local Tribal Safety and Health Fairs.

The Department’s Mine Safety Health Administration (MSHA) created specific bilingual positions in (English/Spanish and English/Navajo) to enhance mining community’s safety and health needs through improved outreach and communication. This will be standard hiring policy for all future hires (FY 2022 -FY 2023) in specific regions such as the Western U.S. where there is a predominantly Hispanic and American Indian mining community. In FY 2021, MSHA participated in outreach to minority serving higher education institutions (HBCUs, HSIs and TCUs) for hiring and it also participated in DOL WebEx activities to teach individuals how to apply for Federal jobs. Further, MSHA hosted virtual informational events with DOL focusing on Q&A sessions to attract individuals from HBCUs, HSIs and TCUs to learn more about MSHA. Additionally, MSHA is working on an outreach plan for the Navajo Nation on the topic of non-miner related Black Lung cases, which are extremely high in the population.

The Department’s Veterans’ Employment and Training Service (VETS) top priorities are (1) getting the military-to-civilian transition right, (2) leveraging the right strategic

partnerships to maximize employment outcomes, and (3) advancing equity and inclusion in our underserved veteran communities. VETS is taking a new and proactive approach by reaching out to underserved communities, especially Native American and Alaska Native veterans, who have not traditionally engaged with DOL and other segments of the Federal Government at the same rate as other veteran communities. By engaging with new partners, we will increase awareness of VETS programs and work towards removing barriers to equitable access. VETS is also continuing to improve its data maturity to strengthen the analytical capabilities needed to better serve and publicly report outcomes for historically excluded and underserved veterans. While excellent work has been done to support transitioning service members, veterans, and military spouses within tribal communities, VETS recognizes that there is always more work to do. VETS is consistently reviewing its programs to determine areas where the Agency can improve customers’ experiences and employment outcomes and ensure that Native American and Alaska Native veterans are able to access our services.

These are among many of DOL’s ongoing actions to engage with tribes and support the efforts of Tribal Governments to have sustainable tribal communities and achieve our mutual goals of ensuring fair wages, employee rights, and workplace safety while working to alleviate the high unemployment found on tribal lands. The Department is committed to building on these efforts to engage in regular and meaningful consultation and collaboration with tribal officials on policies and actions that have tribal implications, including the development of this formal tribal consultation policy. Accordingly, this policy has been developed in consultation with Indian tribes and tribal officials as set forth in Executive Order 13175.

Implementation of this tribal consultation policy will facilitate greater consistency across the DOL in carrying out tribal consultations and will improve collaboration with Indian tribes at all levels of departmental organizations and offices. This policy will also ensure that a reporting structure and process is in place so that all departmental tribal consultation work will be transparent and accountable. DOL employees having responsibility for the outcomes of consultation and collaborative activities will be better able to assess effectiveness and coordinate their efforts with other

related departmental initiatives. Through these efforts, the Department anticipates an even stronger relationship with Indian tribes and improved program delivery to meet the needs of Indian tribes and communities.

#### *B. Referenced Authorities*

This Tribal consultation policy document was developed based upon:

1. Indian Self-Determination and Education Assistance Act, Public Law 93–638, as amended (25 U.S.C. 5301–5310).
2. Native American Programs Act of 1974, (42 U.S.C. 2991–2992, as amended).
3. Consolidated Appropriations Act of 2005, Public Law 108–447.
4. Executive Order (E.O.) 12866, Regulatory Planning and Review, September 30, 1993.
5. Presidential Memorandum, Government-to-Government Relations with Native American Tribal Governments, April 29, 1994.
6. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, November 6, 2000.
7. Presidential Memorandum, Government-to-Government Relationship with Tribal Governments, September 23, 2004.
8. Presidential Memorandum, Tribal Consultation, November 5, 2009.
9. OMB Memorandum M–10–33, Guidance for Implementing Executive Order 13175, July 30, 2010.
10. Presidential Memorandum, Tribal Consultation and Strengthening Nation-to-Nation Relationships, January 26, 2021.
11. Presidential Memorandum, Uniform Standards for Tribal Consultation, November 30, 2023.

## **II. Guiding Principles**

#### *A. Government-to-Government Relationship and Tribal Self-Determination*

The United States, in accordance with treaties, statutes, Executive orders, and judicial decisions, has recognized the right of Indian tribes to self-government and maintains a government-to-government relationship with federally recognized tribes. Indian tribes exercise inherent sovereign powers over their members and territory. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes. Based on this government-to-government relationship, DOL will continue to work with Indian tribes on its programs involving tribes in a

manner that respects tribal self-government and sovereignty, honors tribal treaty and other rights, and meets the Federal Government's tribal trust responsibilities.

#### *B. Open Communications and Respect for Cultural Values and Traditions*

Communication and the exchange of ideas will be open and transparent. Department officials will respect the cultural values and traditions of the tribes. To ensure efficiency and avoid duplicative efforts, DOL will work with other Federal departments to enlist their interest and support in cooperative efforts to assist tribes to accomplish their goals within the context of all DOL programs.

#### *C. Ensuring Consultation Is Meaningful*

The Department is committed to ongoing and continuous dialogue with Indian tribes, both formally and informally, on matters affecting tribal communities. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship that emphasizes trust, respect, and shared responsibility. Engaging with tribes and building relationships with tribal officials have improved the Department's policy toward Indian tribes on a broad range of DOL matters. The Department is committed to further improving its collaboration with Indian tribes and creating additional opportunities for input from all affected tribal communities. Consultation that is meaningful, effective, and conducted in good faith makes the Department's operation, decision making, and governance practices more efficient.

## **III. Policy Statement**

#### *A. Departmental Consultation Policy Generally*

In accordance with Executive Order 13175, when formulating and implementing policies that will have tribal implications, it is the Department's policy that, to the extent practicable and permitted by law, consultation with affected Indian tribes will occur. As stated in the Executive order, this refers to proposed legislation, regulations, policies, or actions that have substantial direct effects on one or more Indian tribes, 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.

#### *B. Implementation Responsibilities of DOL Operating Agencies*

Each DOL operating agency will have an accountable process to ensure meaningful and timely input by Indian

tribes on policies or actions that have tribal implications. With respect to DOL programs administered by Indian Tribal Governments, operating agencies will grant Indian Tribal Governments the maximum administrative discretion permissible consistent with applicable law, contracting requirements, and grant agreements, and will defer to Indian tribes to develop their own policies and standards where legally permissible. The Department's operating agencies will review their existing tribal consultation and/or program administration practices, including those of their regional offices, and revise them as needed to comply with the Department's policy as set forth in this document. If DOL agencies require technical assistance in conducting consultations, the designated departmental official's office (see section IX below) can provide and/or coordinate such assistance.

## **IV. Regulations**

In accordance with Executive Order 13175, to the extent practicable and permitted by law, prior to the promulgation of any regulation that has tribal implications and preempts tribal law, the DOL agency involved will:

1. Notify and consult with affected Indian tribes early in the process of developing the proposed regulation consistent with the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), Executive Order 12866, and Executive Order 13563, and ensure that the tribes are informed about opportunities to participate in stakeholder meetings and public forums about which they might not otherwise be aware;

2. Provide a tribal summary impact statement in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, which consists of a description of the extent of the agency's prior consultation with Indian tribes, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which tribal concerns have been met; and

3. Make available to the Secretary any written communications submitted to the agency on behalf of a tribe.

On issues relating to tribal self-governance, tribal self-determination, and implementation or administration of tribal programs, each DOL agency will make all practicable attempts where appropriate to use consensual mechanisms for developing regulations.

For any draft final regulation that has tribal implications that is submitted to the Office of Information and Regulatory Affairs for review under E.O. 12866, the

agency will certify that the requirements of Executive Order 13175 have been met.

## V. Unfunded Mandates

In accordance with Executive Order 13175, no DOL agency shall promulgate any regulation that is not required by statute and imposes substantial direct compliance costs on tribal communities, unless:

1. Funds necessary to pay the direct costs incurred by Indian tribes in complying with the regulation are provided by the Federal Government; or

2. Prior to the formal promulgation of the regulation, the agency:

- a. Consulted with Indian tribes early in the process of developing the proposed regulation;

- b. In a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provides to the Director of the Office of Management and Budget a description of the extent of the agency's prior consultation with representatives of affected Indian tribes, a summary of the nature of their concerns and DOL's position supporting the need to issue the regulation; and

- c. Makes available to the Director of the Office of Management and Budget any written communications submitted to DOL by such Indian tribes.

## VI. Flexibility and Waivers

With respect to statutory or regulatory requirements that are discretionary and subject to waiver by DOL, each DOL agency will review the processes under which Indian tribes apply for waivers and take appropriate steps to streamline those processes as necessary.

When reviewing any application by an Indian tribe for a waiver of regulatory requirements in connection with any program administered by a DOL agency, the agency will consider the relevant factors with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is not inconsistent with the applicable Federal policy objectives and is otherwise appropriate as determined by the agency.

Each DOL agency will promptly render a decision upon a complete application for a waiver. The agency will provide the applicant with timely written notice of the decision and, if the application for a waiver is not granted, the reasons for such denial, including a citation to any relevant legal authority that provides a basis for the denial.

## VII. Consultation Process Guidelines

1. *Notification.* When a DOL agency or regional office determines that a proposed policy or action will have tribal implications, whether for an individual tribe, regionally, or nationally, the DOL agency will have an affirmative responsibility to provide advance notice to the potentially affected Indian tribes at the earliest practicable time, but not less than 60 days prior to DOL's proposal, either through individual notice, established networks of communication, or **Federal Register** publication. An Indian tribe may initiate a request for consultation with DOL or a DOL agency on a DOL matter that it believes has tribal implications at any time by contacting that agency or the designated departmental official (see section IX), and the tribe should disseminate any DOL-provided information to its members by the method(s) it deems appropriate (e.g., U.S. mail, electronic mail, hard-copy handouts). With respect to rulemaking proceedings of general applicability that have no particularized impact on Indian tribes, DOL agencies may use the existing **Federal Register** notice and comment process to provide notice but should supplement this process with targeted outreach where appropriate.

2. *Subjects of Consultation.* To the extent consistent with applicable laws and administrative requirements, consultation can involve any DOL matter having Tribal implications, including but not limited to: Tribal program management, rulemaking, regulations, policies, waivers, and flexibility; grant programs; contracting opportunities; regulatory guidance; and other matters of Tribal interest. At the same time, DOL agencies should not create undue burdens on Tribes with respect to regulations or other matters that do not have Tribal implications. Routine matters, including normal DOL interactions with direct grantees such as monitoring, selecting grantees, and reporting requirements do not trigger further consultation processes under this policy. Enforcement policy, planning, investigations, cases, and proceedings are not appropriate subjects for consultation under this policy.

3. *Initial Planning and Scoping.* Following notification to affected Tribes that policies or actions have Tribal implications, the DOL agency or regional office, in conjunction with the designated departmental official's office, should engage with those Tribes on initial planning and the appropriate scope of the consultation. Initial planning and scoping should include

describing the nature and extent of the expected Tribal implications; identifying any time constraints or deadlines, relevant existing policies, and potential resource issues; and making a determination as to the most useful and appropriate consultation mechanism.

4. *Consultation Mechanisms.* The manner of consultation should be appropriate to the nature and complexity of the matter and can occur via mailings (e.g., for remote Tribes that may not have internet access), one or more face-to-face meetings or meetings via teleconference, roundtables, or other appropriate means and may include the use of electronic media and messaging and website portals.

5. *Conducting Consultations.* When a consultation commences, DOL will solicit the views of the Indian tribes involved on the relevant subjects and issues. Consultation should involve a thorough examination of the subject at issue, including discussion of cultural, economic, and other impacts on tribal programs, services, functions, and activities; compliance guidance; programmatic and funding issues if relevant; any external constraints such as executive, judicial, or legislative actions; and any relevant technical or other regulatory issues as they affect tribes.

6. *Frequency of Consultation Meetings.* Consultation meetings may be scheduled on a regular basis or on an as needed basis except that at least one national tribal consultation meeting will be held by DOL each calendar year. For example, DOL agencies may establish a quarterly or semi-annual conference call with the tribes to consult with them on the regulatory proposals being considered by the agency and inform them about opportunities to participate in stakeholder meetings and public forums. To reduce costs, tribes and DOL agencies will make their best efforts to coordinate in person consultation meetings to coincide with other regularly scheduled meetings (such as multi-agency and association meetings and regional tribal meetings).

7. *Submissions of Tribal Comments.* The DOL agency involved in the consultation will communicate clear and explicit instructions on the means and time frames for Indian tribes to submit comments to DOL on the matter, whether in person, by teleconference, and/or in writing, and if appropriate will allow a reasonable period of time following a consultation meeting for tribes to submit additional materials. A written communication on the correspondence of the highest elected official, appointed tribal official, or

other third-party designee of such authority (according to the procedures set forth under the definition of “Indian Tribes” in section X), will be considered by DOL to be the official position of the tribe on the subject at issue. If the DOL agency determines that the Administrative Procedure Act or other Federal law or regulation prohibits continued discussion at a specified point in the decision-making process, the agency will so inform the Indian tribes. With respect to rulemaking proceedings of general applicability that will have no unique impacts on Indian tribes, DOL agencies may use existing **Federal Register** notices, dockets, and comment periods to obtain tribal comments, but should supplement them with additional means of obtaining tribal input where appropriate.

8. *Time Frames.* Time frames for the consultation process will depend on the nature and complexity of the consultation and the need to act quickly. Suggested guidelines are as follows:

- a. The initial planning and scoping should normally take place at least 30 days before the date of the issuance of the notice of the proposed action;
  - b. If a consultation meeting will occur, the meeting should normally be scheduled within 30 days of the completion of the planning and scoping;
  - c. For consultations involving one or more meetings, the consultation process should normally be concluded within 60 days of the final consultation meeting; for consultations not involving meetings the consultation process should normally be concluded within 60 days of the planning and scoping.
- Shorter time frames may be more appropriate in exigent situations, such as when a critical deadline is involved, or expanded as necessary for novel or highly complex matters.

9. *Reporting of Outcome of Consultation to Tribes.* The DOL agency involved in the consultation will report the status or outcome of the issue involved to the affected Indian tribes. And, to the extent that tribal input was not adopted, the agency will provide a written explanation for why such input was not adopted or incorporated.

10. *Formation of Tribal Committees, Task Forces, or Work Groups.* Based on the government-to-government relationship, consultation under this policy is generally with one or more individual Tribal Governments. In some cases, it may become necessary for DOL to form a tribal committee, task force, or work group to study a particular policy, practice, issue, or concern. Members of such committees or work groups will include representatives of federally

recognized Tribal Governments or their designees with authority to represent their interests or act on their behalf. Tribal representation on such committees or work groups should consist of geographically diverse small, medium, and large tribes, whenever possible. Members of these committees or work groups shall make good faith attempts to attend all meetings which shall be open to the public and may establish member roles and protocols for producing their work and obtaining input and comment on it. All final work group products or recommendations will be given serious consideration by the Department. [See Section XI below on the Federal Advisory Committee Act (FACA) exemption for consultations undertaken with officials of federally recognized Tribal Governments pursuant to this Tribal consultation policy.]

11. *Use of Existing Statutory Advisory Committees.* DOL agencies may also use existing Tribal advisory committees such as the NAETC as part of meeting their consultation responsibilities under this policy to the extent otherwise permitted by law. If such an advisory committee is required by law to be used exclusively for a particular function or purpose, consultation shall take place in accordance with the requirements of such committee and nothing in this policy requires any further consultation (see, e.g., 29 U.S.C. 2911(h)).

12. *Submission of Comments by Other AI/AN Organizations.* The primary focus of formal consultation activities under this policy is with representatives of federally recognized Indian tribes. DOL recognizes, however, that in some cases the consultation process would be negatively affected if other (non-federally recognized) AI/AN organizations lacking the government-to-government relationship were excluded. Accordingly, nothing in this policy prohibits other AI/AN organizations that are not representatives of Indian tribes from providing their views to the Department.

## VIII. Performance and Accountability

The consultation process and activities conducted under this policy should be accountable, transparent, and result in a meaningful outcome for the Department and for the affected Indian tribes. To enable the Department and the Indian tribes to effectively evaluate the implementation and results of this consultation policy:

1. DOL agencies will maintain records of each consultation and will document the status or outcome of each subject of consultation.

2. DOL agencies will, with input from Indian tribes, develop and utilize appropriate evaluation measures to assess their efforts to determine whether their overall consultation process is effective over time.

3. DOL agencies will report annually to the office of the designated Departmental official on the frequency, scope, and effectiveness of their consultation activities including any recommendations received from Indian tribes on ways to improve the consultation process.

4. The designated Departmental official's office will compile the reports of the agencies and prepare an annual DOL consultation report evaluating the overall effectiveness of this policy which will be made available to the Indian tribes. The office will seek tribal feedback on the annual consultation report and consider any comments from Indian Tribes and Federal participants to determine whether DOL should make any amendments to this policy.

5. The designated departmental official's office will prepare and submit any reports required to be submitted to the Office of Management and Budget under Executive Order 13175 and the November 5, 2009, Presidential Memorandum.

## IX. Designated Officials and Points of Contact

### A. Designated Departmental Official

The designated departmental official to coordinate the implementation of this policy will be the Tribal Liaison within the Office of Congressional and Intergovernmental Affairs, or other departmental officials as designated by the Secretary.

The duties and responsibilities of the designated departmental official include: Serving as the Secretary's expert informational resource on Tribal matters; maintaining an overall understanding of Tribal concerns and issues as they relate to DOL programs and coordinating and managing the Secretary's policies for Indian Tribes; coordination of Tribal site visits for DOL executive leadership; serving as DOL's representative on interdepartmental working groups on Tribal matters; conducting periodic intradepartmental meetings and otherwise overseeing the implementation of the Department's Tribal consultation policy by DOL operating agencies; providing advice and assistance to DOL agencies and regional field offices on Tribal matters; and conducting outreach to national Tribal Government organizations.

### *B. Point of Contact for Each DOL Operating Agency*

Each DOL operating agency will designate a senior official as having primary responsibility for Tribal matters. The designated departmental official's office will maintain an up-to-date list clearly identifying the agency Tribal officials and their contact information and this information will be made available to Indian Tribes. DOL agencies should also designate an alternate official to serve in the absence of the primary official. The duties of the agency officials having responsibility for Tribal matters include: Having and maintaining knowledge of this policy and the government-to-government relationships and sovereign status of Indian Tribes; serving as the primary liaison with Indian Tribes for their agency; ensuring the consultation responsibilities of their agencies are carried out, including those of their regional offices; and reporting to the administration in their respective agencies, as well as the designated Departmental official. Unless otherwise approved by the designated Departmental official, these responsibilities shall not be placed within the agency Offices of Civil Rights, as Tribal relations and consultations are treaty, trust, and government-to-government based, and are not a function of civil rights based on race.

### **X. Definitions**

For the purposes of this policy, the following definitions apply:

**American Indian and Alaska Native (AI/AN)**—A member of an American Indian or Alaska Native tribe, band, nation, pueblo, village, or community of indigenous peoples in the United States, as membership is defined by the Tribal community, including Native Hawaiians.

**AI/AN Organization**—An AI/AN organization or group having members that are not representatives of federally recognized Indian Tribal governments, such as state Tribes and members of urban AI/AN groups that are not located on Indian Tribal lands.

**Consultation**—An enhanced form of communication consisting of an open and free exchange of information and opinion among parties which emphasizes trust, respect, and shared responsibility. The consultation process enables mutual understanding, facilitates the effort to reach consensus on issues, and contributes to informed decision making.

**Deliberative Process Privilege**—A privilege exempting the Federal

Government from disclosure of government agency materials containing opinions, recommendations, and other internal communications that are part of the deliberative process within the Department or agency.

**Department**—Means the U.S. Department of Labor.

**DOL Operating Agency**—A Department of Labor administration, agency, bureau, office, or division that: (1) Has operational responsibility for a Departmental program that has Tribal implications; or (2) has been designated by the Secretary to participate in this policy.

**Executive order**—An order issued by the Federal Government's executive on the basis of authority specifically granted to the executive branch (as by the U.S. Constitution or a Congressional Act).

**Indian Tribe**—An Indian or Alaska Native tribe that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5130), and with whom the Federal Government maintains a government-to-government relationship, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601–1613a). The Department of the Interior's Bureau of Indian Affairs maintains and regularly publishes the official list of federally recognized Indian Tribes which are generally established pursuant to a Federal treaty, statute, Executive order, court order, or a Federal administrative action making these Tribes eligible for certain Federal programs and benefits because of their status as Indians. A federally recognized Indian tribe may expressly delegate a third party to represent the tribe in all Tribal consultations with the Department of Labor, provided the Department is notified of such delegation in writing prior to the consultation. An Indian tribe may rescind its delegation at any time, but the rescission should occur in writing, if practicable.

**Policies or Actions with Tribal Implications**—Refers to proposed legislation, regulations, policies, and actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. This encompasses a broad range of DOL programs and activities targeted at Tribal Governments or having AI/ANs as participants including, but not

limited to, Tribal program management, rulemaking, regulations, policies, waivers and flexibility; grant programs; contracting opportunities; regulatory guidance; or other DOL activities that would have a substantial direct effect on a tribe's traditional way of life, Tribal lands, Tribal resources, or the ability of the tribe to govern its members or to provide services to its members. This term does not include matters that are the subject of litigation or that are undertaken in accordance with an administrative or judicial order.

**Secretary**—Means the Secretary of Labor.

**Substantial Direct Compliance Costs**—Those costs incurred directly from implementation of changes necessary to meet the requirements of a Federal mandate. Because of the large variation in resources among Tribes, "substantial costs" will vary by Indian tribe. Where necessary and appropriate, the Secretary will determine the level of costs that represent "substantial costs" in the context of an Indian tribe's resource base.

**To the Extent Practicable and Permitted by Law**—Refers to situations where the opportunity for consultation is limited due to practical constraints including time, budget, or other such reason, and situations where other legal requirements take precedence.

**Tribal Committee, Task Force, or Work Group**—A group composed of Indian Tribal officials or their designees with authority to represent their interests or act on their behalf that is formed to work on a particular policy, practice, issue, or concern. This can include representatives of existing organizations representing federally recognized Tribes, such as the NCAI.

**Tribal Officials**—Tribal council members and delegates, chairpersons, or other elected or duly appointed officials of the governing bodies of Indian Tribes or authorized inter-Tribal organizations or their designees with authority to represent them or act on their behalf.

### **XI. Supplemental Terms and Effective Date**

**1. Inapplicability of the Federal Advisory Committee Act (FACA).** In accordance with section 204(b) of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), the provisions of FACA are not applicable to consultations between the Federal Government and elected officers of Tribal Governments or their designated employees with authority to act on their behalf. Therefore, FACA is generally not applicable to consultations undertaken pursuant to this Tribal consultation policy. As the Office of Management

and Budget stated in its guidelines implementing section 204(b):

2. This exemption applies to meetings between Federal officials and employees and Tribal Governments acting through their elected officers, officials, employees, and Washington representatives, at which 'views, information, or advice' are exchanged concerning the implementation of intergovernmental responsibilities or administration, including those that arise explicitly or implicitly under statute, regulation, or Executive order. The scope of meetings covered by this exemption should be construed broadly to include meetings called for any purpose relating to intergovernmental responsibilities or administration. Such meetings include, but are not limited to, meetings called for the purpose of seeking consensus, exchanging views, information, advice, and/or recommendations; or facilitating any other interaction relating to intergovernmental responsibilities or administration. (OMB Memorandum 95-20 (September 21, 1995), pp. 6-7, published at 60 FR 50651, 50653 (September 29, 1995)).

3. If, however, DOL were to form an advisory committee consisting of (non-federally recognized) AI/AN organizations or groups lacking the government-to-government relationship, the section 204(b) exception would not apply and all FACA requirements would need to be followed.

4. *Reservation of Authorities.* Nothing in this policy waives or diminishes the U.S. Government's rights, authorities, immunities, or privileges, including the deliberative process privilege. Among other things, internal communications on the development of proposed legislation, enforcement policy, and other internal policy matters are part of the deliberative process by the Executive Branch and will remain confidential. Nothing in this policy waives or diminishes any Tribal rights, authorities, immunities, or privileges including treaty rights and sovereign immunities, and this policy does not diminish any rights or protections afforded to individual AI/ANs under Federal law.

5. *Disclaimer.* This document is intended to improve the Department's management of its relations and cooperative activities with Indian Tribes. DOL has no obligation to engage in any consultation activities under this policy unless they are practicable and permitted by law. Nothing in this policy requires any budgetary obligation or creates a right of action against the Department for failure to comply with this policy nor creates any right,

substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

6. *Effective Date.* The Tribal Consultation Policy is effective October 10, 2023, and shall apply to all prospective actions taken by the Department as described herein.

**Julie A. Su,**

*Acting Secretary, Department of Labor.*

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**BILLING CODE 4510-23-P**

## **NATIONAL ARCHIVES AND RECORDS ADMINISTRATION**

**[NARA-2024-010]**

### **Agency Information Collection Activities: Proposed Collection; Comment Request**

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Notice of proposed extension request.

**SUMMARY:** NARA proposes to request an extension from the Office of Management and Budget (OMB) of a currently approved information collection used by individuals applying for a research card that grants them access to original archival records in a National Archives and Records Administration facility. We invite you to comment on this proposed information collection pursuant to the Paperwork Reduction Act of 1995.

**DATES:** We must receive written comments on or before February 26, 2024.

**ADDRESSES:** Send comments to Paperwork Reduction Act Comments (MP), Room 4100; National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740-6001 or email them to [tamee.fechhelm@nara.gov](mailto:tamee.fechhelm@nara.gov).

#### **FOR FURTHER INFORMATION CONTACT:**

Tamee Fechhelm, Paperwork Reduction Act Officer, by email at [tamee.fechhelm@nara.gov](mailto:tamee.fechhelm@nara.gov) or by telephone at 301.837.1694 with requests for additional information or copies of the proposed information collection and supporting statement.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104-13), NARA invites the public and other Federal agencies to comment on proposed information collections. The comments and suggestions should address one or more of the following points: (a) whether the proposed information collection is necessary for NARA to properly perform

its functions; (b) NARA's estimate of the burden of the proposed information collection and its accuracy; (c) ways NARA could enhance the quality, utility, and clarity of the information it collects; (d) ways NARA could minimize the burden on respondents of collecting the information, including through information technology; and (e) whether this collection affects small businesses. We will summarize any comments you submit and include the summary in our request for OMB approval. All comments will become a matter of public record. In this notice, NARA solicits comments concerning the following information collection:

*Title:* Researcher Application.

*OMB number:* 3095-0016.

*Agency form number:* NA Form 14003.

*Type of review:* Regular.

*Affected public:* Individuals or households, business or other for-profit, not-for-profit institutions, Federal, State, local or Tribal government.

*Estimated number of respondents:* 7,600.

*Estimated time per response:* 5 minutes.

*Frequency of response:* On occasion.

*Estimated total annual burden hours:* 633 hours.

*Abstract:* The information collection is prescribed by 36 CFR 1254.8. The collection is an application for a research card. Respondents are individuals who want access to original archival records in a NARA facility. NARA uses the information to screen individuals, to identify which types of records they should use, and to allow further contact.

**Sheena Burrell,**

*Executive for Information Services/CIO.*

[FR Doc. 2023-28521 Filed 12-26-23; 8:45 am]

**BILLING CODE 7515-01-P**

## **NATIONAL SCIENCE FOUNDATION**

### **Astronomy and Astrophysics Advisory Committee**

#### **Notice of Meeting**

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463, as amended), the National Science Foundation (NSF) announces the following meeting:

*Name and Committee Code:*

Astronomy and Astrophysics Advisory Committee Meeting (#13883) (Hybrid).

*Date and Time:* January 18-19, 2023; 9:00 a.m.-4:00 p.m.

*Place:* National Science Foundation, 2415 Eisenhower Avenue, Room W 2210, Alexandria, VA 22314 (Hybrid).

Attendance information for the meeting will be forthcoming on the AAAC website: <https://www.nsf.gov/mps/ast/aaac.jsp>.

*Type of Meeting:* Open.

*Contact Person:* Dr. Carrie Black, Program Director, Division of Astronomical Sciences, Suite W 9188, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; Telephone: 703-292-2426.

*Purpose of Meeting:* To provide advice and recommendations to the National Science Foundation (NSF), the National Aeronautics and Space Administration (NASA) and the U.S. Department of Energy (DOE) on issues within the field of astronomy and astrophysics that are of mutual interest and concern to the agencies. To prepare the annual report.

*Agenda:* To hear presentations of current programming by representatives from NSF, NASA, DOE and other agencies relevant to astronomy and astrophysics; to discuss current and potential areas of cooperation between the agencies; to formulate recommendations for continued and new areas of cooperation and mechanisms for achieving them.

Dated: December 20, 2023.

**Crystal Robinson,**

*Committee Management Officer.*

[FR Doc. 2023-28467 Filed 12-26-23; 8:45 am]

**BILLING CODE 7555-01-P**

## NATIONAL SCIENCE FOUNDATION

**RIN 3145-AA58**

### Notice on Penalty Inflation Adjustments for Civil Monetary Penalties

**AGENCY:** National Science Foundation.

**ACTION:** Notice announcing updated penalty inflation adjustments for civil monetary penalties for 2024.

**SUMMARY:** The National Science Foundation (NSF or Foundation) is providing notice of its adjusted maximum civil monetary penalties, effective January 15, 2024. These adjustments are required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

**FOR FURTHER INFORMATION CONTACT:** Bijan Gilanshah, Assistant General Counsel, Office of the General Counsel, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314. Telephone: 703-292-5055.

**SUPPLEMENTARY INFORMATION:** On June 27, 2016, NSF published an interim final rule amending its regulations to adjust, for inflation, the maximum civil

monetary penalties that may be imposed for violations of the Antarctic Conservation Act of 1978 (ACA), as amended, 16 U.S.C. 2401 *et seq.*, and the Program Fraud Civil Remedies Act of 1986 (PFCRA), 31 U.S.C. 3801, *et seq.* These adjustments are required by the 2015 Act. The 2015 Act also requires agencies to make subsequent annual adjustments for inflation. Pursuant to OMB guidance dated December 19, 2023, the cost-of-living adjustment multiplier for 2024 is 1.03241. Accordingly, the 2024 annual inflation adjustments for the maximum penalties under the ACA are \$21,022 ( $\$20,362 \times 1.03241$ ) for violations and \$35,574 ( $\$34,457 \times 1.03241$ ) for knowing violations of the ACA. Finally, the 2024 annual inflation adjustment for the maximum penalty for violations under PFCRA is \$13,946 ( $\$13,508 \times 1.03241$ ).

Dated: December 20, 2023.

**Suzanne H. Plimpton,**

*Reports Clearance Officer, National Science Foundation.*

[FR Doc. 2023-28433 Filed 12-26-23; 8:45 am]

**BILLING CODE 7555-01-P**

## OFFICE OF PERSONNEL MANAGEMENT

**[Docket ID: OPM-2023-0011]**

### Submission for Review: 3206-0162, Report of Medical Examination of Person Electing Survivor Benefits, OPM 1530

**AGENCY:** Office of Personnel Management.

**ACTION:** 30-Day notice and request for comments.

**SUMMARY:** The Office of Personnel Management (OPM), Retirement Services, offers the general public and other Federal agencies the opportunity to comment on a revised information collection request (ICR), with change: 3206-0162, Report of Medical Examination of Person Electing Survivor Benefits, OPM 1530.

**DATES:** Comments are encouraged and will be accepted until February 26, 2024.

**ADDRESSES:** Interested persons are invited to submit written comments on the proposed information collection. 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](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:** A copy of this ICR with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW, Room 3316-L, Washington, DC 20415, Attention: Cyrus S. Benson, or sent via electronic mail to [Cyrus.Benson@opm.gov](mailto:Cyrus.Benson@opm.gov) or faxed to (202) 606-0910 or reached via telephone at (202) 936-0401.

**SUPPLEMENTARY INFORMATION:** As required by the Paperwork Reduction Act of 1995, OPM is soliciting comments for this collection. The information collection (OMB No. 3206-0162) was previously published in the **Federal Register** on May 3, 2023, at 88 FR 27930, allowing for a 60-day public comment period. No comments were received. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;
2. 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;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. 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 submissions of responses.

At the time of retirement, an employee or Member in good health may elect an insurable interest survivor annuity benefit on behalf of an eligible beneficiary. OPM Form 1530 is used to collect the information necessary to determine whether the employee or Member is in good health, so that OPM can determine whether the applicant is eligible to elect an insurable interest survivor annuity benefit. The revision included in this ICR is as follows: (1) the Public Burden Statement has been revised; and (2) the edition date has been updated.

**Analysis**

*Agency:* Retirement Operations, Retirement Services, Office of Personnel Management.

*Title:* Report of Medical Examination of Person Electing Survivor Benefits.  
*OMB Number:* 3206–0162.  
*Frequency:* On occasion.  
*Affected Public:* Individuals or Households.  
*Number of Respondents:* 500.  
*Estimated Time Per Respondent:* 90 minutes.  
*Total Burden Hours:* 750.

Office of Personnel Management.

**Kayyonne Marston,**  
*Federal Register Liaison.*

[FR Doc. 2023–28459 Filed 12–26–23; 8:45 am]

**BILLING CODE 6325–38–P**

## POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024–129 and CP2024–135]

### 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 29, 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.<sup>1</sup>

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).*: MC2024–129 and CP2024–135; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 151 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 20, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* December 29, 2023.

This Notice will be published in the **Federal Register**.

**Jennie L. Jbara,**

*Alternate Certifying Officer.*

[FR Doc. 2023–28518 Filed 12–26–23; 8:45 am]

**BILLING CODE 7710–FW–P**

<sup>1</sup> 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).

## POSTAL SERVICE

### International Product Change—Priority Mail Express International, Priority Mail International & First-Class Package International Service Agreement

**AGENCY:** Postal Service™.

**ACTION:** Notice.

**SUMMARY:** The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a Priority Mail Express International, Priority Mail International & First-Class Package International Service contract to the list of Negotiated Service Agreements in the Competitive Product List in the Mail Classification Schedule.

**DATES:** *Date of notice:* December 27, 2023.

**FOR FURTHER INFORMATION CONTACT:** Christopher C. Meyerson, (202) 268–7820.

**SUPPLEMENTARY INFORMATION:** The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on December 14, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 31 to Competitive Product List*. Documents are available at [www.prc.gov](http://www.prc.gov), Docket Nos. MC2024–120 and CP2024–126.

**Sarah Sullivan,**

*Attorney, Ethics & Legal Compliance.*

[FR Doc. 2023–28450 Filed 12–26–23; 8:45 am]

**BILLING CODE 7710–12–P**

## RAILROAD RETIREMENT BOARD

### Civil Monetary Penalty Inflation Adjustment

**AGENCY:** Railroad Retirement Board.

**ACTION:** Notice announcing updated penalty inflation adjustments for civil monetary penalties for 2024.

**SUMMARY:** As required by Section 701 of the Bipartisan Budget Act of 2015, entitled the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, the Railroad Retirement Board (Board) hereby publishes its 2024 annual adjustment of civil penalties for inflation.

**FOR FURTHER INFORMATION CONTACT:**

Peter J. Orłowicz, Senior Counsel, Railroad Retirement Board, 844 North Rush Street, Chicago, IL 60611–1275, (312) 751–4922, TTD (312) 751–4701.

**SUPPLEMENTARY INFORMATION:** Section 701 of the Bipartisan Budget Act of

2015, Public Law 114–74 (Nov. 2, 2015), entitled the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act), amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note) (Inflation Adjustment Act) to require agencies to publish regulations adjusting the amount of civil monetary penalties provided by law within the jurisdiction of the agency not later than January 15th of every year.

For the 2024 annual adjustment for inflation of the maximum civil penalty under the Program Fraud Civil Remedies Act of 1986, the Board applies the formula provided by the 2015 Act and the Board's regulations at Title 20, Code of Federal Regulations, Part 356. In accordance with the 2015 Act, the amount of the adjustment is based on the percent increase between the Consumer Price Index (CPI-U) for the month of October preceding the date of the adjustment and the CPI-U for the October one year prior to the October immediately preceding the date of the adjustment. If there is no increase, there is no adjustment of civil penalties. The percent increase between the CPI-U for October 2023 and October 2024, as provided by Office of Management and Budget Memorandum M–24–07 (December 19, 2023), is 1.03241 percent. Therefore, the new maximum penalty under the Program Fraud Civil Remedies Act is \$13,946 (the 2023 maximum penalty of \$13,508 multiplied by 1.03241, rounded to the nearest dollar). The new minimum penalty under the False Claims Act is \$13,946 (the 2023 minimum penalty of \$13,508 multiplied by 1.03241, rounded to the nearest dollar), and the new maximum penalty is \$27,894 (the 2023 maximum penalty of \$27,018 multiplied by 1.03241, rounded to the nearest dollar). The adjustments in penalties will be effective December 27, 2023.

Dated: December 21, 2023.

By Authority of the Board.

**Stephanie Hillyard,**

*Secretary to the Board.*

[FR Doc. 2023–28508 Filed 12–26–23; 8:45 am]

**BILLING CODE P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99211; File No. SR–MEMX–2023–35]

### Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Exchange's Short Term Option Series Program

December 20, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> notice is hereby given that on December 15, 2023, MEMX LLC (“Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II 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

The Exchange is filing with the Commission a proposed rule change to expand the Exchange's Short Term Option Series Program as set forth in Rule 19.5, Interpretation and Policy .05, to permit the listing of two Wednesday expirations for options on United States Oil Fund, LP (“USO”), United States Natural Gas Fund, LP (“UNG”), SPDR Gold Shares (“GLD”), iShares Silver Trust (“SLV”), and iShares 20+ Year Treasury Bond ETF (“TLT”) (collectively “Exchange Traded Products” or “ETPs”). The text of the proposed rule change is provided in Exhibit 5.

#### 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.

#### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The purpose of the proposed rule change is to amend Rule 19.5, Interpretation and Policy .05. Specifically, the Exchange proposes to expand the Short Term Option Series Program to permit the listing of two Wednesday expirations for options on United States Oil Fund, LP (“USO”), United States Natural Gas Fund, LP (“UNG”), SPDR Gold Shares (“GLD”), iShares Silver Trust (“SLV”), and iShares 20+ Year Treasury Bond ETF (“TLT”) (collectively “Exchange Traded Products” or “ETPs”). This is a competitive filing that is based on a proposal submitted from Nasdaq ISE, LLC (“Nasdaq ISE”) and recently approved by the Commission.<sup>3</sup>

Currently, as set forth in Rule 19.5, Interpretation and Policy .05, after an option class has been approved for listing and trading on the Exchange, the Exchange may open for trading on any Thursday or Friday that is a business day (“Short Term Option Opening Date”) series of options on that class that expire at the close of business on each of the next five Fridays that are business days and are not Fridays on which monthly options series or Quarterly Options Series expire (“Friday Short Term Option Expiration Dates”). The Exchange may have no more than a total of five Friday Short Term Option Expiration Dates (“Short Term Options Weekly Expirations”). If the Exchange is not open for business on the respective Thursday or Friday, the Short Term Option Opening Date for Short Term Options Weekly Expirations will be the first business day immediately prior to that respective Thursday or Friday. Similarly, if the Exchange is not open for business on the Friday that the Short Term Options Weekly Expirations are set to expire, the Short Term Option Expiration Date for Short Term Options Weekly Expirations will be the first business day immediately prior to that Friday.

Additionally, the Exchange may open for trading series of options on the symbols provided in Table 1 of Rule 19.5, Interpretation and Policy .05(h) that expire at the close of business on each of the next two Mondays,

<sup>3</sup> See Securities Exchange Act Release No. 98905 (November 13, 2023) (SR–ISE–2023–11) (Order Approving a Proposed Rule Change to Amend the Short Term Option Series Program to Permit the Listing of Two Wednesday Expirations for Options on Certain Exchange Traded Products) (“Nasdaq ISE Approval”).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b–4.

Tuesdays, Wednesdays, and Thursdays, respectively, that are business days and are not business days in which monthly options series or Quarterly Options Series expire (“Short Term Option Daily Expirations”). For those symbols listed in Table 1, the Exchange may have no more than a total of two Short Term Option Daily Expirations beyond the current week for each of Monday, Tuesday, Wednesday, and Thursday expirations at one time.

At this time, the Exchange proposes to expand the Short Term Option Daily Expirations to permit the listing and trading of options on USO, UNG, GLD, SLV, and TLT expiring on Wednesdays. The Exchange proposes to permit two Short Term Option Expiration Dates beyond the current week for each Wednesday expiration at one time. In order to effectuate the proposed changes, the Exchange would add USO, UNG, GLD, SLV, and TLT to Table 1 of Rule 19.5, Interpretation and Policy .05(h), which specifies each symbol that qualifies as a Short Term Option Daily Expiration.

The proposed Wednesday USO, UNG, GLD, SLV, and TLT expirations will be similar to the current Wednesday QQQ and IWM Short Term Option Daily Expirations set forth in Rule 19.5, Interpretation and Policy .05,<sup>4</sup> such that the Exchange may open for trading on any Tuesday or Wednesday that is a business day (beyond the current week) series of options on USO, UNG, GLD, SLV, and TLT to expire on any Wednesday of the month that is a business day and is not a Wednesday in which Quarterly Options Series expire (“Wednesday USO Expirations,” “Wednesday UNG Expirations,” “Wednesday GLD Expirations,” “Wednesday SLV Expirations,” and “Wednesday TLT Expirations”) (collectively, “Wednesday ETP Expirations”).<sup>5</sup> In the event Short Term Option Daily Expirations expire on a Wednesday and that Wednesday is the same day that a Quarterly Options Series expires, the Exchange would skip that week’s listing and instead list the following week; the two weeks would therefore not be consecutive. Today, Wednesday expirations in QQQ and IWM similarly skip the weekly listing in the event the weekly listing expires on

the same day in the same class as a Quarterly Options Series.

USO, UNG, GLD, SLV, and TLT Friday expirations would continue to have a total of five Short Term Option Expiration Dates provided those Friday expirations are not Fridays in which monthly options series or Quarterly Options Series expire (“Friday Short Term Option Expiration Dates”).

Similar to Wednesday QQQ and IWM Short Term Option Daily Expirations within Rule 19.5, Interpretation and Policy .05(h), the Exchange proposes that it may open for trading on any Tuesday or Wednesday that is a business day series of options on USO, UNG, GLD, SLV, and TLT that expire at the close of business on each of the next two Wednesdays that are business days and are not business days in which Quarterly Options Series expire.

The interval between strike prices for the proposed Wednesday ETP Expirations will be the same as those for the current Short Term Option Series for Friday expirations applicable to the Short Term Option Series Program.<sup>6</sup> Specifically, the Wednesday ETP Expirations will have a strike interval of \$0.50 or greater for strike prices below \$100, \$1 or greater for strike prices between \$100 and \$150, and \$2.50 or greater for strike prices above \$150.<sup>7</sup> As is the case with other equity options series listed pursuant to the Short Term Option Series Program, the Wednesday ETP Expirations series will be P.M.-settled.

Pursuant to Rule 19.5, Interpretation and Policy .05(h), with respect to the Short Term Option Series Program, a Wednesday expiration series shall expire on the first business day immediately prior to that Wednesday, e.g., Tuesday of that week if the Wednesday is not a business day.

Currently, for each option class eligible for participation in the Short Term Option Series Program, the Exchange is limited to opening thirty (30) series for each expiration date for the specific class.<sup>8</sup> The thirty (30) series restriction does not include series that are open by other securities exchanges under their respective weekly rules; the Exchange may list these additional series that are listed by other options exchanges.<sup>9</sup> With the proposed changes, this thirty (30) series restriction would apply to Wednesday USO, UNG, GLD, SLV, and TLT Short Term Option Daily Expirations as well. In addition, the Exchange will be able to list series that

are listed by other exchanges, assuming they file similar rules with the Commission to list Wednesday ETP Expirations.

With this proposal, Wednesday ETP Expirations would be treated similarly to existing Wednesday QQQ and IWM Expirations. With respect to monthly option series, Short Term Option Daily Expirations will be permitted to expire in the same week in which monthly option series on the same class expire. Not listing Short Term Option Daily Expirations for one week every month because there was a monthly on that same class on the Friday of that week would create investor confusion.

Further, as with Wednesday QQQ and IWM Expirations, the Exchange would not permit Wednesday ETP Expirations to expire on a business day in which monthly options series or Quarterly Options Series expire. Therefore, all Short Term Option Daily Expirations would expire at the close of business on each of the next two Wednesdays that are business days and are not business days in which monthly options series or Quarterly Options Series expire. The Exchange believes that it is reasonable to not permit two expirations on the same day in which a monthly options series or a Quarterly Options Series would expire because those options would be duplicative of each other.

The Exchange does not believe that any market disruptions will be encountered with the introduction of Wednesday ETP Expirations. The Exchange currently trades P.M.-settled Short Term Option Series that expire Wednesday for QQQ and IWM and has not experienced any market disruptions nor issues with capacity. Today, the Exchange has surveillance programs in place to support and properly monitor trading in Short Term Option Series that expire Wednesday for QQQ and IWM.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,<sup>10</sup> in general, and furthers the objectives of section 6(b)(5) of the Act,<sup>11</sup> in particular, in that it is 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

<sup>4</sup> The Exchange’s rules also provide for Wednesday expirations in SPY. As of the date of this filing SPY is not listed for trading on the Exchange.

<sup>5</sup> While the relevant rule text in Rule 19.5, Interpretation and Policy .05(h) also indicates that the Exchange will not list such expirations on a Wednesday that is a business day in which monthly options series expire, practically speaking this would not occur.

<sup>6</sup> See Rule 19.5, Interpretation and Policy .05(e).

<sup>7</sup> See *id.*

<sup>8</sup> See Rule 19.5, Interpretation and Policy .05(a).

<sup>9</sup> See *id.*

<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

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.

Similar to Wednesday expirations in QQQ and IWM, the proposal to permit Wednesday ETP Expirations, subject to the proposed limitation of two expirations beyond the current week, would protect investors and the public interest by providing the investing public and other market participants more choice and flexibility to closely tailor their investment and hedging decisions in these options and allow for a reduced premium cost of buying portfolio protection, thus allowing them to better manage their risk exposure.

The Exchange represents that it has an adequate surveillance program in place to detect manipulative trading in the proposed option expirations, in the same way that it monitors trading in the current Short Term Option Series for Wednesday QQQ and IWM expirations. The Exchange also represents that it has the necessary system capacity to support the new expirations. Finally, the Exchange does not believe that any market disruptions will be encountered with the introduction of these option expirations. As discussed above, the Exchange believes that its proposal is a modest expansion of weekly expiration dates for GLD, SLV, USO, UNG, and TLT given that it will be limited to two Wednesday expirations beyond the current week. Lastly, the Exchange believes its proposal will not be a strain on liquidity providers because of the multi-class nature of GLD, SLV, USO, UNG, and TLT and the available hedges in highly correlated instruments, as described above.

The Exchange believes that the proposal is consistent with the Act as the proposal would overall add a small number of Wednesday ETP Expirations by limiting the addition of two Wednesday expirations beyond the current week. The addition of Wednesday ETP Expirations would remove impediments to and perfect the mechanism of a free and open market by encouraging Market Makers to continue to deploy capital more efficiently and improve market quality. The Exchange believes that the proposal will allow market participants to expand hedging tools and tailor their investment and hedging needs more effectively in USO, UNG, GLD, SLV, and TLT as these funds are most likely to be utilized by market participants to hedge the underlying asset classes.

Similar to Wednesday QQQ and IWM expirations, the introduction of

Wednesday ETP Expirations is consistent with the Act as it will, among other things, expand hedging tools available to market participants and allow for a reduced premium cost of buying portfolio protection. The Exchange believes that Wednesday ETP Expirations will allow market participants to purchase options on USO, UNG, GLD, SLV, and TLT based on their timing as needed and allow them to tailor their investment and hedging needs more effectively, thus allowing them to better manage their risk exposure. Today, the Exchange lists Wednesday QQQ and IWM Expirations.<sup>12</sup>

The Exchange believes the Short Term Option Series Program has been successful to date and that Wednesday ETP Expirations should simply expand the ability of investors to hedge risk against market movements stemming from economic releases or market events that occur throughout the month in the same way that the Short Term Option Series Program has expanded the landscape of hedging. There are no material differences in the treatment of Wednesday QQQ and IWM expirations compared to the proposed Wednesday ETP Expirations. Given the similarities between Wednesday QQQ and IWM expirations and the proposed Wednesday ETP Expirations, the Exchange believes that applying the provisions in Rule 19.5, Interpretation and Policy .05(h) that currently apply to Wednesday QQQ and IWM expirations is justified. For example, the Exchange believes that allowing Wednesday ETP Expirations and monthly ETP expirations in the same week will benefit investors and minimize investor confusion by providing Wednesday ETP Expirations in a continuous and uniform manner.

#### *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. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to a filing submitted by Nasdaq ISE that was recently approved by the Commission,<sup>13</sup> as well as to competitive filings submitted by Cboe EDGX Exchange Inc. ("EDGX"),<sup>14</sup> Cboe BZX Exchange Inc.

<sup>12</sup> See Rule 19.5, Interpretation and Policy .05(h).

<sup>13</sup> See *supra* note 1 [sic].

<sup>14</sup> See Exchange Act Release No. 99037 (November 29, 2023), 88 FR 84370 (December 5, 2023) (SR-CboeEDGX-2023-071).

("BZX")<sup>15</sup> and BOX Exchange LLC ("BOX")<sup>16</sup> in which each respective exchange indicates that the filings were submitted as competitive responses to the Nasdaq ISE filing.

While the proposal will expand the Short Term Options Expirations to allow Wednesday ETP Expirations to be listed on the Exchange, the Exchange believes that this limited expansion for Wednesday expirations for options on USO, UNG, GLD, SLV, and TLT will not impose an undue burden on competition; rather, it will meet customer demand. The Exchange believes that market participants will continue to be able to expand hedging tools and tailor their investment and hedging needs more effectively in USO, UNG, GLD, SLV, and TLT given multi-class nature of these products and the available hedges in highly correlated instruments, as described above. Similar to Wednesday QQQ and IWM expirations, the introduction of Wednesday ETP Expirations does not impose an undue burden on competition. The Exchange believes that it will, among other things, expand hedging tools available to market participants and allow for a reduced premium cost of buying portfolio protection. The Exchange believes that Wednesday ETP Expirations will allow market participants to purchase options on USO, UNG, GLD, SLV, and TLT based on their timing as needed and allow them to tailor their investment and hedging needs more effectively. The Exchange does not believe the proposal will impose any burden on inter-market competition, as nothing prevents the other options exchanges from proposing similar rules to list and trade Wednesday ETP Expirations. Further, the Exchange does not believe the proposal will impose any burden on intramarket competition, as all market participants will be treated in the same manner under this proposal.

#### *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.

<sup>15</sup> See Exchange Act Release No. 99036 (November 29, 2023), 88 FR 84383 (December 5, 2023) (SR-CboeBZX-2023-096).

<sup>16</sup> See Exchange Act Release No. 98997 (November 21, 2023), 88 FR 82929 (November 27, 2023) (SR-BOX-2023-27).

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to section 19(b)(3)(A) of the Act<sup>17</sup> and Rule 19b-4(f)(6)<sup>18</sup> thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>19</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>20</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. According to the Exchange, waiver of the 30-day operative delay would ensure fair competition among the exchanges by allowing the Exchange to permit the listing of two Wednesday expirations for options on the ETPs. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change does not raise any new or novel issues.<sup>21</sup> Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.<sup>22</sup>

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 shall institute proceedings to determine whether the proposed rule 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](mailto:rule-comments@sec.gov). Please include file number SR-MEMX-2023-35 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-MEMX-2023-35. 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 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-MEMX-2023-35 and should be submitted on or before January 17, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Christina Z. Milnor,**  
*Assistant Secretary.*

[FR Doc. 2023-28453 Filed 12-26-23; 8:45 am]

BILLING CODE 8011-01-P

### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-99210; File No. SR-MIAX-2023-23]

#### **Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Designation of Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Change To Increase Fees for the ToM Market Data Product and Establish Fees for the cToM Market Data Product**

December 20, 2023.

On June 7, 2023, Miami International Securities Exchange, LLC ("MIAX" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change (File Number SR-MIAX-2023-23) to increase fees for the MIAX Top of Market ("ToM") market data product and establish fees for the MIAX Complex Top of Market ("cToM") market data product. The proposed rule change was immediately effective upon filing with the Commission pursuant to section 19(b)(3)(A) of the Act.<sup>3</sup> The proposed rule change was published for comment in the **Federal Register** on June 26, 2023.<sup>4</sup> On August 3, 2023, the Commission issued an order temporarily suspending the proposed rule change pursuant to section 19(b)(3)(C) of the Act<sup>5</sup> and simultaneously instituting proceedings under section 19(b)(2)(B) of the Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change.<sup>7</sup>

<sup>23</sup> 17 CFR 200.30-3(a)(12), (59).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as "establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization." 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>4</sup> See Securities Exchange Act Release No. 97768 (June 20, 2023), 88 FR 41423 ("Notice").

<sup>5</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> See Securities Exchange Act Release No. 98050, 88 FR 53941 (August 9, 2023) ("Order Instituting Proceedings").

<sup>17</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>18</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>19</sup> 17 CFR 240.19b-4(f)(6).

<sup>20</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>21</sup> See *supra* note 3.

<sup>22</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

Section 19(b)(2) of the Act<sup>8</sup> provides that, after initiating proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the date of publication of notice of filing of the proposed rule change. The Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination. The proposed rule change was published for notice and comment in the **Federal Register** on June 26, 2023.<sup>9</sup> December 23, 2023 is 180 days from that date, and February 21, 2024 is 240 days from that date.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to section 19(b)(2) of the Act,<sup>10</sup> designates February 21, 2024 as the date by which the Commission shall either approve or disapprove the proposed rule change (File No. SR-MIAX-2023-23).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Christina Z. Milnor,**  
*Assistant Secretary.*

[FR Doc. 2023-28454 Filed 12-26-23; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-99209; File No. SR-EMERALD-2023-13]

### Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Designation of Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Change To Increase Fees for the ToM Market Data Product and Establish Fees for the cToM Market Data Product

December 20, 2023.

On June 7, 2023, MIAX Emerald, LLC (“MIAX Emerald” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and

Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change (File Number SR-EMERALD-2023-13) to increase fees for the MIAX Emerald Top of Market (“ToM”) market data product and establish fees for the MIAX Emerald Complex Top of Market (“cToM”) market data product. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.<sup>3</sup> The proposed rule change was published for comment in the **Federal Register** on June 26, 2023.<sup>4</sup> On August 3, 2023, the Commission issued an order temporarily suspending the proposed rule change pursuant to Section 19(b)(3)(C) of the Act<sup>5</sup> and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change.<sup>7</sup>

Section 19(b)(2) of the Act<sup>8</sup> provides that, after initiating proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the date of publication of notice of filing of the proposed rule change. The Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination. The proposed rule change was published for notice and comment in the **Federal Register** on June 26, 2023.<sup>9</sup> December 23, 2023 is 180 days from that date, and February 21, 2024 is 240 days from that date.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> designates February 21, 2024 as the date by which the Commission shall either approve or

disapprove the proposed rule change (File No. SR-EMERALD-2023-13).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Christina Z. Milnor,**  
*Assistant Secretary.*

[FR Doc. 2023-28452 Filed 12-26-23; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-99208; File No. SR-NSCC-2023-013]

### Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Addendum A (Fee Structure)

December 20, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 15, 2023, National Securities Clearing Corporation (“NSCC”) 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 clearing agency. NSCC filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Clearing Agency’s Statement of the Terms of Substance of the Proposed Rule Change

NSCC is filing the proposed rule change to modify Addendum A (Fee Structure) (“Addendum A”) of NSCC’s Rules & Procedures (“Rules”) to increase its Clearing Fund Maintenance Fee, as described below.<sup>5</sup>

#### II. Clearing Agency’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as “establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.” 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>4</sup> See Securities Exchange Act Release No. 97767 (June 20, 2023), 88 FR 41442 (“Notice”).

<sup>5</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> See Securities Exchange Act Release No. 98051, 88 FR 53937 (August 9, 2023) (“Order Instituting Proceedings”).

<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</sup> See Notice, *supra* note 4.

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</sup> See Notice, *supra* note 4.

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> 17 CFR 200.30-3(a)(57).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>11</sup> 17 CFR 200.30-3(a)(57).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> 17 CFR 240.19b-4(f)(2).

<sup>5</sup> Capitalized terms used herein and not otherwise defined shall have the meaning assigned to such terms in the Rules, available at [www.dtcc.com/-/media/Files/Downloads/legal/rules/nscc\\_rules.pdf](http://www.dtcc.com/-/media/Files/Downloads/legal/rules/nscc_rules.pdf).

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of this proposed rule change is to amend Addendum A (Fee Structure) of the Rules to modify NSCC's Clearing Fund Maintenance Fee effective January 1, 2024. The proposed fee change is discussed in detail below.

Background

NSCC's Clearing Fund Maintenance Fee was implemented in 2016 in order to (i) diversify NSCC's revenue sources, mitigating NSCC's dependence on revenues driven by trading volumes and (ii) add a stable revenue source that would contribute to NSCC's operating margin by offsetting increasing costs and expenses.<sup>6</sup> The fee is charged to all NSCC Members that are required to make deposits to the NSCC Clearing Fund in proportion to the Member's average monthly cash deposit to the Clearing Fund.

As part of the annual budgeting process, NSCC reviews price levels against its cost of operations and evaluates potential expense reductions and/or fee changes to correct any misalignment of costs and fees. NSCC's fees are cost-based plus a markup as approved by the Board of Directors or management (pursuant to authority delegated by the Board), as applicable. This markup is applied to recover development costs and operating expenses and to accumulate capital sufficient to meet regulatory and economic requirements.<sup>7</sup>

During the 2024 budgeting process, NSCC identified opportunities to better align fees and costs for NSCC, which were approved by the Businesses, Technology and Operations Committee of the Board of Directors. NSCC anticipates an increase in the cost of funding NSCC's default liquidity resources due to the rising interest rate environment, which would constitute

the significant majority of the projected increase in NSCC's overall operating expenses. Specifically, two tranches of senior notes issued in 2020 with lower coupon rates are maturing in 2023, and these notes need to be refinanced with new issuances at significantly higher prevailing market rates. As a result, the weighted average rate of NSCC's senior notes portfolio and its related interest expense would increase. NSCC is therefore proposing to increase the Clearing Fund Maintenance Fee to partially offset its increasing cost of default liquidity resources.

Proposed Fee Changes

Pursuant to Section V.F of Addendum A, NSCC charges a Clearing Fund Maintenance Fee, which is a monthly fee calculated, in arrears, as the product of (A) 0.25% and (B) the average of each Member's (or Limited Member's, if applicable) cash deposit balance in the Clearing Fund, as of the end of each day, for the month, multiplied by the number of days for that month and divided by 360. Based on its annual budgeting review, NSCC proposes to increase the rate used to calculate the Clearing Fund Maintenance Fee by 10 basis points from 0.25% to 0.35%. To effectuate the proposed fee change, NSCC would amend Section V.F. of Addendum A concerning the Clearing Fund Maintenance Fee to reflect the new calculation rate of 0.35%. NSCC would also remove the reference to Limited Members in the Clearing Fund Maintenance Fee description because Limited Members are no longer required to maintain Clearing Fund deposits at NSCC and therefore the Clearing Fund Maintenance Fee no longer applies to Limited Members.<sup>8</sup>

Expected Member Impact

The proposed rule change would result in increased Clearing Fund Maintenance Fees for NSCC Members, the impact of which would vary based on each Member's average monthly cash deposit to the Clearing Fund. Taken alone, the proposed rule change could be expected to result in an increase of approximately \$9 million in fee revenue. However, NSCC notes that

while the Clearing Fund Maintenance Fee is being increased, NSCC also anticipates that average Clearing Fund balances would be reduced following the implementation of the T+1 settlement cycle in May 2024.<sup>9</sup> As a result, the proposed fee change is expected to increase NSCC's overall annual fee revenue by approximately \$3 million. NSCC projects that over half of its Members would see an increase of less than \$25,000, approximately 29 Members would see increases ranging from \$25,000–\$100,000, and approximately 20 Members would see an increase of over \$100,000.

Member Outreach

NSCC has conducted ongoing outreach to Members in order to provide them with notice of the proposed changes and the anticipated impact for the Member. As of the date of this filing, no written comments relating to the proposed changes have been received in response to this outreach. The Commission will be notified of any written comments received.

Implementation Timeframe

NSCC would implement this proposal on January 1, 2024. As proposed, a legend would be added to Addendum A stating there are changes that became effective upon filing with the Commission but have not yet been implemented. The proposed legend also would include the date on which such changes would be implemented and the file number of this proposal, and state that, once this proposal is implemented, the legend would automatically be removed.

2. Statutory Basis

NSCC believes the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. Specifically, NSCC believes the proposed rule change is consistent with Section 17A(b)(3)(D) of the Act<sup>10</sup> and Rule 17Ad-22(e)(23)(ii)<sup>11</sup> thereunder for the reasons set forth below.

<sup>9</sup> See Securities Exchange Act Release No. 96930 (Feb. 15, 2023), 88 FR 13872 (Mar. 6, 2023) (S7-05-22) (Shortening the Securities Transaction Settlement Cycle). For example, NSCC analysis suggests that the aggregate volatility component of NSCC's margin calculation could potentially be reduced by 41% by a move to a T+1 settlement cycle. See DTCC White Paper, Advancing Together: Leading the Industry to Accelerated Settlement (February 2021), available at [www.dtcc.com/-/media/Files/PDFs/White%20Paper/DTCC-Accelerated-Settle-WP-2021.pdf](http://www.dtcc.com/-/media/Files/PDFs/White%20Paper/DTCC-Accelerated-Settle-WP-2021.pdf).

<sup>10</sup> 15 U.S.C. 78q-1(b)(3)(D).

<sup>11</sup> 17 CFR 240.17Ad-22(e)(23)(iii).

<sup>6</sup> See Securities Exchange Act Release No. 78525 (Aug. 9, 2016), 81 FR 54146 (Aug. 15, 2016) (SR-NSCC-2016-002).

<sup>7</sup> NSCC maintains procedures to control costs and regularly review pricing levels against costs of operation. See NSCC Disclosure Framework for Covered Clearing Agencies and Financial Market Infrastructures, available at [www.dtcc.com/-/media/Files/Downloads/legal/policy-and-compliance/NSCC\\_Disclosure\\_Framework.pdf](http://www.dtcc.com/-/media/Files/Downloads/legal/policy-and-compliance/NSCC_Disclosure_Framework.pdf), at 124.

<sup>8</sup> In December 2021, NSCC adopted a proposed rule change to (i) remove the requirement that Members and Mutual Fund/Insurance Services Members pay a Mutual Fund Deposit into the Clearing Fund relating to Mutual Fund Services, (ii) remove provisions relating to the Mutual Fund Deposit and the Insurance Deposit and (iii) remove a provision relating to establishing a Clearing Fund requirement for NSCC Members that currently do not have a Clearing Fund requirement. See Securities Exchange Act Release No. 93722 (Dec. 6, 2021), 86 FR 70548 (Dec. 10, 2021) (SR-NSCC-2021-015).

Section 17A(b)(3)(D) of the Act<sup>12</sup> requires that the rules of a clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants. NSCC believes the proposed fee is reasonable and would be allocated equitably among its full-service Members. Because the proposed changes do not alter how the Clearing Fund Maintenance Fee is currently allocated (*i.e.*, charged) to Members, NSCC believes the fee would continue to be equitably allocated. More specifically, as mentioned above, the Clearing Fund Maintenance Fee is and would continue to be charged to all Members in proportion to the Member's average monthly cash deposit to the Clearing Fund. As such, and as is currently the case, Members that make greater use of NSCC's guaranteed services or which have activity in those services that present greater risk to NSCC would generally be subject to a larger Clearing Fund Maintenance Fee because such Members would typically be required to maintain larger Clearing Fund deposits pursuant to the Rules.<sup>13</sup>

NSCC also believes that the Clearing Fund Maintenance Fee would continue to be a reasonable fee under the described changes. As described above, the Clearing Fund Maintenance Fee was implemented in 2016 in order to (i) diversify NSCC's revenue sources, mitigating NSCC's dependence on revenues driven by trading volumes and (ii) add a stable revenue source that would contribute to NSCC's operating margin by offsetting increasing costs and expenses. NSCC proposes to adopt a 10 basis point increase in the fee to help offset increased costs funding NSCC's default liquidity resources due to the rising interest rate environment. As noted above, the net interest carry on NSCC's medium term notes is projected to decline next year as legacy senior notes mature and are refinanced at higher prevailing market rates. For this reason, NSCC believes the proposed changes to the Clearing Fund Maintenance Fee are reasonable.

Rule 17Ad-22(e)(23)(ii) under the Act<sup>14</sup> requires NSCC to establish, implement, maintain and enforce written policies and procedures reasonably designed to provide sufficient information to enable participants to identify and evaluate the risks, fees, and other material costs they incur by participating in the covered clearing agency. The proposed fees would be clearly and transparently

published in Addendum A of the Rules, which are available on a public website,<sup>15</sup> thereby enabling Members to identify the fees and costs associated with participating in NSCC. As such, NSCC believes the proposed rule change is consistent with Rule 17Ad-22(e)(23)(ii) under the Act.<sup>16</sup>

#### *(B) Clearing Agency's Statement on Burden on Competition*

NSCC does not believe that the changes to the Clearing Fund Maintenance Fee would impose any burden on competition. The Clearing Fund Maintenance Fee is charged ratably based on each Members' use of NSCC's guaranteed services, as reflected in Members' cash deposits to the Clearing Fund. Thus, the fee is designed to be reflective of each Member's individual activity at NSCC. While Member's may experience some impact from the increase in fees, NSCC notes that average Clearing Fund balances would also be reduced following the implementation of the T+1 settlement cycle in May 2024, offsetting some of this impact.<sup>17</sup> NSCC believes the proposed fee change would not unfairly inhibit access to NSCC's services by any Member. NSCC therefore believes the proposed rule change would have a minimal impact on Members and would not impose any burden on competition.

#### *(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

NSCC has conducted outreach to Members to provide them with notice of the proposed fees.

NSCC has not received or solicited any written comments relating to this proposal. If any written comments are received, NSCC will amend this filing to publicly file such comments as an Exhibit 2 to this filing, as required by Form 19b-4 and the General Instructions thereto.

Persons submitting comments are cautioned that, according to Section IV (Solicitation of Comments) of the Exhibit 1A in the General Instructions to Form 19b-4, the Commission does not edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly, including their name, email address, and any other identifying information.

All prospective commenters should follow the Commission's instructions on

how to submit comments, *available at* [www.sec.gov/regulatory-actions/how-to-submit-comments](http://www.sec.gov/regulatory-actions/how-to-submit-comments). General questions regarding the rule filing process or logistical questions regarding this filing should be directed to the Main Office of the Commission's Division of Trading and Markets at [tradingandmarkets@sec.gov](mailto:tradingandmarkets@sec.gov) or 202-551-5777.

NSCC reserves the right not to respond to any comments received.

### **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)<sup>18</sup> of the Act and paragraph (f)<sup>19</sup> of Rule 19b-4 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](mailto:rule-comments@sec.gov). Please include file number SR-NSCC-2023-013 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to file number SR-NSCC-2023-013. 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 with respect to the proposed rule change that are filed with the Commission, and all written

<sup>12</sup> 15 U.S.C. 78q-1(b)(3)(D).

<sup>13</sup> See Rule 4 and Procedure XV, *supra* note 5.

<sup>14</sup> 17 CFR 240.17Ad-22(e)(23)(iii).

<sup>15</sup> See *supra* note 5.

<sup>16</sup> 17 CFR 240.17Ad-22(e)(23)(ii).

<sup>17</sup> See *supra* note 9.

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>19</sup> 17 CFR 240.19b-4(f).

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 NSCC and on DTCC's website (<https://dtcc.com/legal/sec-rule-filings.aspx>). 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-NSCC-2023-013 and should be submitted on or before January 17, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

**Christina Z. Milnor,**  
Assistant Secretary.

[FR Doc. 2023-28457 Filed 12-26-23; 8:45 am]

**BILLING CODE 8011-01-P**

## DEPARTMENT OF STATE

[Public Notice: 12294]

### Notice of Public Meeting: International Information and Communications Policy Division Stakeholder Briefing

**ACTION:** Notice of public meeting.

**SUMMARY:** The State Department will hold a public meeting at 2 p.m.–3:30 p.m. (ET) on WebEx with the Bureau of Cyberspace and Digital Policy's International Information and Communications Policy (CDP/ICP) division. The purpose of the meeting is to brief stakeholders on CDP/ICP's past and upcoming international engagements. These include engagement at the International Telecommunication Union (ITU), the Organization of American States Inter-American Telecommunication Commission (CITEL), the Organization for Economic Cooperation and Development (OECD), the Asia Pacific Economic Cooperation (APEC) Forum Telecommunications and Information Working Group, the Group of Seven (G7) Digital & Tech Working Group, the Group of Twenty (G20)

Digital Economy Task Force, and other multilateral processes and bilateral digital and ICT dialogues.

**DATES:** The meeting will be on January 18, 2024.

**FOR FURTHER INFORMATION CONTACT:** Please contact Daniel Oates, Global Technology Policy Advisor, CDP/ICP, at [OatesDM@state.gov](mailto:OatesDM@state.gov) or 202-436-5516.

**SUPPLEMENTARY INFORMATION:** Additional information about the Bureau of Cyberspace and Digital Policy is accessible at <https://www.state.gov/bureaus-offices/deputy-secretary-of-state/bureau-of-cyberspace-and-digital-policy/>.

We encourage anyone wanting to attend this virtual meeting to register using the following link by 5:00PM Tuesday, January 16: <https://statedept.webex.com/weblink/register/r5293d97462276d4d02be7fb36b04879a>.

Requests for reasonable accommodation made after January 8 will be considered but might not be able to be accommodated. The public may have an opportunity to provide comments at this meeting.

### Agenda

Thursday, January 18, at 2 p.m. (ET)

Opening Remarks  
Briefings on CDP/ICP's past and upcoming activities  
Public Comment  
Adjournment

**Stephan A. Lang,**

Deputy Assistant Secretary, International Information and Communications Policy, Bureau of Cyberspace and Digital Policy, Department of State.

[FR Doc. 2023-28447 Filed 12-26-23; 8:45 am]

**BILLING CODE 4710-10-P**

## SURFACE TRANSPORTATION BOARD

### Release of Waybill Data

The Surface Transportation Board has received a request from the Utah Inland Port Authority (WB23-72—12/20/23) for permission to use select data from the Board's annual 2021 masked Carload Waybill Sample. A copy of this request may be obtained from the Board's website under Docket No. WB23-72.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

*Contact:* Alexander Dusenberry, (202) 245-0319.

**Brendetta Jones,**  
Clearance Clerk.

[FR Doc. 2023-28568 Filed 12-26-23; 8:45 am]

**BILLING CODE 4915-01-P**

## TENNESSEE VALLEY AUTHORITY

### Meeting of the Regional Resource Stewardship Council and the Regional Energy Resource Council

**AGENCY:** Tennessee Valley Authority (TVA).

**ACTION:** Notice of Federal advisory committee meeting.

**SUMMARY:** The TVA Regional Resource Stewardship Council (RRSC) and Regional Energy Resource Council (RERC) will hold a combined meeting of both councils on January 18, 2024, to seek advice on the Valley Pathways Study, a study led by both TVA and the University of Tennessee Baker Center for Public Policy to develop a roadmap for Net Zero greenhouse gas (GHG) emission economy by 2050.

**DATES:** The meeting will be held in Knoxville, Tennessee, at the Downtown Knoxville Marriott on Thursday, January 18, 2024, from 8:30 a.m. to 4 p.m. E.T. RRSC and RERC council members are invited to attend the meeting in person. The public is invited to view the meeting virtually or to attend in-person. There will be a 1-hour public listening session at 1:30 E.T. Those wishing to speak virtually must email Bekim Haliti at [bhaliti@tva.gov](mailto:bhaliti@tva.gov) by 5 p.m. on Tuesday, January 16. Written comments are invited and can be sent by email to Bekim Haliti at [bhaliti@tva.gov](mailto:bhaliti@tva.gov). A link and instructions to view the meeting will be posted on TVA's RRSC website at [www.tva.com/rrsc](http://www.tva.com/rrsc) and TVA's RERC website at [www.tva.com/rerc](http://www.tva.com/rerc) prior to the scheduled meeting.

**ADDRESSES:** The public is invited to view the meeting virtually or attend in person. The in-person meeting will be held at the Downtown Knoxville Marriott at 525 Henley St. Knoxville, TN 37902. There will be a 1-hour Public Listening Session from 1:30 to 2:30. Persons who wish to speak virtually during the public listening session must pre-register by 5 p.m. E.T. Tuesday, January 16, by emailing [bhaliti@tva.gov](mailto:bhaliti@tva.gov). Anyone needing special accommodations should let the contact below know at least one week in advance.

**FOR FURTHER INFORMATION CONTACT:** Bekim Haliti, [bhaliti@tva.gov](mailto:bhaliti@tva.gov), 931-349-1894.

<sup>20</sup> 17 CFR 200.30-3(a)(12).

**SUPPLEMENTARY INFORMATION:** The RERC was established to advise TVA on its energy resource activities and the priorities among competing objectives and values. The RRSC was established to advise TVA on its natural resource and stewardship activities, and the priorities among competing objectives and values. The RRSC and RERC are discretionary advisory committees established under the authority of the Tennessee Valley Authority (TVA) in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. 10.

The meeting agenda includes the following:

#### January 18

1. Welcome and Introductions
2. TVA Leadership Update
3. Valley Pathways Study presentation
4. Review and discuss Advice Questions
5. Public Listening Session
6. Finalize Advice Statements

The DFO of the Tennessee Valley Authority and Vice President of External Strategy and Regulatory Oversight, Melanie Farrell, having review and approved this document, is delegating the authority to sign this document to Bekim Haliti, Specialist of Valley Alliances for publication in the **Federal Register**.

Dated: December 18, 2023.

**Bekim Haliti,**

*Specialist, Valley Alliances, Tennessee Valley Authority.*

[FR Doc. 2023-28534 Filed 12-26-23; 8:45 am]

**BILLING CODE 8120-08-P**

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

### FEDERAL RESERVE SYSTEM

### FEDERAL DEPOSIT INSURANCE CORPORATION

#### Proposed Agency Information Collection Activities; Comment Request

**AGENCY:** Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); and Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Joint notice and request for comment.

**SUMMARY:** In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the OCC, the Board, and the FDIC (the agencies) 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 Federal Financial Institutions Examination Council (FFIEC), of which the agencies are members, has approved the agencies' publication for public comment of a proposal to revise and extend for three years the Consolidated Reports of Condition and Income (Call Reports) (FFIEC 031, FFIEC 041, and FFIEC 051), which are currently approved collections of information. The FFIEC has also approved the Board's publication for public comment, on behalf of the agencies, of a proposal to revise and extend for three years the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks (FFIEC 002), and the Report of Assets and Liabilities of a Non-U.S. Branch that is Managed or Controlled by a U.S. Branch or Agency of a Foreign (Non-U.S.) Bank (FFIEC 002S), which are also currently approved collections of information. The agencies are requesting comment on proposed revisions to the Call Report forms and instructions, and the FFIEC 002, as applicable, that include the revision and addition of certain new data items related to the reporting on loans to nondepository financial institutions (NDFIs) and other loans, guaranteed structured financial products, and proposed long-term debt requirements. In addition, the agencies are seeking comment on a proposal to adopt ongoing standards for electronic signatures to comply with the Call Report signature and attestation requirement. The revisions are proposed to take effect with the June 30, 2024, report date, except for those related to the proposed long-term debt requirements which would take effect for the first report date at or following the effective date of any final rule.

**DATES:** Comments must be submitted on or before February 26, 2024.

**ADDRESSES:** Interested parties are invited to submit written comments to any or all of the agencies. All comments will be shared among the agencies.

**OCC:** You may submit comments, which should refer to "Call Report and FFIEC 002 Revisions," by any of the following methods:

- **Email:** [prainfo@occ.treas.gov](mailto:prainfo@occ.treas.gov).
- **Mail:** Chief Counsel's Office, Office of the Comptroller of the Currency, Attention: 1557-0081, 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 "1557-0081" in your comment. In general, the OCC will publish comments on [www.reginfo.gov](http://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 following method:

- **Viewing Comments Electronically:** Go to [www.reginfo.gov](http://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 "1557-0081." 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](http://www.reginfo.gov), please contact the Regulatory Information Service Center at (202) 482-7340.

**Board:** You may submit comments, which should refer to "Call Report and FFIEC 002 Revisions," by any of the following methods:

- **Agency Website:** <http://www.federalreserve.gov>. Follow the instructions for submitting comments at: <http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm>.

- **Email:** [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include "Call Report and FFIEC 002 Revisions" in the subject line of the message.

- **Fax:** (202) 395-6974.

- **Mail:** Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available on the Board's website at <https://www.federalreserve.gov/apps/foia/proposedregs.aspx> as submitted, unless modified for technical reasons.

Accordingly, your comments will not be edited to remove any identifying or contact information.

**FDIC:** You may submit comments, which should refer to "Call Report and FFIEC 002 Revisions," by any of the following methods:

- **Agency Website:** <https://www.fdic.gov/resources/regulations/federal-register-publications/>. Follow the instructions for submitting comments on the FDIC's website.
- **Email:** [comments@FDIC.gov](mailto:comments@FDIC.gov). Include "Call Report and FFIEC 002 Revisions" in the subject line of the message.
- **Mail:** Manuel E. Cabeza, Counsel, Attn: Comments, Room MB-3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- **Hand Delivery:** Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW building (located on F Street NW) on business days between 7 a.m. and 5 p.m.
- **Public Inspection:** All comments received, including any personal information provided, will be posted without change to <https://www.fdic.gov/resources/regulations/federal-register-publications/>. Commenters should submit only information that the commenter wishes to make available publicly. The FDIC may review, redact, or refrain from posting all or any portion of any comment that it may deem to be inappropriate for publication, such as irrelevant or obscene material. The FDIC may post only a single representative example of identical or substantially identical comments, and in such cases will generally identify the number of identical or substantially identical comments represented by the posted example. All comments that have been redacted, as well as those that have not been posted, that contain comments on the merits of this document will be retained in the public comment file and will be considered as required under all applicable laws. All comments may be accessible under the Freedom of Information Act.

Additionally, commenters may send a copy of their comments to the OMB desk officer for the agencies by mail to the Office of Information and Regulatory Affairs, U.S. Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503; by fax to (202) 395-6974; or by email to [oira\\_submission@omb.eop.gov](mailto:oira_submission@omb.eop.gov).

**FOR FURTHER INFORMATION CONTACT:** For further information about the proposed revisions to the information collections discussed in this notice, please contact

any of the agency staff whose names appear below. In addition, copies of the report forms for the Call Reports and the FFIEC 002 can be obtained at the FFIEC's website ([https://www.ffiec.gov/ffiec\\_report\\_forms.htm](https://www.ffiec.gov/ffiec_report_forms.htm)).

**OCC:** Kevin Korzeniewski, Counsel, Chief Counsel's Office, (202) 649-5490. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

**Board:** Nuha Elmaghrabi, Federal Reserve Board Clearance Officer, (202) 452-3884, Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may call (202) 263-4869.

**FDIC:** Manuel E. Cabeza, Counsel, (202) 898-3767, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Affected Reports**

The proposed changes discussed below affect the Call Reports and the FFIEC 002.

##### **A. Call Report**

The agencies propose to extend for three years, with revision, their information collections associated with the FFIEC 031, FFIEC 041, and FFIEC 051 Call Reports.

**Report Title:** Consolidated Reports of Condition and Income (Call Report).

**Form Number:** FFIEC 031 (Consolidated Reports of Condition and Income for a Bank with Domestic and Foreign Offices), FFIEC 041 (Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only), and FFIEC 051 (Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only and Total Assets Less Than \$5 Billion).

**Frequency of Response:** Quarterly.

**Affected Public:** Business or other for-profit.

**Type of Review:** Revision and extension of currently approved collections.

##### **OCC**

**OMB Control No.:** 1557-0081.

**Estimated Number of Respondents:** 1,014 national banks and federal savings associations.

**Estimated Average Burden per Response:** 40.85 burden hours per quarter to file.

**Estimated Total Annual Burden:** 165,688 burden hours to file.

##### **Board**

**OMB Control No.:** 7100-0036.

**Estimated Number of Respondents:** 708 state member banks.

**Estimated Average Burden per Response:** 44.33 burden hours per quarter to file.

**Estimated Total Annual Burden:** 125,543 burden hours to file.

##### **FDIC**

**OMB Control No.:** 3064-0052.

**Estimated Number of Respondents:** 2,975 insured state nonmember banks and state savings associations.

**Estimated Average Burden per Response:** 38.94 burden hours per quarter to file.

**Estimated Total Annual Burden:** 463,386 burden hours to file.

The estimated average burden hours collectively reflect the estimates for the FFIEC 031, the FFIEC 041, and the FFIEC 051 reports for each agency. When the estimates are calculated by type of report across the agencies, the estimated average burden hours per quarter are 85.88 (FFIEC 031), 54.79 (FFIEC 041), and 34.49 (FFIEC 051). The changes to the Call Report forms and instructions proposed in this notice would result in an estimated increase in burden hours per quarter for the FFIEC 031 of 1.35 hours, FFIEC 041 of 0.19 hours, and FFIEC 051 of 0.08 hours. The estimated burden per response for the quarterly filings of the Call Report is an average that varies by agency because of differences in the composition of the institutions under each agency's supervision (e.g., size distribution of institutions, types of activities in which they are engaged, and existence of foreign offices).

**Type of Review:** Extension and revision of currently approved collections. In addition to the proposed revisions discussed below, Call Reports are periodically updated to clarify instructional guidance and correct grammatical and typographical errors on the forms and instructions, which are published on the FFIEC website.<sup>1</sup> These non-substantive updates may also be commented upon.

##### **Legal Basis and Need for Collections**

The Call Report information collections are mandatory: 12 U.S.C. 161 (national banks), 12 U.S.C. 324 (state member banks), 12 U.S.C. 1817 (insured state nonmember commercial and savings banks), and 12 U.S.C. 1464 (federal and state savings associations). At present, except for selected data items and text, these information collections are not given confidential treatment.

<sup>1</sup> [www.ffiec.gov/forms031.htm](http://www.ffiec.gov/forms031.htm); [www.ffiec.gov/forms041.htm](http://www.ffiec.gov/forms041.htm); [www.ffiec.gov/forms051.htm](http://www.ffiec.gov/forms051.htm).

Banks and savings associations submit Call Report data to the agencies each quarter for the agencies' use in monitoring the condition, performance, and risk profile of individual institutions and the industry as a whole. Call Report data serve a regulatory or public policy purpose by assisting the agencies in fulfilling their shared missions of ensuring the safety and soundness of financial institutions and the financial system and protecting consumer financial rights, as well as agency-specific missions affecting federal and state-chartered institutions, such as conducting monetary policy, ensuring financial stability, and administering federal deposit insurance. Call Reports are the source of the most current statistical data available for identifying areas of focus for on-site and off-site examinations. Among other purposes, the agencies use Call Report data in evaluating institutions' corporate applications, including interstate merger and acquisition applications for which the agencies are required by law to determine whether the resulting institution would control more than 10 percent of the total amount of deposits of insured depository institutions in the United States. Call Report data also are used to calculate the risk-based assessments for insured depository institutions.

#### *B. FFIEC 002 and 002S*

The Board proposes to extend for three years, with revision, the FFIEC 002 and FFIEC 002S reports.

**Report Titles:** Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks; Report of Assets and Liabilities of a Non-U.S. Branch that is Managed or Controlled by a U.S. Branch or Agency of a Foreign (Non-U.S.) Bank.

**Form Numbers:** FFIEC 002; FFIEC 002S.

**OMB Control Number:** 7100-0032.

**Frequency of Response:** Quarterly.

**Affected Public:** Business or other for-profit.

**Respondents:** All state-chartered or federally-licensed U.S. branches and agencies of foreign banking organizations, and all non-U.S. branches managed or controlled by a U.S. branch or agency of a foreign banking organization.

**Estimated Number of Respondents:** FFIEC 002—183; FFIEC 002S—18.

**Estimated Average Burden per Response:** FFIEC 002—24.67 hours; FFIEC 002S—6.0 hours.

**Estimated Total Annual Burden:** FFIEC 002—18,058 hours; FFIEC 002S—432 hours.

**Type of Review:** Extension and revision of currently approved collections.

The proposed revisions to the FFIEC 002 instructions in this notice would not have a material impact on the existing burden estimates.

#### **Legal Basis and Need for Collection**

On a quarterly basis, all U.S. branches and agencies of foreign banks are required to file the FFIEC 002, which is a detailed report of condition with a variety of supporting schedules. This information is used to fulfill the supervisory and regulatory requirements of the International Banking Act of 1978. The data also are used to augment the bank credit, loan, and deposit information needed for monetary policy and other public policy purposes. In addition, FFIEC 002 data are used to calculate the risk-based assessments for FDIC-insured U.S. branches of foreign banks. The FFIEC 002S is a supplement to the FFIEC 002 that collects information on assets and liabilities of any non-U.S. branch that is managed or controlled by a U.S. branch or agency of the foreign bank. A non-U.S. branch is managed or controlled by a U.S. branch or agency if a majority of the responsibility for business decisions, including but not limited to decisions with regard to lending or asset management or funding or liability management, or the responsibility for recordkeeping in respect of assets or liabilities for that foreign branch resides at the U.S. branch or agency. A separate FFIEC 002S must be completed for each managed or controlled non-U.S. branch. The FFIEC 002S must be filed quarterly along with the U.S. branch or agency's FFIEC 002.

These information collections are mandatory (12 U.S.C. 1817(a)(1) and (3), 3102(b), and 3105(c)(2)). Except for select sensitive items, the FFIEC 002 is not given confidential treatment; the FFIEC 002S is given confidential treatment (5 U.S.C. 552(b)(4) and (8)). The data from both reports are used for (1) monitoring deposit and credit transactions of U.S. residents; (2) monitoring the impact of policy changes; (3) analyzing structural issues concerning foreign bank activity in U.S. markets; (4) understanding flows of banking funds and indebtedness of developing countries in connection with data collected by the International Monetary Fund and the Bank for International Settlements that are used in economic analysis; and (5) assisting in the supervision of U.S. offices of foreign banks. The Federal Reserve System collects and processes these reports on behalf of all three agencies.

## **II. Current Actions**

### *A. Loans to Nondepository Financial Institutions*

#### **1. Background**

Loans to NDFIs have increasingly played an essential role in the financial system. NDFIs include a wide range of counterparties including insurance companies, mortgage companies, private equity funds, hedge funds, broker-dealers, real estate investment trusts (REITs), marketplace lenders, special purpose entities, and other financial vehicles. Currently, data on loans to NDFIs is collected on Schedule RC-C, Part I, Loans and Leases, item 9.a. "Loans to nondepository financial institutions."

Since this item was added in 2010, institutions have increased direct lending exposure to NDFIs. In March 2010, loans to NDFIs reported in this item totaled approximately \$56 billion and represented only 0.8 percent of gross loans reported by respondents. However, in June 2023, the reported amount of loans to NDFIs increased significantly to almost \$786 billion and represented 6.4 percent of respondents' total loan exposure. Notwithstanding this increase in NDFI credit risk, current Call Report forms and instructions do not provide granularity on specific NDFI exposure, such as direct and off-balance sheet exposure, data on NDFI exposure in non-domestic offices, or NDFI loan performance data (e.g., nonaccrual and past due status). Further, the agencies have observed inconsistency in NDFI exposure reporting among industry filers.

#### **2. Call Report Proposed Revisions**

The agencies are proposing to update the Call Report forms and instructions to increase the granularity in reporting exposure to NDFIs and to improve reporting consistency. These proposed revisions would enhance the understanding of NDFI exposure, risks, and performance trends. The revisions would group together loan exposures that exhibit similar underlying risk characteristics while addressing the diversity in practice on the reporting of these loans that exists today. In addition, the proposed granular reporting would allow for more accurate analysis of bank financial statements for applicable institutions and performance metrics. These revisions and clarifications are proposed to be effective as of the June 30, 2024, report date.

The specific proposed revisions and clarifications impacting the three report forms are as follows:

## Schedule RC–C, Part I, Loans and Leases

■ For all three Call Reports, to ensure consistent reporting on loans to NDFIs, the instructions for item 9.a, “Loans to nondepository financial institutions” would be updated to include additional detail on the types of loans that should be reported in this line item. In addition, the instructions would be revised to include in the amounts reported in this item all loans to brokers and dealers in securities and loans to investment firms and mutual funds. These loans were previously included in item 9.b (FFIEC 051) or in item 9.b.(1) (FFIEC 031 and FFIEC 041), as noted below.

■ On the FFIEC 051, item 9.b, “Other loans,” and on the FFIEC 031 and FFIEC 041, item 9.b.(1), “Loans for purchasing or carrying securities (secured and unsecured),” the instructions would be revised to exclude from the amounts reported in this item all loans to brokers and dealers in securities and loans to investment firms and mutual funds. These loans would be reported under the new NDFI definition in item 9.a, “Loans to nondepository financial institutions.”

■ On the FFIEC 051, item 9.b, “Other loans,” and on the FFIEC 031 and FFIEC 041 reports, item 9.b.(1), “Loans for purchasing or carrying securities (secured and unsecured),” the instructions would also be revised to include in the amounts reported in this item all margin loans, including securities-based loans and non-purpose margin loans. In addition, this item description on the FFIEC 031 and FFIEC 041 report forms would be revised to “Loans for purchasing or carrying securities, including margin loans.”

■ For the FFIEC 031 and FFIEC 041, Memorandum item 10 (currently “not applicable”) would be renamed “Loans to nondepository financial institutions” and would include the following subitems, as defined in the instructions for Schedule RC–C, Part I, item 9.a, to capture direct lending exposures to NDFIs: 10.a, “Loans to mortgage credit intermediaries;” 10.b, “Loans to business credit intermediaries;” 10.c, “Loans to private equity funds;” 10.d, “Loans to consumer credit intermediaries;” and 10.e, “Other loans to nondepository financial institutions.” The sum of subitems 10.a through 10.e would equal Schedule RC–C, Part I, item 9.a. These items would only be collected from institutions with \$10 billion or more in total assets.

■ For the FFIEC 031 only, item 9, “Loans to nondepository financial institutions and other loans,” additional subitems 9.a, 9.b.1, and 9.b.2 (Column

A) would be added to collect data at the consolidated bank level that would be in addition to the exposure currently captured for those items in domestic offices only (Column B). In addition, item 9, “Loans to nondepository financial institutions and other loans,” column A, would no longer be reported as an aggregate amount.

## Schedule RC–L, “Derivatives and Off-Balance Sheet Items”

■ For all three report forms, the subitems for item 1.e, “Other unused commitments” would be revised to include the collection of data on both depository financial institutions and NDFIs. Specifically, subitem 1.e.(2), “Loans to financial institutions” would be changed to “Loans to depository financial institutions.” Subitem 1.e.(3), would be renamed “Loans to nondepository financial institutions” and would collect data on unused commitments for loans to nondepository financial institutions. The existing subitem 1.e.(3), “All other unused commitments,” would be renumbered to item 1.e.(4).

■ For the FFIEC 031 and FFIEC 041, item 1.e.(3), “Loans to nondepository financial institutions,” would include five subitems with the same five categories as the new subitems listed for Schedule RC–C, Part I, Memorandum item 10 above. The sum of these subitems 1.e.(3)(a) through 1.e.(3)(e) would equal the amount reported in Schedule RC–L, item 1.e.(3). These items would only be collected from institutions with \$10 billion or more in total assets.

## Schedule RC–N, “Past Due and Nonaccrual Loans, Leases, and Other Assets”

■ For the FFIEC 041 and the FFIEC 051, Memorandum item 9 would be renamed, “Loans to nondepository financial institutions included in Schedule RC–N, item 7” and would capture past due and nonaccrual information for NDFIs in columns A through C.

■ For the FFIEC 031 only, Memorandum item 9, would also be renamed, “Loans to nondepository financial institutions included in Schedule RC–N, item 7” to capture past due and nonaccrual information for NDFIs. However, institutions would report amounts in Memorandum item 9.a, “To U.S. nondepository financial institutions” and Memorandum item 9.b, “To foreign nondepository institutions” in columns A through C.

*Question 1:* Is the granularity of the proposed subcategories appropriate or are there additional or fewer

subcategories that should be considered?

## 3. FFIEC 002 Proposed Revisions

The Board’s proposed revisions to the FFIEC 002 are intended to align with similar changes proposed to the Call Report, Schedule RC–C, Part I, as applicable, and discussed in the prior section.

## Schedule C, “Loans”

■ The instructions for item 3, “Loans to other financial institutions” would be updated to include additional detail on the types of loans that should be reported in this line item. In addition, the instructions would be revised to include all loans to brokers and dealers in securities and loans to investment firms and mutual funds in the amounts reported in this item. These loans were previously included in item 7, below.

■ The instructions for item 7, “Loans for purchasing or carrying securities (secured and unsecured)” would be revised to exclude from the amounts reported in this item all loans to brokers and dealers in securities and loans to investment firms and mutual funds. These loans would be reported under the new NDFI definition in item 3, “Loans to other financial institutions.”

■ The instructions for item 7, “Loans for purchasing or carrying securities (secured and unsecured)” would also be revised to include in the amounts reported in this item all margin loans, including securities-based loans and non-purpose margin loans. In addition, this item description on the report form would be revised to “Loans for purchasing or carrying securities, including margin loans.”

The Board is proposing to align the effective date for these revisions on Schedule C of the FFIEC 002 with the revised Call Report items, described above.

*B. Reporting on Guaranteed Structured Financial Products*

In February 2023, a proposal for revisions to the Call Reports<sup>2</sup> included a question on the reporting of certain Federal Home Loan Mortgage Corporation and similar securitization structures that have government guarantees on Schedule RC–B, Securities. The agencies sought comment on the reporting of these types of structured financial products including those issued or guaranteed by U.S. government or government sponsored agencies.

The agencies received two comments on this topic. One comment opposed

<sup>2</sup> 85 FR 10644 (February 21, 2023).

reporting these securities in Schedule RC–B, Securities, item 5.b, noting that this item includes a broad range of structured financial products, and there would be a lack of clarity on the amount reported in this item that is guaranteed by a government or agency. The other comment supported reporting these securities in item 5.b. However, the commenter also noted the lack of transparency in this item regarding the composition of reported structured financial products. The commenter stated it would be appropriate for an additional breakdown to be added to item 5.b to report the amount that is guaranteed by the U.S. government or an agency. In the final 30-day notice published in June 2023,<sup>3</sup> the agencies indicated they would continue reviewing the original clarification and the new item proposed by the commenter.

After further review of the comment to collect data on the amounts reported in item 5.b that are guaranteed by U.S. government agencies or sponsored agencies, the agencies are proposing to add a new Memorandum item 7, “Guaranteed by U.S. Government agencies or sponsored agencies included in Schedule RC–B, item 5.b”, columns A through D, on Schedule RC–B. The proposed amounts in the new Memorandum item would collect the total amortized cost and total fair value for held-to-maturity securities and available-for-sale securities.

### C. Long-Term Debt

On August 29, 2023, the federal bank regulatory agencies requested comment on a proposal that would require large banks with total assets of \$100 billion or more to maintain a layer of long-term debt, which would improve financial stability by increasing the resolvability and resiliency of such institutions. This notice of proposed rulemaking (NPR) was published in the **Federal Register** on September 19, 2023.<sup>4</sup> This NPR would affect insured depository institutions (IDIs) that are not consolidated subsidiaries of U.S. global systemically important banks (G–SIBs) and that (i) have at least \$100 billion in consolidated assets or (ii) are affiliated with IDIs that have \$100 billion in consolidated assets (covered IDIs) that are required to have outstanding a minimum amount of eligible long-term debt (LTD). Generally, under the proposal, covered IDIs that are consolidated subsidiaries of covered bank holding companies and savings

and loan holding companies would be required to issue the LTD.

The agencies are proposing to revise Schedule RC–R, Part I, Regulatory Capital Components and Ratios, for all three Call Reports by adding the following new line items under the heading “Long-Term Debt (LTD).” These new line items would be applicable only to IDIs subject to the long-term debt requirement in the NPR:

- 56.a, “Effective date of LTD requirement;”
- 56.b, “Outstanding eligible LTD;”
- 56.c, “Outstanding eligible LTD with a remaining maturity greater than or equal to one year and less than two years;”
- 56.d, “LTD total risk-weighted assets ratio;” and
- 56.e, “LTD leverage ratio.”

Additionally, on the FFIEC 031 and FFIEC 041 forms only, the agencies will add a sixth item, 56.f, “LTD supplementary leverage ratio.”

The agencies are proposing to add these new items to monitor compliance by covered IDIs with the applicable proposed LTD requirements. These items would be consistent with similar items reported by holding companies on the Board’s Consolidated Financial Statements for Holding Companies (FR Y–9C), Schedule HC–R, Part I, Regulatory Capital Components and Ratios. For example, item 56.b, “Outstanding eligible LTD,” on the Call Report would capture the same long-term debt information as item 54, “Outstanding eligible long-term debt,” on the FR Y–9C, except it would apply to covered IDIs instead of holding companies. The proposed instructions for items 56.a through 56.f would correspond with the relevant items on the FR Y–9C as proposed in the NPR that was published on September 19, 2023. Similar to the FR Y–9C, the proposed effective date for the Call Report revisions would align with the effective date of any final rule on LTD requirements, and the reporting changes would take effect for the first report date on or after that effective date.

### D. Electronic Signatures

#### Background

Federal law requires that certain personnel and directors attest to the accuracy of the data submitted in the bank’s Call Report by signature.<sup>5</sup> In addition to being required by statute, review of the Call Report in connection with signing the attestation supports internal control over the bank’s reporting. The Call Report instructions

permit a bank to satisfy the signature requirement by obtaining physical signatures from the relevant parties attached to a copy of the associated Call Report that is retained in the bank’s files.

The onset of the COVID–19 pandemic in March 2020 and resulting bank office closures presented challenges to complying with the physical signature requirement. The agencies responded by permitting reasonable alternative signature methods, including electronic signatures, to be used for the duration of the pandemic.<sup>6</sup>

The federal COVID–19 public health emergency declaration ended on May 11, 2023. However, both the agencies and banks have benefitted from the alternative to the use of physical signatures on each Call Report submission. For the agencies, electronic documentation can provide a stronger audit trail than a paper copy that can be misplaced or altered. For banks, electronic signatures can reduce recordkeeping burden associated with preparing for, collecting, and retaining signatures. Therefore, the agencies are proposing to adopt ongoing standards for electronic signatures to comply with the Call Report signature and attestation requirement. Until the agencies finalize these proposed standards, banks may continue following the alternate standards provided in the quarterly Call Report Supplemental Instructions. The agencies also will continue to permit physical signatures for banks that choose not to use the electronic signature alternative.

#### Proposed Framework

A valid electronic signature generally must meet the following requirements: (1) The signer must use an acceptable electronic form of signature; (2) The electronic form of signature must be executed or adopted by a person with the intent to sign the electronic record; (3) The electronic form of signature must be attached to<sup>7</sup> or part of the electronic record being signed; (4) There must be a means to identify, verify, and authenticate a particular person as the signer; and (5) There must be a means to preserve the integrity of the signed record.<sup>8</sup> The agencies are proposing the

<sup>6</sup> Call Report Supplemental Instructions for March 2020, available at: [https://www.ffiec.gov/pdf/FFIEC\\_forms/FFIEC031\\_FFIEC041\\_FFIEC051\\_supplinst\\_202003.pdf](https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_FFIEC041_FFIEC051_supplinst_202003.pdf).

<sup>7</sup> In this context, “attached to” means “logically associated with.”

<sup>8</sup> See “Use of Electronic Signatures in Federal Organization Transactions,” available at: [https://assets.cio.gov/assets/files/resources/Use\\_of\\_ESignatures\\_in\\_Federal\\_Agency\\_Transactions\\_v1-0\\_20130125.pdf](https://assets.cio.gov/assets/files/resources/Use_of_ESignatures_in_Federal_Agency_Transactions_v1-0_20130125.pdf).

<sup>3</sup> 88 FR 38592 (June 13, 2023).

<sup>4</sup> 88 FR 64524 (September 19, 2023).

<sup>5</sup> 12 U.S.C. 161(a) (national banks) and 1817(a)(3) (all insured depository institutions).

electronic signature alternative for the Call Report signature purposes consistent with these requirements and Federal law on electronic signatures.<sup>9</sup>

#### 1. Form of Signature

The agencies are proposing to allow the following forms of signature: an image of the signer's physical signature; or application of an electronic signature, such as by clicking a box or entering a personal identification number (PIN). These forms of signature are widely available in current software products, are used by many banks that permit electronic signatures on loans or other agreements with customers and have been used by banks under the alternatives permitted for the Call Report since March 2020. While other forms of signature exist, such as biometric identification (e.g., voiceprint, fingerprint, retinal scan), these would not be suitable for the Call Report given cost, complexity, and associated privacy issues involved in recording and maintaining signatures in these forms.

#### 2. Intent to Sign

In order to be a valid electronic signature, the signature of the appropriate bank officer or director must be applied by the officer or director with the intent to sign and in the appropriate capacity. For the Call Report, this means the appropriate bank officer (typically the chief financial officer) or director intends to sign the Call Report as the attestation that it is prepared in accordance with the instructions and is true and correct, as stated on the signature page of the Call Report. The bank officer's or director's intent and capacity must be included as part of the electronic signature process by using an electronic version of the relevant attestation text on the Call Report signature page.

#### 3. Association of Signature

A valid electronic signature must be made part of the record of the document being signed, to confirm that the signature applies to and is linked to the entire record. For Call Report purposes, this means the signature must be associated with a complete version of the bank's Call Report, including all applicable schedules, as the signer is attesting to the correctness of the information in those schedules. This association can be made by using a process that appends the signature data to the record signed, or which establishes a database-type link between

the signature data and the record signed. An electronic signature made on a cover page or the Call Report signature page, without the Call Report schedules incorporated or attached, would not satisfy this requirement.

To validate that the bank obtained the signatures prior to filing the Call Report, the date of each electronic signature would need to be included as part of the signature and attestation process and similarly made part of the record. This could be accomplished in different ways, for example, by the signer manually entering the date when signing, which could be verified by system transaction logs, or by software embedding the date as part of the form of signature or elsewhere within the record.

#### 4. Identification and Authentication of the Signer

A valid signature requires proving an association between the signature and the person signing. For Call Report purposes, the agencies would accept any reliable information technology system identification and authentication method or process that associates access to and execution of the electronic signature transaction with the identity of the signer with a level of assurance sufficient to protect against repudiation or adverse impact to the bank that would result from a successful challenge to the execution of the electronic signature. For example, requiring the bank officer or director to log into the bank's network using unique multifactor credentials in order to electronically sign the Call Report could identify and authenticate the signer with sufficient assurance to protect against such risks. Credentials used to access the signature transaction must be sufficient for the protection of a bank's non-public or otherwise proprietary information.

#### 5. Integrity of Signed Record

The usability of a signed electronic record requires maintaining the integrity of the electronic signature and associated record. A bank would need to have sufficient data security and data integrity practices to ensure that the Call Report with electronic signature is safely stored, readily retrievable, and cannot be lost or altered.<sup>10</sup> As with paper-based signatures, electronic signatures would not be submitted to the Central Data Repository along with the Call Report data, but the electronically signed Call Report would

need to be available to agency examiners upon request.

A Call Report with an electronic signature would be subject to the same record retention period as a paper version of the Call Report, as specified in the Call Report instructions, and may be deleted after the relevant timeframe. Generally, this period is three years after the report date, unless state law or a dispute with the FDIC requires a longer retention period. A bank that uses electronic signatures for its Call Reports would not be required to print or maintain a paper version of the submitted Call Report, as the relevant electronic versions of the Call Report and signatures would be stored in electronic form.

*Question 2:* Are the proposed requirements for Call Report electronic signatures appropriate? What additional options should the agencies consider allowing or disallowing?

*Question 3:* Does the proposed effective date provide sufficient time for banks seeking to use electronic signatures to implement the proposed standards?

*Question 4:* Should the agencies consider expanding the use of electronic signatures to other FFIEC reports? If so, would the proposed requirements for Call Report electronic signatures be appropriate for those reports as well?

### III. Timing

The proposed revisions to the Call Report forms and instructions, and the FFIEC 002, as applicable, and adoption of ongoing standards for electronic signatures to comply with the Call Report signature and attestation requirement are proposed to become effective with the June 30, 2024, report date, except for those related to the proposed long-term debt requirements which would take effect for the first report date at or following the effective date of any final rule. The agencies invite comment on any difficulties that institutions would expect to encounter in implementing the systems changes necessary to accommodate the proposed revisions to the Call Reports and the FFIEC 002, as applicable, consistent with this effective date.

### IV. Request for Comment

Public comment is requested on all aspects of this joint notice including the questions that were provided in the earlier sections. In addition to the questions included above, comment is specifically invited on:

(a) Whether the proposed revisions to the collections of information that are the subject of this notice are necessary for the proper performance of the

<sup>9</sup> See, e.g., Electronic Records and Signatures in Global and National Commerce Act, Pub. L. 106–229; Government Paperwork Elimination Act of 1998, Pub. L. 105–277.

<sup>10</sup> These practices generally already exist within banks' current information technology infrastructure for other bank records and customer information.

agencies' functions, including whether the information has practical utility;

(b) The accuracy of the agencies' estimates of the burden of the information collections as they are proposed to be revised, 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 collections 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.

Comments submitted in response to this joint notice will be shared among the agencies.

**Patrick T. Tierney,**

*Assistant Director, Bank Advisory Office of the Comptroller of the Currency.*

Board of Governors of the Federal Reserve System.

**Michele Taylor Fennell,**

*Deputy Associate Secretary of the Board.*

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on December 14, 2023.

**James P. Sheesley,**

*Assistant Executive Secretary.*

[FR Doc. 2023-28473 Filed 12-26-23; 8:45 am]

**BILLING CODE 4810-33-P; BILLING CODE 6210-01-P;  
BILLING CODE 6714-01-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.

**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 Enforcement, Compliance and Analysis, 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 Actions

On December 19, 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 authorities listed below.

##### Individuals

1. ARDAKANI, Gholamreza Ebrahimzadeh (a.k.a. ARDAKANI HOSEIN, Gholamreza Ebrahimzadeh; a.k.a. ARDAKANI, Gholam Reza Ebrahimzadeh; a.k.a. "Denise Lee"), Iran; DOB 20 Aug 1992; nationality Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Gender Male; Passport M34961597 (Iran) expires 27 Sep 2020; National ID No. 4440049443 (Iran) (individual) [NPWMD] [IRGC] [IFSR] (Linked To: ARDAKANI, Hossein Hatefi).

Designated pursuant to section 1(a)(iii) of Executive Order 13382 of June 28, 2005, "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters," 70 FR 38567, 3 CFR, 2005 Comp., p. 170 ("E.O. 13382"), for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, ARDAKANI, Hossein Hatefi, a person whose property and interests in property are blocked pursuant to E.O. 13382.

2. ARDAKANI, Hossein Hatefi (a.k.a. ARDAKANI, Hosein Hatefi; a.k.a. ARDAKANI, Hussein Hatefi; a.k.a. ARDEKANI, Hossein Hatafi; a.k.a. "Seatha Murugiah"), Tehran, Iran; DOB 21 Sep 1985; POB Ardakan, Iran; nationality Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Gender Male; Passport U34290111 (Iran); National ID No. 4449916581 (Iran) (individual) [NPWMD] [IRGC] [IFSR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS AEROSPACE FORCE SELF SUFFICIENCY JIHAD ORGANIZATION).

Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, ISLAMIC REVOLUTIONARY GUARD CORPS AEROSPACE FORCE SELF SUFFICIENCY JIHAD ORGANIZATION, a person whose property and interests in property are blocked pursuant to E.O. 13382.

3. DEWANTO, Agung Surya, Indonesia; DOB 17 Apr 1973; nationality Indonesia;

Additional Sanctions Information—Subject to Secondary Sanctions; Gender Male; Passport R248877 (Indonesia); alt. Passport M765751 (Indonesia) expires 28 Mar 2008; alt. Passport A2935714 (Indonesia); Identification Number 1398039 (Indonesia) (individual) [NPWMD] [IRGC] [IFSR] (Linked To: SURABAYA HOBBY CV).

Designated pursuant to section 1(a)(iv) of E.O. 13382 for acting or purporting to act for or on behalf of, directly or indirectly, SURABAYA HOBBY CV, a person whose property and interests in property are blocked pursuant to E.O. 13382.

4. MOHAMMADABADI, Mehdi Dehghani (a.k.a. MOHAMMADABADI ABOLGHASEM, Mehdi Dehghani), Tehran, Iran; DOB 23 Sep 1982; nationality Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Gender Male; National ID No. 4433172081 (Iran) (individual) [NPWMD] [IRGC] [IFSR] (Linked To: KAVAN ELECTRONICS BEHRAD LIMITED LIABILITY COMPANY).

Designated pursuant to section 1(a)(iv) of E.O. 13382 for acting or purporting to act for or on behalf of, directly or indirectly, KAVAN ELECTRONICS BEHRAD LIMITED LIABILITY COMPANY, a person whose property and interests in property are blocked pursuant to E.O. 13382.

##### Entities

1. ARTA WAVE SDN BHD, No. 46-1, Jalan Tasik Utama, 5 Medan, Niaga, Kuala Lumpur 57000, Malaysia; 26-2, Jalan 9/23 E, Taman Danau Kota, Off Jalan Genting Klang, Kuala Lumpur 53300, Malaysia; Rm. 1014, Favor Industrial Centre, 2-6 King Hong Street, Kwai Chung, Hong Kong, China; Additional Sanctions Information—Subject to Secondary Sanctions; Organization Established Date 10 Dec 2018; Commercial Registry Number 1306915A (Malaysia); Registration Number 201801044883 (Malaysia) [NPWMD] [IRGC] [IFSR] (Linked To: ARDAKANI, Hossein Hatefi).

Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, ARDAKANI, Hossein Hatefi, a person whose property and interests in property are blocked pursuant to E.O. 13382.

2. BASAMAD ELECTRONIC POUYA ENGINEERING LIMITED LIABILITY COMPANY (a.k.a. DYNAMIC ELECTRONIC FREQUENCY ENGINEERING LIMITED LIABILITY COMPANY), No. 63, Unit 4, Shahrara, Patrice Lumumba St., Abshori St., Tehran 1445934911, Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Organization Established Date 20 Jan 2015; National ID No. 14004684489 (Iran); Registration Number 466887 (Iran) [NPWMD] [IRGC] [IFSR] (Linked To: ARDAKANI, Hossein Hatefi).

Designated pursuant to section 1(a)(iv) of E.O. 13382 for being owned or controlled by ARDAKANI, Hossein Hatefi, a person whose property and interests in property are blocked pursuant to E.O. 13382.

3. DIRAC TECHNOLOGY HK LIMITED, Rm 2304 Ho King, Commercial Bldg 2-16, Fa Yuen St., Mongkok, Kowloon, Hong Kong, China; website <https://dirac-tech.com/>;

Additional Sanctions Information—Subject to Secondary Sanctions; Organization Established Date 15 Dec 2021; Registration Number 3112845 (Hong Kong) [NPWMD] [IRGC] [IFSR] (Linked To: ARDAKANI, Hossein Hatefi).

Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, ARDAKANI, Hossein Hatefi, a person whose property and interests in property are blocked pursuant to E.O. 13382.

4. INTEGRATED SCIENTIFIC MICROWAVE TECHNOLOGY SDN BHD (a.k.a. INTEGRATED SCIENTIFIC MICROWAVE TECHNOLOGY; a.k.a. “ISM TECH”), 1–11 1st Floor, Jalan Paden Perdana 2 Dataran Pandan Prima, Kuala Lumpur 55100, Malaysia; Rm. 1014, Favor Industrial Centre 2–6 Kin Hong Street, Kwai Chung, Hong Kong, China; Additional Sanctions Information—Subject to Secondary Sanctions; Organization Established Date 09 May 2019; Registration Number 201901016612 (Malaysia) [NPWMD] [IRGC] [IFSR] (Linked To: ARDAKANI, Hossein Hatefi).

Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, ARDAKANI, Hossein Hatefi, a person whose property and interests in property are blocked pursuant to E.O. 13382.

5. KAVAN ELECTRONICS BEHRAD LIMITED LIABILITY COMPANY (a.k.a. KAVAN ELECTRONIC CO., LTD; a.k.a. KAVAN ELECTRONIC COMPANY; a.k.a. KAVAN ELECTRONIC SADR ARIA ENGINEERING LIMITED LIABILITY COMPANY), No. 63, Unit 4, Shahrara, Patrice Lumumba St., Abshori Sharghi St., Tehran 1445934911, Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Organization Established Date 13 Jul 2016; National ID No. 14005997725 (Iran); Registration Number 495080 (Iran) [NPWMD] [IRGC] [IFSR] (Linked To: ARDAKANI, Hossein Hatefi; Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS AEROSPACE FORCE SELF SUFFICIENCY JIHAD ORGANIZATION).

Designated pursuant to section 1(a)(iv) of E.O. 13382 for being owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, ARDAKANI, Hossein Hatefi, a person whose property and interests in property are blocked pursuant to E.O. 13382.

Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, ISLAMIC REVOLUTIONARY GUARD CORPS AEROSPACE FORCE SELF SUFFICIENCY JIHAD ORGANIZATION, a person whose property and interests in property are blocked pursuant to E.O. 13382.

6. NAVA HOBBIES SDN BHD, Floor 25, Unit 29–25, No. 685, Jalan Damansara, Kuala Lumpur 60000, Malaysia; website <https://www.nahb.my/>; Additional Sanctions Information—Subject to Secondary Sanctions; Organization Established Date 2022; Registration Number 202201040867

(Malaysia) [NPWMD] [IRGC] [IFSR] (Linked To: ARDAKANI, Hossein Hatefi).

Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, ARDAKANI, Hossein Hatefi, a person whose property and interests in property are blocked pursuant to E.O. 13382.

7. SAMAN INDUSTRIAL GROUP, West Bound of Azadi Stadium Boulevard, Next to 1 Aftab Street, Tehran, Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Organization Type: Defense activities [NPWMD] [IRGC] [IFSR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS AEROSPACE FORCE SELF SUFFICIENCY JIHAD ORGANIZATION).

Designated pursuant to section 1(a)(iv) of E.O. 13382 for being owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, ISLAMIC REVOLUTIONARY GUARD CORPS AEROSPACE FORCE SELF SUFFICIENCY JIHAD ORGANIZATION, a person whose property and interests in property are blocked pursuant to E.O. 13382.

8. SKYLINE ADVANCED TECHNOLOGIES SDN BHD, Suite 18.08, 18th Floor, Plaza Permata, 6 Jalan Kampar, Kuala Lumpur 50400, Malaysia; website <https://satech.com.my/>; Additional Sanctions Information—Subject to Secondary Sanctions; Organization Established Date 2021; Registration Number 202101041127 (Malaysia) [NPWMD] [IRGC] [IFSR] (Linked To: ARDAKANI, Hossein Hatefi).

Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, ARDAKANI, Hossein Hatefi, a person whose property and interests in property are blocked pursuant to E.O. 13382.

9. SURABAYA HOBBY CV, Jl. Barata Jaya Xix/57-b, Surabaya, East Java, Indonesia; Jl. Raya Kendangsari Industri No. 2, Kendangsari, KEC, Tenggiling, Mejoyo, Surabaya, East Java, Indonesia; website <https://www.surabayahobby.com/>; Additional Sanctions Information—Subject to Secondary Sanctions; Identification Number 4242110 (Indonesia) [NPWMD] [IRGC] [IFSR] (Linked To: PISHGAM ELECTRONIC SAFEH COMPANY).

Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, PISHGAM ELECTRONIC SAFEH COMPANY, a person whose property and interests in property are blocked pursuant to E.O. 13382.

10. TEYF TADBIR ARYA ENGINEERING COMPANY (a.k.a. TEIF TADBIR ARYA; a.k.a. TEYF TADBIR ARIA), Unit 10, No. 1, End of Bahar, Kardan Street, Patrice Street, Tehran 1445964433, Iran; Additional Sanctions Information—Subject to Secondary Sanctions; Organization Established Date 26 Jun 2012; National ID No. 10320792753 (Iran); Registration Number 427320 (Iran) [NPWMD] [IRGC] [IFSR] (Linked To: ARDAKANI, Hossein Hatefi).

Designated pursuant to section 1(a)(iv) of E.O. 13382 for being owned or controlled by

ARDAKANI, Hossein Hatefi, a person whose property and interests in property are blocked pursuant to E.O. 13382.

Dated: December 19, 2023.

**Bradley T. Smith,**

*Director, Office of Foreign Assets Control,  
U.S. Department of the Treasury.*

[FR Doc. 2023–28461 Filed 12–26–23; 8:45 am]

**BILLING CODE 4810–AL–P**

## DEPARTMENT OF THE TREASURY

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Internal Revenue Service (IRS) Information Collection Requests

**AGENCY:** Departmental Offices, U.S. Department of the Treasury.

**ACTION:** Notice.

**SUMMARY:** The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

**DATES:** Comments should be received on or before January 26, 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](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 submissions may be obtained from Melody Braswell by emailing [PRA@treasury.gov](mailto:PRA@treasury.gov), calling (202) 622–1035, or viewing the entire information collection request at [www.reginfo.gov](http://www.reginfo.gov).

#### SUPPLEMENTARY INFORMATION:

##### Internal Revenue Service (IRS)

1. *Title:* United States Estate (and Generation-Skipping Transfer) Tax Return.

*OMB Number:* 1545–0015.

*Form Number:* Form 706, and Schedule R–1 (Form 706).

*Abstract:* Executors use Form 706 to report and compute the Federal Estate Tax imposed by Internal Revenue Code (IRC) section 2001 and the Federal Generation Skipping Tax, imposed by IRC section 2601. The IRS uses the

information to enforce these taxes and to verify that the tax has been properly computed. Schedule R-1 (Form 706) serves as a payment voucher for the Generation-Skipping Transfer (GST) tax imposed on a direct skip from a trust, which the trustee of the trust, must pay.

*Current Actions:* There is no change to the existing collection. However, the estimated number of responses was reduced based on current filing data.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Individuals or Households; and Businesses or other for-profit organizations.

*Estimated Number of Responses:* 14,267.

*Estimated Time per Respondent:* 38 hours.

*Estimated Total Annual Burden Hours:* 517,090.

2. *Title:* Depreciation and Amortization (including Information on Listed Property).

*OMB Number:* 1545-0172.

*Form Number:* 4562.

*Abstract:* Form 4562 is used to claim a deduction for depreciation and amortization; to make the election to expense certain tangible property under Internal Revenue Code section 179; and to provide information on the business/investment use of automobiles and other listed property. The form provides the IRS with the information necessary to determine that the correct depreciation deduction is being claimed.

*Current Actions:* There are no changes being made to the form at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organization.

*Estimated Number of Respondents:* 12,313,626.

*Estimated Time per Respondent:* 40 hours.

*Estimated Total Annual Burden Hours:* 448,368,447 hours.

3. *Title:* IRC Section 6324A Lien Agreement Notice of Election of and Agreement To Special Lien in Accordance With Internal Revenue Code Section 6324A and Related Regulations.

*OMB Number:* 1545-0757.

*Form Number:* 13925.

*Abstract:* Section 6324A of the Code permits an executor of a decedent's estate to elect a lien on section 6166 property in favor of the United States in lieu of a bond or other personal liability if an election under section 6166 or 6166A. Form 13925 is used to provide valuation information annually each year thereafter until the estate tax is collected in full.

*Current Actions:* There are no changes to the form or burden.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Individuals or households, and business or other for-profit organizations.

*Estimated Number of Respondents:* 500.

*Estimated Time per Response:* 1 hour.

*Estimated Total Annual Burden*

*Hours:* 500 hours.

4. *Title:* Estimated Income Tax for Estates and Trusts.

*OMB Number:* 1545-0971.

*Form Project Number:* Form 1041-ES.

*Abstract:* Internal Revenue Code section 6654(1) imposes a penalty on trusts, and in certain circumstances, a decedent's estate, for underpayment of estimated tax. Form 1041-ES is used by the fiduciary to make the estimated tax payments. The form provides the IRS with information to give estates and trusts proper credit for estimated tax payments. For first-time filers, the form is available in an Over the Counter (OTC) version at IRS offices. For previous filers, the form is sent to them by the IRS with preprinted vouchers in the Optical Character Resolution (OCR) version.

*Current Actions:* The estimated annual responses have increased by 211,239. This creates an increase in the total estimated annual burden by 1,647,946 hours. Changes in the burden estimates previously approved by OMB, are due to corrections of filing data. This form is being submitted for renewal purposes only.

*Type of Review:* Revision of a currently approved collection.

*Affected Public:* Individuals and business or other for-profit organizations.

*Estimated Number of Responses:* 791,141.

*Estimated Time per Respondent:* 4 hrs., 29 min.

*Estimated Total Annual Burden Hours:* 3,565,694.

5. *Title:* Reporting Agent Authorization.

*OMB Number:* 1545-1058.

*Form Number:* Form 8655 and Revenue Procedure 2012-32.

*Abstract:* Form 8655 allows a taxpayer to designate a reporting agent to file certain employment tax returns electronically or on magnetic tape, to receive copies of notices and other tax information, and to submit Federal tax deposits. This form allows IRS to disclose tax account information and to provide duplicate copies of taxpayer correspondence to authorized agents. Revenue Procedure 2012-32 provides the requirements for completing and submitting Form 8655, *Reporting Agent Authorization*. An Authorization allows

a taxpayer to designate a Reporting Agent to perform certain acts on behalf of a taxpayer.

*Current Actions:* There are no changes being made to this collection at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 114,250.

*Estimated Time per Respondent:* 10 hours.

*Estimated Total Annual Burden Hours:* 819,050.

6. *Title:* Cognitive and Psychological Research Coordinated by Statistics of Income on Behalf of All IRS Operations Functions.

*OMB Number:* 1545-1349.

*Abstract:* The proposed research will improve the quality of data collection by examining the psychological and cognitive aspects of methods and procedures such as: Interviewing processes, forms redesign, survey and tax collection technology and operating procedures (internal and external in nature).

*Current Actions:* We will be conducting different opinion surveys, focus group sessions, think-aloud interviews, and usability studies regarding cognitive research surrounding forms submission or IRS system/product development.

*Type of Review:* Revision of a currently approved collection.

*Affected Public:* Individuals and businesses or other for-profit organizations.

*Estimated Number of Respondents:* 6,000.

*Estimated Time per Respondent:* 1 hour, 30 minutes.

*Estimated Total Annual Burden Hours:* 9,000.

7. *Title:* Consent To Extend the Time To Assess Tax Under Section 367—Gain Recognition Agreement.

*OMB Number:* 1545-1395.

*Form Number:* Form 8838.

*Abstract:* Form 8838 is used to extend the statute of limitations for U.S. persons who transfer stock or securities to a foreign corporation. The form is filed when the transferor makes a gain recognition agreement. This agreement allows the transferor to defer the payment of tax on the transfer. The IRS uses Form 8838 so that it may assess tax against the transferor after the expiration of the original statute of limitations. The estimates in this notice are for estates, trusts, and tax-exempt organizations filing Form 8838.

*Current Actions:* There is no change to the existing collection. However, the

estimated number of responses was reduced to eliminate duplication of burden estimates. The estimated burden for individuals filing Form 8838 is approved under OMB control number 1545–0074, and the estimated burden for businesses filing Form 8838 is approved under OMB control number 1545–0123.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Responses:* 200.

*Estimated Time per Respondent:* 8 hours, 23 minutes.

*Estimated Total Annual Burden Hours:* 1,646.

**8. Title:** Interest Computation under the look-back Method for Property Depreciated Under the Income Forecast Method.

*OMB Number:* 1545–1622.

*Form Number:* 8866.

*Abstract:* Taxpayers depreciating property under the income forecast method and placed in service after September 13, 1995, must use Form 8866 to compute and report interest due or to be refunded under Internal Revenue Code 167(g)(2). The Internal Revenue Service uses the information on Form 8866 to determine if the interest has been figured correctly.

*Current Actions:* There is no change to the form at this time. This request is being submitted for renewal purposes only.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Individuals or households, and business or other for-profit organizations.

*Estimated Number of Respondents:* 50.

*Estimated Time per Respondent:* 13 hours, 86 min.

*Estimated Total Annual Burden Hours:* 693.

**9. Title:** Communications Excise Tax; Prepaid Telephone Cards.

*OMB Number:* 1545–1628.

*Regulation Number:* Treasury Decision 8855 (REG–118620–97).

*Abstract:* Carriers must keep certain information documenting their sales of prepaid telephone cards to other carriers to avoid responsibility for collecting tax. The regulations provide rules for the application of the communications excise tax to prepaid telephone cards.

*Current Actions:* There are no changes to the regulation or burden.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 96.

*Estimated Time per Response:* 20 minutes.

*Estimated Total Annual Burden Hours:* 34 hours.

**10. Title:** Application for United States Residency Certification.

*OMB Number:* 1545–1817.

*Form Project Number:* Form 8802.

*Abstract:* An entity must use Form 8802 to apply for United States Residency Certification. All requests for U.S. residency certification must be received on Form 8802, Application for United States Residency Certification. As proof of residency in the United States and of entitlement to the benefits of a tax treaty, U.S. Government certification that you are a U.S. citizen, U.S. corporation, U.S. partnership, or resident of the United States for purposes of taxation.

*Current Actions:* There are no changes being made to the form at this time. This form is being submitted for renewal purposes only.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Individuals or households, business or other for-profit organization, and not-for-profit institution.

*Estimated Number of Responses:* 130,132.

*Estimated Time per Respondent:* 3 hrs., 38 min.

*Estimated Total Annual Burden Hours:* 472,380.

**11. Title:** Disclosure of Returns and Return Information in Connection with Written Contracts or Agreements for the Acquisition of Property or Services for Tax Administration Purposes.

*OMB Number:* 1545–1821.

*Form Number:* TD 9327.

*Abstract:* The regulations clarify that redisclosures of returns and return information by contractors to agents or subcontractors are permissible, and that the penalty provisions, written notification requirements, and safeguard requirements are applicable to these agents and subcontractors. Section 301.6103(n)–1(e)(3) of the regulations require that before the execution of a contract or agreement for the acquisition of property or services under which returns or return information will be disclosed, the contract or agreement must be made available to the IRS.

*Current Actions:* There are no changes being made to the collection at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Individuals or households, business or other for-profit organizations, and not-for-profit institutions.

*Estimated Number of Respondents:* 2,500.

*Estimated Time per Respondent:* 6 minutes.

*Estimated Total Annual Burden Hours:* 250.

**12. Title:** Relief from Ruling Process For Making Late Reverse QTIP Election.

*OMB Number:* 1545–1898.

*Revenue Procedure Number:* 2004–47.

*Abstract:* This revenue procedure provides alternative relief for taxpayers who failed to make a reverse QTIP election on an estate tax return. Instead of requesting a private letter ruling and paying the accompanying user fee, taxpayers may file certain documents with the Cincinnati Service Center directly to request relief.

*Current Actions:* There are no changes to the paperwork burden previously approved by OMB.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Individuals or households.

*Estimated Number of Respondents:* 6.

*Estimated Annual Average Time per Respondent:* 9 hours.

*Estimated Total Annual Burden Hours:* 54.

**13. Title:** Qualifying Advanced Energy Project Credit.

*OMB Number:* 1545–2151.

*Notice Numbers:* Notice 2023–18.

*Abstract:* This notice establishes the program under § 48C(e)(1) of the Internal Revenue Code to allocate \$10 billion of credits (\$4 billion of which may only be allocated to projects located in certain energy communities) for qualified investments in eligible qualifying advanced energy projects (§ 48C(e) program). A qualifying advanced energy project re-equips, expands, or establishes a manufacturing facility for the production of certain energy related property. A taxpayer must submit, for each qualifying advanced energy project: (1) a concept paper for Department of Energy (DOE) consideration and (2) a § 48C(e) application (consisting of (i) an application for DOE recommendation and (ii) an application for § 48C(e) certification). To be eligible to claim any § 48C credits allocated to a project under the § 48C(e) program, a taxpayer must also provide to DOE (1) evidence establishing that a project satisfies the certification requirements specified in Notice 2023–18 and (2) a notification that the project has been placed in service.

*Current Actions:* There is no change in the paperwork burden previously approved by OMB. This notice is being submitted for renewal purposes only.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit.

**Concept Papers**

*Estimated Number of Respondents:* 2,500.  
*Estimated Average Time per Respondent:* 2.2667 hrs. (136 minutes).  
*Estimated Total Annual Burden Hours:* 5,667 hrs.

**Application Process**

*Estimated Number of Respondents:* 2,500.  
*Estimated Average Time per Respondent:* 10.4333 hrs. (626 minutes).  
*Estimated Total Annual Burden Hours:* 26,083 hrs.

14. *Title:* Guidance under Section 529A: Qualified ABL Programs.  
*OMB Number:* 1545–2293.  
*Regulatory Number:* TD 9923.  
*Abstract:* The Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act of 2014, as part of The Tax Increase Prevention Act of 2014 (Pub. L. 113–295), added Internal Revenue Code (IRC) section 529A. IRC section 529A provides rules under which States or State agencies or instrumentalities may establish and maintain a new type of tax-favored savings program through which contributions may be made to the account of an eligible disabled individual to meet qualified disability expenses. These accounts also receive favorable treatment for purposes of certain means-tested Federal programs. Treasury Regulations section 1.529A–2 provides guidance about the requirements applicable to qualified ABLE programs and individuals seeking to establish ABLE accounts under such programs.

*Current Actions:* There is no change to the existing collection.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* States, and Individuals or households.

*Estimated Number of Responses:* 28,987.

*Estimated Time per Respondent:* 22 minutes.

*Estimated Total Annual Burden Hours:* 10,729.

15. *Title:* Taxpayer Experience Office Speaker Request.

*OMB Number:* 1545–New.

*Form Project Number:* Form 15424.

*Abstract:* If an organization would like a representative from Internal Revenue Service (IRS) Taxpayer Experience Office to speak at their event, they can complete the speaker request form. This form provides organizations with a more structured way of making the request. Also, the form streamlines the process by ensuring the IRS receives the necessary information in order to provide a speaker.

*Current Actions:* This is a request for new OMB control number.

*Type of Review:* New form.

*Affected Public:* Business, or other for-profit, and not-for-profit institutions.

*Estimated Number of Responses:* 100.

*Estimated Time per Respondent:* 10 minutes.

*Estimated Total Annual Burden Hours:* 17 hrs.

*Authority:* 44 U.S.C. 3501 *et seq.*

**Melody Braswell,**

*Treasury PRA Clearance Officer.*

[FR Doc. 2023–28538 Filed 12–26–23; 8:45 am]

**BILLING CODE 4830–01–P**

**DEPARTMENT OF THE TREASURY**

**Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Alcohol and Tobacco Tax and Trade Bureau Information Collection Requests**

**AGENCY:** Departmental Offices, U.S. Department of the Treasury.

**ACTION:** Notice of information collection; request for comment.

**SUMMARY:** The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

**DATES:** Comments should be received on or before January 26, 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](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 submissions may be obtained from Spencer W. Clark by emailing [PRA@treasury.gov](mailto:PRA@treasury.gov), calling (202) 927–5331, or viewing the entire information collection request at [www.reginfo.gov](http://www.reginfo.gov).

**SUPPLEMENTARY INFORMATION:****Alcohol and Tobacco Tax and Trade Bureau (TTB)**

(1.) *Title:* Brewer’s Notices; and Letterhead Applications and Notices Filed by Brewers.

*OMB Control Number:* 1513–0005.

*Type of Review:* Extension without change of a currently approved collection.

*Description:* The Internal Revenue Code (IRC) at 26 U.S.C. 5401 requires brewers to file a notice of intent to operate a brewery, containing the information the Secretary of the Treasury prescribes by regulation. In addition, the IRC at 26 U.S.C. 5411, 5412, 5414, 5415, and 5417, authorizes certain other uses of and operations at breweries under regulations issued the Secretary. Under those IRC authorities, the TTB regulations in 27 CFR part 25, Beer, require new brewery applicants to submit TTB F 5130.10, Brewer’s Notice, which provides TTB with information similar to that collected on a permit application; require brewers to submit an amended Brewer’s Notice when certain changes occur to the brewery’s ownership, control, location, description, and bond or operating status; and require brewers to submit letterhead applications or notices regarding certain changes in brewery operations and the destruction, loss, or return of beer. The TTB part 25 regulations also require brewers to maintain a permanent file at their premises containing their Brewer’s Notice, its incorporated supporting documents, and the related letterhead applications and notices, available for inspection by TTB officers. This information collection request is necessary to protect the revenue and ensure that brewers conduct their operations in compliance with relevant Federal laws and regulations.

*Form:* TTB F 5130.10.

*Affected Public:* Businesses or other for-profits.

*Estimated Number of Respondents:* 7,820.

*Frequency of Response:* On occasion.

*Estimated Total Number of Annual Responses:* 10,320.

*Estimated Time per Response:* Varies from 30 minutes to 3 hours.

*Estimated Total Annual Burden Hours:* 10,870.

(2.) *Title:* Application for an Alcohol Fuel Producer Permit Under 26 U.S.C. 5181.

*OMB Control Number:* 1513–0051.

*Type of Review:* Extension without change of a currently approved collection.

*Description:* Under the authority of the Internal Revenue Code at 26 U.S.C.

5181(a)(1), persons wishing to establish a distilled spirits plant for the sole purpose of producing and receiving distilled spirits for fuel use must provide an application and bond as the Secretary of the Treasury may prescribe by regulation. Under this authority, TTB has issued regulations concerning the establishment of such alcohol fuel plants (AFPs) in 27 CFR part 19, subpart X. Those regulations require that a person wishing to establish a new AFP must submit an application for an alcohol fuel producer permit using form TTB F 5110.74. The regulations also require existing AFP proprietors to use that same form to make certain amendments to their permit information. TTB F 5110.74 and its required supporting documents identify or describe, among other things, the applicant, the proposed AFP's location and layout, its stills, its size category (small, medium, or large) based on the amount of alcohol fuel to be produced annually, and the security measures to be taken to prevent theft and diversion of the distilled spirits produced. The collected information allows TTB to determine the applicant's eligibility under the IRC to obtain or modify an alcohol fuel producer permit, and to determine whether the applicant's AFP operations will conform to Federal law and regulations. Such determinations are necessary to protect the revenue as distilled spirits produced at an AFP are potable and thus subject to Federal excise tax until denatured for fuel use. Once distilled spirits are denatured at an AFP, the resulting alcohol fuel may be withdrawn free of tax as authorized by the IRC at 26 U.S.C. 5214(a)(12).

*Form:* TTB F 5110.74.

*Affected Public:* Businesses or other for-profits.

*Estimated Number of Respondents:* 75.

*Frequency of Response:* On occasion.

*Estimated Total Number of Annual Responses:* 75.

*Estimated Time per Response:* 1 hour 36 minutes.

*Estimated Total Annual Burden Hours:* 96.

*Authority:* 44 U.S.C. 3501 *et seq.*

**Spencer W. Clark,**

*Treasury PRA Clearance Officer.*

[FR Doc. 2023-28524 Filed 12-26-23; 8:45 am]

**BILLING CODE 4810-31-P**

## DEPARTMENT OF THE TREASURY

### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Employer's Quarterly Federal Tax Return

**AGENCY:** Departmental Offices, U.S. 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 U.S. Employment Tax Returns and related Forms.

**DATES:** Comments should be received on or before January 26, 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](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 submissions may be obtained from Melody Braswell by emailing [PRA@treasury.gov](mailto:PRA@treasury.gov), calling (202) 622-1035, or viewing the entire information collection request at [www.reginfo.gov](http://www.reginfo.gov).

### SUPPLEMENTARY INFORMATION:

## Internal Revenue Service (IRS)

*Title:* U.S. Employment Tax Returns and related Forms.

*OMB Number:* 1545-0029.

*Form Numbers:* CT-1, CT-1X, CT-2, SS-8, SS-8 (PR), W-2, W-2 AS, W-2 C, W-2 GU, W-2 VI, W-3, W-3 (PR), W-3 C, W-3 C (PR), W-3 SS, 940, 940 (PR), 940 SCH A, 940 SCH A (PR), 940 SCH R, 941, 941 (PR), 941 SCH B, 941 SCH B (PR), 941 SCH D, 941 SCH R, 941 SS, 941 X, 941 X (PR), 943, 943 (PR), 943 A, 943 A (PR), 943 SCH R, 943 X, 943 X (PR), 944, 944 X, 945, 945 A, 945 X, 2032, 2678, 8027, 8027 T, 8453 EMP, 8850, 8879 EMP, 8922, 8952, and 8974.

*Abstract:* These forms are used by employers to report their employment tax related activity. The data is used to verify that the items reported on the forms are correct.

*Current Actions:* The burden estimation methodology for employment tax is being transitioned from the legacy ADL model to the Taxpayer Burden Model. The changes result in a burden hour estimate of 456,000,000 hours, a decrease in total estimated time burden of 492,967,465 hours. The newly reported total out-of-pocket costs is \$18,910,000,000 and total monetized burden is \$33,540,000,000. The change related to the transition of the burden estimate from the legacy Arthur D. Little Model methodology to the RAAS Taxpayer Burden Model, is a one-time change. In addition, changes are being made to the form to be current with enacted legislation.

*Type of Review:* Revision of currently approved collections.

*Affected Public:* Employers.

*Estimated Number of Respondents:* 7,128,000.

*Estimated Hours:* 456,000,000.

*Estimated Hours per Respondent:* approximately 64 hours.

*Estimated Out-of-Pocket Costs:* \$18,910,000,000.

*Estimated Out-of-Pocket Cost per Respondent:* \$2,653.

*Estimated Monetized Burden:* \$33,540,000,000.

*Estimated Monetized Burden per Respondent:* \$4,705.

## FISCAL YEAR (FY) 2023 BURDEN TOTAL ESTIMATES FOR EMPLOYMENT TAX FORMS, SCHEDULES, AND REGULATIONS

FY2023

|                             | FY20-22       | Program change due to adjustment | Program change due to new legislation | Program change due to agency | FY23              |
|-----------------------------|---------------|----------------------------------|---------------------------------------|------------------------------|-------------------|
| Responses per year .....    | * 339,405,986 | (332,277,986)                    | 0                                     | 0                            | ** 7,128,000      |
| Burden in Hours .....       | 948,967,465   | (492,967,465)                    | 0                                     | 0                            | 456,000,000       |
| Monetized Time Burden ..... | \$0           | \$146,265,620,000                | 0                                     | 0                            | \$146,265,620,000 |

FISCAL YEAR (FY) 2023 BURDEN TOTAL ESTIMATES FOR EMPLOYMENT TAX FORMS, SCHEDULES, AND REGULATIONS—  
Continued

| FY2023                           |         |                                        |                                                |                                       |                  |
|----------------------------------|---------|----------------------------------------|------------------------------------------------|---------------------------------------|------------------|
|                                  | FY20–22 | Program change<br>due to<br>adjustment | Program<br>change<br>due to new<br>legislation | Program<br>change<br>due to<br>agency | FY23             |
| Out-of-Pocket Costs .....        | \$0     | \$18,910,000,000                       | 0                                              | 0                                     | \$18,910,000,000 |
| Total Monetized Burden *** ..... | \$0     | \$33,540,000,000                       | 0                                              | 0                                     | \$33,540,000,000 |

Source: IRS:RAAS:KDA (04–15–23)

\*FY20 responses per year is count of all forms and schedules filed under legacy A.D. Little burden estimate methodology.

\*\*FY23 responses per year is count of all employers under taxpayer-centric Research, Applied Analytics, and Statistics (RAAS) burden estimate methodology. This approach is also used for OMB 1545–0074 individuals, 1545–0123 (business entities), and 1545–0047 (tax-exempt organizations).

\*\*\* 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.(Authority: 44 U.S.C. 3501 *et seq.*)**Melody Braswell,***Treasury PRA Clearance Officer.*

[FR Doc. 2023–28448 Filed 12–26–23; 8:45 am]

BILLING CODE 4830–01–P

**DEPARTMENT OF VETERANS  
AFFAIRS****Veterans and Community Oversight  
and Engagement Board, Notice of  
Meeting, Amended**The Department of Veterans Affairs  
(VA) gives notice under the Federal  
Advisory Committee Act (FACA), 5U.S.C. ch. 10, that the Veterans and  
Community Oversight and Engagement  
Board (Board) will meet on January 31–  
February 1, 2024, at the VA Greater Los  
Angeles Healthcare System  
(VAGLAHS), 11301 Wilshire Boulevard,  
Building 500, Room 1281, Los Angeles,  
CA. The meeting sessions will begin and  
end as follows:

| Date(s)                | Time(s)                                           | Location(s)                                                | Open ses-<br>sion |
|------------------------|---------------------------------------------------|------------------------------------------------------------|-------------------|
| January 31, 2024 ..... | 8:30 a.m. to 12 p.m.—Pacific Daylight Time (PDT). | VAGLAHS Facility/WEBEX link and call-in information below. | Yes.              |
| January 31, 2024 ..... | 12 p.m. to 5 p.m.—(PDT) .....                     | VAGLAHS Facility .....                                     | No.               |
| February 1, 2024 ..... | 8:30 a.m. to 3 p.m.—PDT .....                     | VAGLAHS Facility/WEBEX link and call-in information below. | Yes.              |

The meetings are open to the public and will be recorded. Sessions are open to the public, except during the time the Board is conducting tours of VA facilities. Tours of VA facilities are closed, to protect Veterans' privacy and personal information, in accordance with 5 U.S.C 552b(c)(6).

The Board was established by the West Los Angeles Leasing Act of 2016 on September 29, 2016. The purpose of the Board is to provide advice and make recommendations to the Secretary of Veterans Affairs on identifying the goals of the community and Veteran partnership; improving services and outcomes for Veterans, members of the Armed Forces, and the families of such Veterans and members; and on the implementation of the Draft Master Plan approved by VA Secretary on January 28, 2016, and on the creation and implementation of any successor master plans.

On Wednesday, January 31, 2024, from 8:30 a.m. to 12 p.m. PDT, the Board will meet in open session with key staff of VAGLAHS. The Advisory

Committee Management Office will present, FACA 101 training. The agenda will include opening remarks from the Committee Chair, Executive Sponsor, and other VA officials. There will be a general update from the Director of VAGLAHS. The Designated Federal Officer will provide an update on the status of recommendation packages. The Board will receive an overview of matters associated with the new Hospital Construction from Office of Construction and Facilities Management. From 12:30 p.m. to 5 p.m. PDT, the Board will convene with a closed tour of VAGLAHS. Tours of VA facilities are closed to protect Veterans' privacy and personal information, in accordance with 5 U.S.C 552b(c)(6).

On Thursday February 1, 2024, the Board will reconvene in open session from 8:30 a.m. to 3 p.m. PDT, at the VAGLAHS facility. The Office of Asset Enterprise Management will provide a comprehensive presentation on the Principal Developer's contractual relationships, terms, conditions, and commitments for permanent supportive

housing to include any negotiations regarding Town Center development construction. The Office of General Counsel, Real Property Group will provide an overview of policies that govern the rights to public access on VA medical and residential facilities.

Time will be allocated for receiving public comments on February 1, at 1:45 p.m. PDT. Individuals wishing to make public comments should contact Chihung Szeto at (562) 708–9959 or at [Chihung.Szeto@va.gov](mailto:Chihung.Szeto@va.gov) and are requested to submit a 1–2-page summary of their comments for inclusion in the official meeting record. Only those members of the public (first 12 public comment registrants) who have confirmed registrations to provide public comment will be allowed to provide public comment. In the interest of time, each speaker will be held to 5-minute time limit. The Committee will accept written comments from interested parties on issues outlined in the meeting agenda, from February 2 through February 9, 2024. Members of the public not able to attend in person

can attend the meeting via WEBEX by joining from the meeting link below. The link will be active from 8 a.m. to 12 p.m. PDT on January 31, 2024, and from 8 a.m. to 2:30 p.m. PDT on February 1, 2024.

#### Day 1

Veteran Community Oversight and Engagement Board (VCOEB)  
Meeting (January 31–February 1, 2024)

Hosted by Walsh, Margaret K. (ERPI)  
<https://veteransaffairs.webex.com/veteransaffairs/j.php?MTID=m58910f86b693a33153cc01165f45e6c2>

Wednesday, January 31, 2024 8 a.m. | 4 hours | (UTC–05) Pacific Time (US & Canada)

Meeting number: 2761 648 5320

Password: CvkBYhd\*482

Agenda: TBD

Join by video system

Dial 27616485320@  
[veteransaffairs.webex.com](https://veteransaffairs.webex.com)

You can also dial 207.182.190.20 and enter your meeting number.

Join by phone

14043971596 USA Toll Number  
Access code: 276 164 85320

#### Day 2

Veteran Community Oversight and Engagement Board (VCOEB)  
Meeting (January 31–February 1, 2024)

Hosted by Walsh, Margaret K. (ERPI)  
<https://veteransaffairs.webex.com/veteransaffairs/j.php?MTID=med643bde1cd1f2d501fac1d2a5a3236d8>

Thursday, February 1, 2024 8 a.m. | 9 hours | (UTC–05) Pacific Time (US & Canada)

Meeting number: 2760 511 3108

Password: GpDAyH24k\*5

Agenda: TBD

Join by video system

Dial 27605113108@  
[veteransaffairs.webex.com](https://veteransaffairs.webex.com)

You can also dial 207.182.190.20 and enter your meeting number.

Join by phone

14043971596 USA Toll Number  
Access code: 276 051 13108

Any member of the public seeking additional information should contact Mr. Eugene W. Skinner Jr. at (202) 631–7645 or at [Eugene.Skinner@va.gov](mailto:Eugene.Skinner@va.gov).

Dated: December 21, 2023.

**Jelessa M. Burney,**

*Federal Advisory Committee Management Officer.*

[FR Doc. 2023–28546 Filed 12–26–23; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0932]

### Agency Information Collection

**Activity: Application for Approval of an Institution of Higher Learning Facility; Institution of Higher Learning—Program Submission List; Application for Approval of Organizations Other Than Institutions of Higher Learning; Non-Institution of Higher Learning—Program Submission List**

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection and allow 60 days for public comment in response to the notice.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before February 26, 2024.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System (FDMS) at [www.Regulations.gov](http://www.Regulations.gov) or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to [nancy.kessinger@va.gov](mailto:nancy.kessinger@va.gov). Please refer to “OMB Control No. 2900–0932” in any correspondence. During the comment period, comments may be viewed online through FDMS.

#### FOR FURTHER INFORMATION CONTACT:

Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20420, (202) 266–4688 or email [maribel.aponte@va.gov](mailto:maribel.aponte@va.gov). Please refer to “OMB Control No. 2900–0932” in any correspondence.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites

comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA’s functions, including whether the information will have practical utility; (2) the accuracy of VBA’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 respondents, including through the use of automated collection techniques or the use of other forms of information technology.

**Authority:** Sec. 11, Public Law 117–333; 38 U.S.C. 3672 and 3674.

**Title:** Application for Approval of an Institution of Higher Learning Facility, VA Form 22–10287; Institution of Higher Learning—Program Submission List, VA Form 22–10287a; Application for Approval of Organizations Other Than Institutions of Higher Learning, VA Form 22–10288; Non-Institution of Higher Learning—Program Submission List, VA Form 22–10288a.

**OMB Control Number:** 2900–0932.

**Type of Review:** Extension.

**Abstract:** Sec. 11, Public Law 117–333, enacted January 5, 2023, amended title 38 U.S.C. 3672, “Approval of Courses”. This provision of the law required VA to create and design two new uniform applications and any accompanying documentation for approval of courses of educational programs, and for those forms to be available for use by October 1, 2023. The Program Office created those four forms to meet the amended criteria of 38 U.S.C. 3672.

These forms are completed by educational institutions, training establishments and other organizations seeking approval of one or more programs of study for the payment of VA Education benefits rendered to eligible beneficiaries. The institutions submit the forms to the State Approving Agencies (SAAs) of jurisdiction for their review. By law, each SAA has the authority to make such approvals in their respective state. VA contracts with SAAs in each state for this approval assessment work.

Prior to the new legislative requirement, each SAA used their own application form(s), making it difficult for training institutions operating in more than one state to readily complete the process, as different states required different information. The amendment to title 38 U.S.C. 3672 now ensures uniformity in the program approval process across all states.

The uniform SAA applications are used by educational and training

institutions to apply for initial approval of their programs for payment of VA benefits; to make revisions of existing program approvals, or to submit withdrawals of approved programs no longer being offered. The institutions complete either the VA Form 22–10287, or the VA Form 22–10288, based on the type of training offered at their institution.

Institutions of Higher Learning (IHLs) will use the VA Form 22–10287 exclusively, and all other types of educational training establishments will use the VA Form 22–10288. Each institution may use the associated “Program List”, VA Form 22–10287a or VA Form 22–10288a to add, revise, or remove any program offered. In some cases, institutions may use their own documentation to make administrative revision(s) such as changes of address, banking information, or ownership changes, when all program offerings remain the same.

The VA Forms 22–10287 and 22–10288, and any associated program list or documentation are submitted by the educational or training institution to the SAA of jurisdiction for review.

Currently the educational institution sends the requests for program approval to the SAAs either via email, direct mail, an SAA portal, or as directed by the SAA. The SAA makes an approval decision and notifies the institution accordingly. The SAA then sends the approval package to the VA Education Liaison Representative (ELR) of jurisdiction. Program reviews will be conducted in the near future to determine the availability of advanced automation technology for submitting the applications between educational and training institutions, SAAs and VA, which may help to reduce future burdens.

The approval package includes the application/form received from the training institution, the SAA’s findings, and any additional related information that supports payment of GI Bill benefits, as well as a copy of the notification sent to the training institution. The VA Education Liaison Representative (ELR) reviews the approval package for completeness, or requests additional information, if required. After the package is deemed

complete, the ELR processes the package by entering the required information into VA’s internal “Web Enabled Approval Management System (WEAMS)”. The ELR provides the report to the training institution, which contains the final approval information. The ELR then sends a copy to the SAA of jurisdiction. Finally, the approval data entered in WEAMS by the ELR is then used by Veterans Claims Examiners to adjudicate education benefit claims.

*Affected Public:* Individuals or Households.

*Estimated Annual Burden:* 70,400 hours.

*Estimated Average Burden Time per Respondent:* 8 hours or 480 minutes.

*Frequency of Response:* Once.

*Estimated Number of Respondents:* 8,800.

By direction of the Secretary.

**Maribel Aponte,**

*VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.*

[FR Doc. 2023–28364 Filed 12–26–23; 8:45 am]

**BILLING CODE 8320–01–P**



# FEDERAL REGISTER

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## Part II

### Department of Health and Human Services

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Centers for Medicare & Medicaid Services

42 CFR Parts 405, 476, and 489

Medicare Program: Appeal Rights for Certain Changes in Patient Status;  
Proposed Rule

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

#### 42 CFR Parts 405, 476, and 489

[CMS-4204-P]

RIN 0938-AV16

#### Medicare Program: Appeal Rights for Certain Changes in Patient Status

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would implement an order from the Federal district court for the District of Connecticut in *Alexander v. Azar* that requires HHS to establish appeals processes for certain Medicare beneficiaries who are initially admitted as hospital inpatients but are subsequently reclassified as outpatients receiving observation services during their hospital stay and meet other eligibility criteria.

**DATES:** To be assured consideration, comments must be received at one of the addresses provided below, by February 26, 2024.

**ADDRESSES:** In commenting, please refer to file code CMS-4204-P.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to <http://www.regulations.gov>. Follow the “Submit a comment” instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-4204-P, P.O. Box 8013, Baltimore, MD 21244-8013.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-4204-P, Mail Stop C4-26-05, 7500 Security Boulevard, Baltimore, MD 21244-1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

#### FOR FURTHER INFORMATION CONTACT:

David Danek, [david.danek@cms.hhs.gov](mailto:david.danek@cms.hhs.gov), for issues related to the retrospective process.

Janet Miller, [janet.miller@cms.hhs.gov](mailto:janet.miller@cms.hhs.gov), for issues related to the prospective process.

Shaheen Halim, [shaheen.halim@cms.hhs.gov](mailto:shaheen.halim@cms.hhs.gov) for issues related to Quality Improvement Organization review.

**SUPPLEMENTARY INFORMATION:** *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: <http://www.regulations.gov>. Follow the search instructions on that website to view public comments. CMS will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the individual will take actions to harm the individual. CMS continues to encourage individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments.

#### I. Executive Summary

The purpose of this proposed rule is to establish appeals processes to comply with a court order issued in the case *Alexander v. Azar*, 613 F. Supp. 3d 559 (D. Conn. 2020), *aff’d sub nom.*, *Barrows v. Becerra*, 24 F.4th 116 (2d Cir. 2022). The proposed processes would apply to certain Medicare beneficiaries who are initially admitted as hospital inpatients but are subsequently reclassified as outpatients receiving observation services during their hospital stay and meet other eligibility criteria.

The proposed processes would consist of the following:

- *Expedited appeals:* We are proposing an expedited appeals process for certain beneficiaries who disagree with the hospital’s decision to reclassify their status from inpatient to outpatient receiving observation services (resulting in a denial of coverage for the hospital stay under Part A). Eligible beneficiaries would be entitled to request an expedited appeal regarding that decision prior to discharge from the hospital. Appeals would be conducted by a Beneficiary & Family Centered Care—Quality Improvement Organization (BFCC-QIO).

- *Standard appeals:* We are proposing that beneficiaries who do not file an expedited appeal would have the opportunity to file a standard appeal (that is, an appeal requested by a

beneficiary eligible for an expedited appeal, but filed outside of the expedited timeframes) regarding the hospital’s decision to reclassify their status from inpatient to outpatient receiving observation services (resulting in a denial of coverage for the hospital stay under Part A). Under our proposal, these standard appeals will follow similar procedures to the expedited appeals process but without the expedited timeframes to file and for the QIO to make decisions.

- *Retrospective appeals:* We are proposing a retrospective review process for certain beneficiaries to appeal denials of Part A coverage of hospital services (and certain SNF services, as applicable), for specified inpatient admissions involving status changes that occurred prior to the implementation of the prospective appeals process, dating back to January 1, 2009. Consistent with existing claims appeals processes, we are proposing that Medicare Administrative Contractors (MACs) will perform the first level of appeal, followed by Qualified Independent Contractor (QIC) reconsiderations, Administrative Law Judge (ALJ) hearings, review by the Medicare Appeals Council, and judicial review.

#### II. Background

This proposed rule sets forth new appeals procedures to implement the court order in *Alexander v. Azar*, 613 F. Supp. 3d 559 (D. Conn. 2020), *aff’d sub nom.*, *Barrows v. Becerra*, 24 F.4th 116 (2d Cir. 2022). In this order, the court directed the Department of Health and Human Services (HHS) to “permit all members of the . . . class to appeal the denial of their Part A coverage” and to establish appeal procedures for certain beneficiaries in Medicare Part A and B (“Original Medicare”) who are initially admitted to a hospital as an inpatient by a physician but whose status during their stay is changed to outpatient by the hospital, thereby effectively denying Part A coverage for their hospital stay.<sup>1</sup> In some cases, the status change also

<sup>1</sup> The terms of the court order refer to denials of Part A coverage. Consistent with the court order, the appeals processes proposed in this rule do not extend to enrollees in Medicare Advantage (MA) plans. Medicare Advantage plan enrollees have existing rights that afford enrollees the right to appeal a plan organization determination where the plan refuses to provide or pay for services, in whole or in part, including the type or level of services, that the enrollee believes should be furnished or arranged for by the MA organization. 42 CFR 422.560 through 422.634. For example, if an MA plan refuses to authorize an inpatient admission, the enrollee may request a standard or expedited plan reconsideration of that organization determination. 42 CFR 422.566(b), 422.568 through 422.572.

affects the availability of Part A coverage for a beneficiary's post-hospital extended care services furnished in a skilled nursing facility (SNF). The court imposed additional conditions on the right to appeal as described in detail in this proposed rule.

The court's order requires new appeal procedures be afforded to the following class: Medicare beneficiaries who, on or after January 1, 2009—

- Have been or will have been formally admitted as a hospital inpatient;
- Have been or will have been subsequently reclassified by the hospital as an outpatient receiving "observation services";<sup>2</sup>
- Have received or will have received an initial determination or Medicare Outpatient Observation Notice (MOON)<sup>3</sup> indicating that the observation services are not covered under Medicare Part A; and
- Either—(1) were not enrolled in Part B coverage at the time of their hospitalization; or (2) stayed at the hospital for 3 or more consecutive days but were designated as inpatients for fewer than 3 days, unless more than 30 days has passed after the hospital stay without the beneficiary's having been admitted to a skilled nursing facility. Medicare beneficiaries who meet the requirements of the foregoing sentence but who pursued an administrative appeal and received a final decision of the Secretary before September 4, 2011, are excluded from the class.

The court determined that beneficiaries who are members of the class described previously have been deprived of due process and ordered the following:

- Class members shall have an opportunity to appeal the denial of their Part A coverage.
- Class members who have stayed, or will have stayed, at a hospital for 3 or more consecutive days, but who were designated as inpatients for fewer than

3 days, shall have the right to an appeal through an expedited appeals process substantially similar to the existing expedited process for challenging hospital discharges.

- Class members shall be permitted to argue that their inpatient admission satisfied the relevant criteria for Part A coverage—for example, that the medical record supported a reasonable expectation of a medically necessary two-midnight stay at the time of the physician's initial inpatient order, in the case of a post-Two Midnight Rule hospital stay—and that the hospital utilization review committee's (URC) determination to the contrary was therefore erroneous. If a class member prevails, then for the purposes of determining Part A benefits, including both Part A hospital coverage and Part A SNF coverage, the beneficiary's reclassification as an outpatient that resulted from the URC's erroneous determination shall be disregarded.

- For class members whose due process rights were violated, or will have been violated, prior to the availability of the procedural protections as previously set forth, such beneficiaries shall be afforded a meaningful opportunity to appeal the denial of their Part A coverage, as well as effective notice of this right.

In addition, on December 9, 2022, the district court issued an "Order Clarifying Judgment" with respect to the claims for outpatient hospital services received by beneficiaries who were enrolled in Part B of the program at the time such services were furnished. In this clarifying order, the judge stated that while he intended to provide a meaningful opportunity for class members whose due process rights were violated to appeal the denial of Part A coverage, he also stressed the need to provide a remedy for class members who endured undercompensated stays at skilled nursing facilities. He further stated that, since class members with Part B coverage had much of their past hospital stays paid for by such coverage, he did not intend to require the unwinding of previously approved Part B outpatient hospital claims so they could be reprocessed as Part A claims. The clarification states that if a class member enrolled in Part B coverage at the time of their hospitalization prevails in an appeal of a claim, then an adjustment of payment for the underlying hospital services (including any applicable deductible and coinsurance amounts) is not required, and Part A payment for covered SNF services may be made without any adjustment to the payment for the underlying hospital services.

In section III.A. of this proposed rule, we describe the proposed procedures that would be available to members of the class described previously (hereinafter, eligible beneficiaries) to appeal denials of Part A coverage of hospital services (and certain SNF services, as applicable), for specified inpatient admissions involving status changes that occurred prior to the implementation of the prospective appeals process, dating back to January 1, 2009. We refer to this as the retrospective appeals process. In section III.B. of this proposed rule, we describe the expedited and standard appeals procedures that would be available prospectively (meaning to beneficiaries whose status is changed after the effective date of this rule and after the implementation and availability of the procedures established by the rule) to eligible beneficiaries who, among other things, are admitted as hospital inpatients and are reclassified by hospitals as outpatients receiving observation services.

Once we publish a final rule regarding the procedures for these new appeals, we intend to specify the implementation date for filing appeal requests for retrospective and prospective appeals. When the prospective process is fully implemented, eligible beneficiaries who are hospitalized and receive notice of their appeal rights and wish to pursue an appeal will be expected to utilize the prospective procedures (proposed 42 CFR 405.1210 through 405.1212). Eligible beneficiaries who are hospitalized and entitled to an appeal under these procedures prior to the implementation date of the prospective process will be able to utilize the retrospective appeals process, subject to the filing limitation proposed in § 405.932(a)(2)(i)(B).

Accordingly, we are proposing new retrospective and prospective appeals processes to implement the court's order as detailed in this proposed rule.

### III. Provisions of the Proposed Regulations

#### A. Retrospective Appeals

##### 1. Overview

The retrospective appeals required by the court order constitute a new process under the Medicare program, as the appeals would be based on alleged entitlement to coverage for services that were not actually billed to the program on a claim. That is, under existing claims appeals processes for the Original Medicare program, a beneficiary is asking for a determination on whether specific items and services billed on a claim for payment should

<sup>2</sup>For the purposes of these proposed procedures, a beneficiary is considered an outpatient receiving observation services when the hospital changes a beneficiary's status from inpatient to outpatient while the beneficiary is in the hospital and the beneficiary subsequently receives observation services following a valid order for such services. See proposed 42 CFR 405.931(h).

<sup>3</sup>As explained in 42 CFR 489.21(y), the Medicare Outpatient Observation Notice (MOON) is a written notice furnished by a hospital to Medicare beneficiaries who receive observation services as an outpatient for more than 24 hours. The notice explains why the beneficiary is not an inpatient and also explains the consequences of being an outpatient rather than an inpatient. A copy of the notice is available to download at [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=202212-0938-016](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202212-0938-016).

have been covered and paid, not whether items and services should have been billed or whether there should have been coverage when there is no claim. Sections 205(a), 1871, and 1872 of the Social Security Act (the Act) provide the Secretary authority to establish regulations to carry out the administration of the insurance programs under Title XVIII of the Act.<sup>4</sup>

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<sup>4</sup> Section 205(a) of the Act, incorporated into Title XVIII by section 1872 of the Act, provides that the Secretary “shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions[.]” Section 1871 of the

The new retrospective appeals procedures required under the court order do not fit into the existing claims appeals process for Original Medicare claims established under section 1869 of the Act. However, in our view, these new procedures would have similarities to the longstanding claims appeals procedures with which Medicare beneficiaries are familiar. Accordingly, we are proposing new procedures to govern the retrospective appeals process

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Act states that the Secretary shall prescribe such regulations as may be necessary to carry out the administration of the insurance programs under this title.

in proposed 42 CFR 405.931 through 405.938 that would be based, in large part and to the extent appropriate, on the existing claims appeals procedures in the existing provisions in 42 CFR part 405 Subpart I (as authorized under section 1869 of the Act).

We provide more detail about the proposed procedures at each level of the administrative appeals process following this overview, and we have included flowcharts to depict the overall proposed appeals process for retrospective reviews (in Figure 1) and prospective reviews (in Figure 2).

**BILLING CODE 4120-01-P**

FIGURE 1: PROPOSED RETROSPECTIVE REVIEW PROCESS

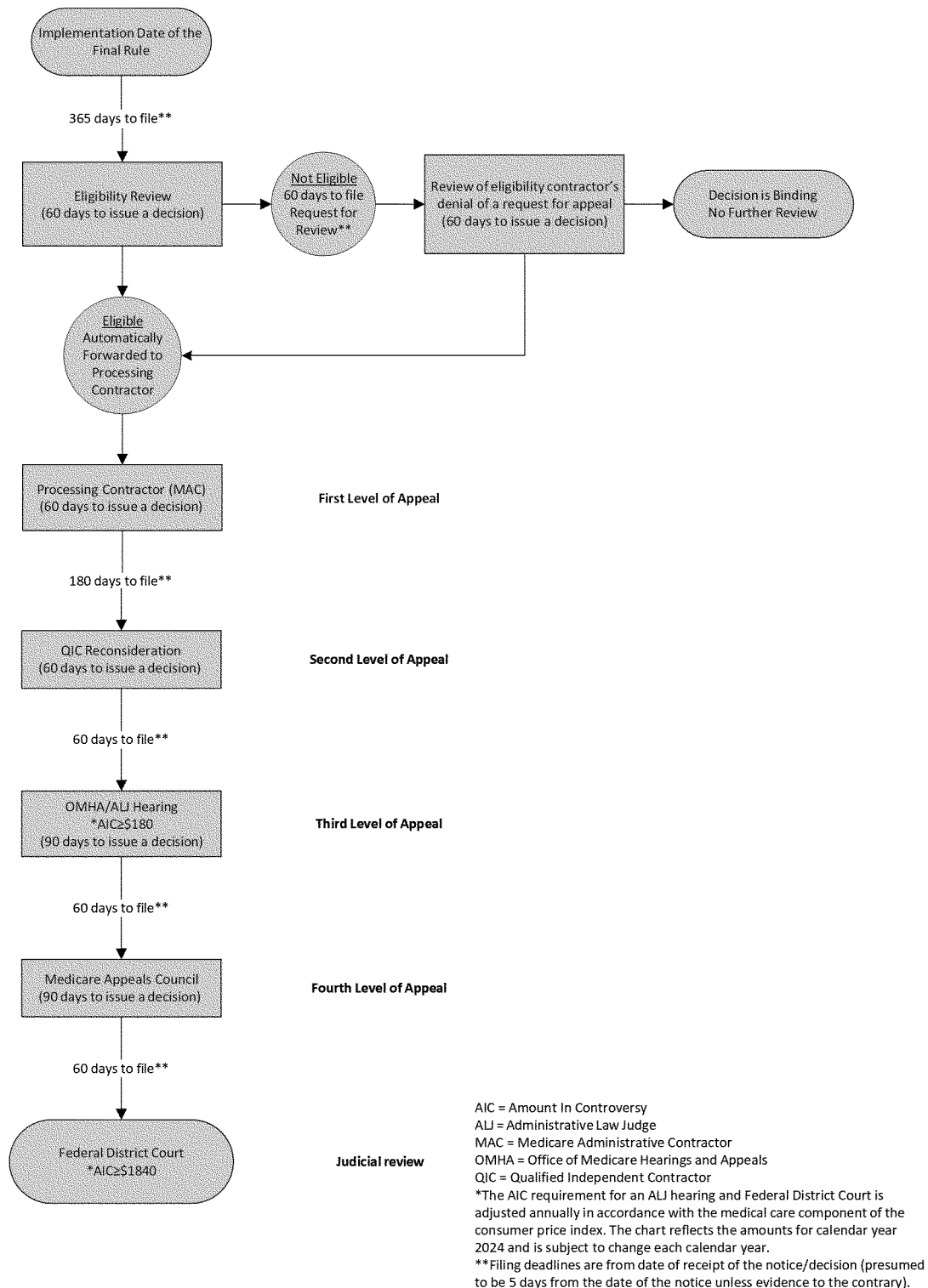
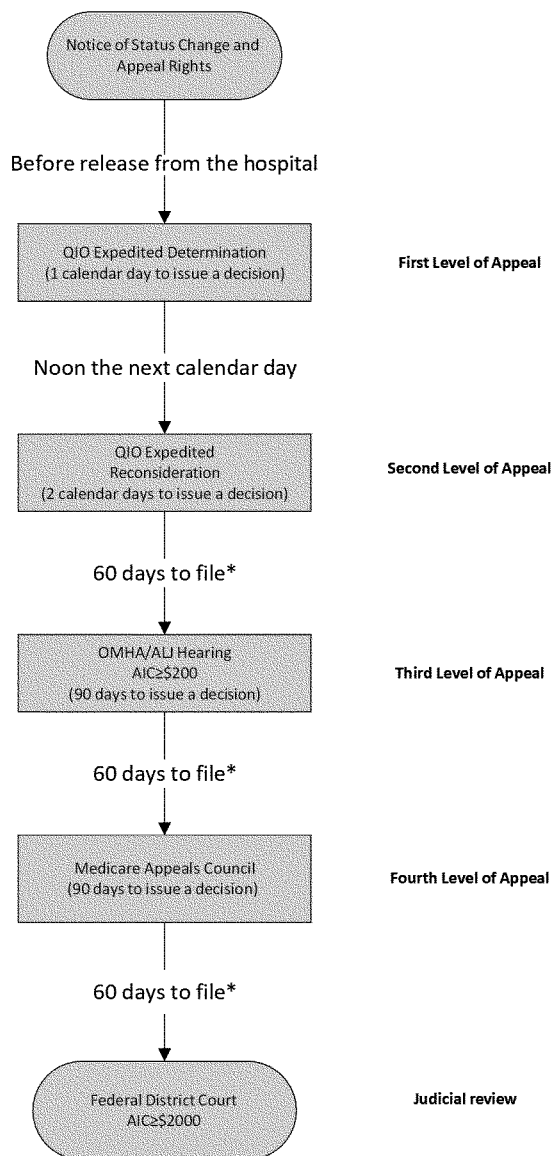


FIGURE 2: PROPOSED EXPEDITED (PROSPECTIVE) APPEALS PROCESS



AIC = Amount In  
Controversy ALJ =  
Administrative Law  
Judge  
OMHA = Office of Medicare Hearings and Appeals

**BILLING CODE 4120-01-C**

In § 405.931(b)(2), we are proposing to define the term “eligibility contractor” to mean the contractor that would serve as a single point of contact for incoming retrospective appeal requests. As proposed in § 405.932(a) through (e), the eligibility contractor would determine if

the request for appeal is valid, including whether the request is timely and contains the required elements for an appeal. In addition, we are proposing that the eligibility contractor would determine whether the individual submitting the request (or the individual

for whom a request is submitted, in the case of a request filed by a representative) meets the definition of a class member as defined by the court, and is, thus, an eligible party entitled to an appeal under the terms of the court order. The eligibility contractor would

then either deny or approve each appeal request received and notify the individual (or their representative) of the determination. For those requests that are denied (that is, the beneficiary has not demonstrated s/he meets the definition of a class member and is not eligible for an appeal, or the appeal request is not otherwise valid), we are proposing in § 405.932(e) that the individual filing the request (or their representative) would have an opportunity to correct any errors and/or demonstrate why the appeal request should be approved. An individual's request to review a denial must be received by the eligibility contractor within 60 calendar days of the individual's receipt of the denial notice under proposed § 405.932(e)(2). For appeal requests that are approved (that is, the beneficiary satisfies the requirements for class membership—and thus, is determined to be an eligible party—and the request is valid), the eligibility contractor would forward those requests to the processing contractor to conduct the first level appeal.

In § 405.931(b)(3), we are proposing that the processing contractor would perform the first level of appeal. The processing contractor would be the MAC that currently has jurisdiction over Part A claims for the hospital at which the beneficiary was initially admitted prior to being subject to a status change. As proposed in § 405.932(f) through (i), processing contractors would generally follow existing procedures that govern redeterminations (42 CFR 405.940 through 405.958), as appropriate, except as we have otherwise proposed in § 405.932.

In § 405.934, we are proposing that eligible parties (or their representatives) who are dissatisfied with the processing contractor's appeal decision would have the opportunity to request a reconsideration to be performed by a QIC. We are proposing that the QICs would generally utilize existing procedures that govern reconsiderations (42 CFR 405.960 through 405.978), as appropriate, except as we have otherwise proposed in § 405.934.

Following a reconsideration, in § 405.936 we are proposing that eligible parties (or their representatives) who are dissatisfied with the reconsideration would be able to request a hearing before an Administrative Law Judge (ALJ) (or review by an attorney adjudicator) if the claims under appeal meet the amount in controversy requirement.<sup>5</sup> In § 405.936(c), we are

proposing a new method of calculating the amount in controversy that reflects the differences between these new appeals and typical claims appeals under existing procedures. In addition, under proposed § 405.938, eligible parties (or their representatives), would be able to request review by the Medicare Appeals Council (hereinafter, Council). As with the first two levels of appeal, we are proposing that these new appeals before an ALJ (or attorney adjudicator) and the Council would generally follow existing procedures in 42 CFR 405.1000 through 1140, as appropriate, except as we have otherwise proposed in §§ 405.936 through 405.938. Eligible parties would also be able to request judicial review under the existing provisions in 42 CFR 405.1136.

In § 405.932(a)(2), we are proposing to limit the time to file a request for a retrospective appeal to 365 calendar days following the implementation date of the final rule. We have provided notice of the pending appeals process for class members since July 2022 on both *Medicare.gov* and *CMS.gov* and we will continue to update those websites with information as this rulemaking proceeds and as we begin to implement the final rule. Thus, when this rulemaking is concluded and procedures are finalized, effective, and operational, we believe we would have afforded eligible beneficiaries ample time to gather necessary documentation in anticipation of filing appeal requests.

## 2. Party Status, Authorized Representatives, and Appointed Representatives

The court order instructs HHS to establish new appeals procedures for certain beneficiaries, specifically, beneficiaries who are members of the defined class, as previously described in the overview and in proposed § 405.931(b). The court's decision noted that some class members suffered financial or other consequences as a result of the change in their status from inpatient to outpatient receiving observation services, including having to pay for the costs of post-hospital extended care services in a SNF out of pocket because they did not satisfy the statutory requirement for SNF coverage of having a 3 consecutive day qualifying inpatient stay (see section 1861(i) of the Act). In addition, other class members had to pay for their hospital services themselves because they lacked Medicare Part B coverage. The court

directed HHS to afford class members a right to appeal certain denials of Part A coverage which are defined later in this section. The court ordered an appeal process be made available to those class members who did not have such a process available if their hospital stays, dating back to January 1, 2009, met the conditions of the order. Accordingly, in § 405.931(b)(1) we are proposing to define an eligible party as an individual who meets the definition of a class member in *Alexander v. Azar*. In that case, the court adopted the following class definition: a Medicare beneficiary who, on or after January 1, 2009—

- Was formally admitted as a hospital inpatient;

- While in the hospital was subsequently reclassified as an outpatient receiving observation services (as defined in § 405.931(h));

- Has received an initial determination (as defined in § 405.920) or a Medicare Outpatient Observation Notice (MOON) (as described in § 489.20(y)) indicating that the observation services are not covered under Medicare Part A; and

- Either—

- ++ Was not enrolled in the Supplementary Medical Insurance program (that is, Medicare Part B coverage) at the time of beneficiary's hospitalization; or

- ++ Stayed at the hospital for 3 or more consecutive days but was designated as an inpatient for fewer than 3 days, unless more than 30 calendar days has passed after the hospital stay without the beneficiary's having been admitted to a SNF.

An eligible party would be entitled to request an appeal under the proposed retrospective process.

In contrast, the court's decision did not include providers as class members entitled to additional appeals procedures and did not require HHS to afford new appeal rights to providers in these new appeals proceedings. Accordingly, in § 405.931(b) and (c), we are proposing to limit party status in these new appeals to beneficiaries who meet the definition of a class member as specified in the court order.

As we believe some beneficiaries who are members of the class may require assistance with their appeal requests, we are proposing to apply existing rules regarding appointed representatives and authorized representatives (see §§ 405.902 and 405.910) to these new appeals.<sup>6</sup> There may also be some

<sup>5</sup> The amount in controversy requirement for CY 2024 is \$180 for a hearing before an Administrative

Law Judge, and \$1,840 for judicial review. See <https://www.govinfo.gov/content/pkg/FR-2023-09-29/pdf/2023-21500.pdf>.

<sup>6</sup> Appointed representative means an individual appointed by a party to represent the party in a Medicare claim or claim appeal. Authorized

situations in which a class member has died since their hospitalization and, as applicable, admission to a SNF. Our existing rules in § 405.906(a)(1) permit certain successors in interest to file appeals on behalf of a deceased beneficiary. Thus, in § 405.931(d)(3) we are proposing to apply those rules to deceased class members who would have been eligible to request an appeal under the proposed procedures for retrospective appeals. However, contrary to existing claims appeals procedures, in § 405.931(d)(1)(i) we are proposing to exclude providers from representing beneficiaries in these new appeals, and we are proposing to prohibit the assignment of appeal rights to providers as well. Since the decision to change a patient's status is made by the hospital, we have concerns that the interests of a class member could conflict with the interests of a hospital or SNF, and we are concerned that a class member's challenge to their denial of Part A coverage resulting from a change in status from inpatient to outpatient receiving observation services may not be appropriately represented by the hospital that initiated that change, determined that outpatient services were appropriate for the beneficiary, and in most cases, previously received payment for outpatient services. We have similar concerns regarding representation by SNFs that already received payment for the SNF services at issue. Unlike most existing claims appeals, where the primary issue under review is the denied coverage and payment for items and/or services billed on a claim, the issue on appeal under these procedures is whether services meet the relevant criteria for coverage and payment under the inpatient hospital benefit under Part A of the program rather than under the Part B outpatient benefit where payment was, in most cases,<sup>7</sup> previously made to the hospital, and the consequences of that decision on coverage of SNF services. Moreover, as we are implementing procedures required under the court's order under the

representative means an individual authorized under State or other applicable law to act on behalf of a beneficiary involved in the appeal (for example, a beneficiary's legal guardian, surrogate decision-maker for an incapacitated beneficiary, or an SSA-appointed representative payee). The authorized representative will have all of the rights and responsibilities of a beneficiary or party, as applicable, throughout the appeals process and does not need a further appointment.

<sup>7</sup> We acknowledge that payment by Medicare would not have been made in appeals brought by a beneficiary who was not enrolled in Part B at the time of hospitalization. In those situations, the beneficiary would have been responsible for payment for outpatient services furnished by the hospital.

Secretary's rulemaking authority in sections 205(a), 1871, and 1872 of the Act, we believe the provisions of section 1869 of the Act guide, but do not explicitly govern, the appeals procedures for the new retrospective appeals ordered by the court and proposed in this proposed rule.

We are proposing to include a definition of "unrepresented beneficiary" applicable to appeals under proposed §§ 405.931 through 405.938. In the existing claims appeals process in 42 CFR part 405 Subpart I, certain procedural requirements do not apply to an unrepresented beneficiary. However, that term is not defined in existing regulations. Therefore, in § 405.931(d)(5), we propose to define an unrepresented beneficiary as a beneficiary who is an eligible party and: (1) has not appointed a representative under § 405.910; or (2) has an authorized representative as defined in § 405.902;<sup>8</sup> or (3) has appointed as its representative, a member of the beneficiary's family, a legal guardian, or an individual who routinely acts on behalf of the beneficiary, such as a family member or friend who has a power of attorney; or (4) in the case of a deceased beneficiary, the appeal request is filed by an eligible party who meets the conditions set forth in § 405.906(a)(1).

We are also proposing to incorporate certain existing policies that would apply in the new appeals procedures for the convenience of appellants and adjudicators. For example, in § 405.931(f), we propose that the date of receipt of a notice or decision sent by the eligibility contractor, processing contractor or other appeals adjudicator is presumed to be 5 calendar days following the date on the notice unless there is evidence to the contrary. In addition, in § 405.931(g) we propose that for the purposes of determining whether a beneficiary has a qualifying inpatient stay for SNF eligibility and for eligibility as a class member, days are counted consistent with existing policy in § 409.30 (that is, 3 consecutive calendar days starting with the admission day but not counting the discharge day).

<sup>8</sup> Typically, an authorized representative will be a legal guardian, representative payee or someone acting under state law on behalf of a beneficiary (for example, a family member with a durable power of attorney). Often these authorized representatives are family members or other individuals who are unfamiliar with the technical requirements of the existing claim appeals process. We believe it is reasonable to treat appeals filed by authorized representatives under these proposed procedures, like other existing claim appeals filed by family members (that is, as if the appeal was filed by an unrepresented beneficiary).

In proposed § 405.931(h), we explain that for the purposes of determining eligibility for an appeal under these procedures, a beneficiary is considered an outpatient receiving observation services when the hospital changes a beneficiary's status from inpatient to outpatient while the beneficiary is in the hospital and the beneficiary subsequently receives observation services following a valid order for such services.

### 3. Appeal Requests and Determinations of Eligibility by the Eligibility Contractor

In § 405.932, we are proposing to channel all retrospective appeal requests from eligible parties through a single point of contact, the eligibility contractor. We are proposing, in § 405.932(a)(2) for a retrospective appeal, that the appeal request filed by an eligible party (or their representative) must be received by the eligibility contractor within 365 calendar days from the implementation date specified when this rule is finalized.<sup>9</sup> Details regarding the deadline to file an appeal and where such appeals should be filed would be posted to [Medicare.gov](https://www.medicare.gov) once the retrospective appeals process is operational. A single point of contact will relieve beneficiaries of the burden of determining which contractor is currently responsible for claims processed many years ago in order to file their appeal request. In addition, due to the complexity of the requirements for determining eligibility as a class member for an appeal, we believe having a single point of contact would promote consistency in such determinations and would provide a better overall experience for eligible beneficiaries pursuing their appeal rights.

We anticipate eligible parties (or their representatives) will provide relevant information to demonstrate their eligibility as a member of the class afforded appeal rights in the court order as proposed in § 405.932(a) through (c), including medical records that may serve to document certain conditions of eligibility under the court order. Medical records would also assist in determining whether the beneficiary received observation services following the reclassification from inpatient to

<sup>9</sup> For example, under these proposed procedures, if the final rule specifies an implementation date of April 1, 2025, an eligible party who was hospitalized after January 1, 2009 (through the implementation date of the prospective appeals process) would have until March 31, 2026, to file a request for appeal with the eligibility contractor. Details regarding the filing location will be specified once the retrospective process is operational.

outpatient receiving observation services. However, we understand the challenges beneficiaries and their representatives may face in obtaining and producing such information in situations where significant time may have passed since a beneficiary was hospitalized. Therefore, we are proposing in § 405.932(c)(2), that the eligibility contractor would work with MACs, eligible parties, and providers, whenever necessary, to attempt to obtain the information needed to make such determinations. In our existing claims appeals process, contractors routinely seek records from providers to assist beneficiaries filing appeals when the beneficiary is unable to provide records needed to adjudicate the appeal.

In § 405.932(b), we are proposing that eligible parties (or their representatives) provide, in writing, certain minimum basic information in their appeal request, so the eligibility and processing contractors may identify the prior claims filed for the hospital stay and SNF services, as applicable, that serve as the basis for the retrospective appeal. These required elements for an appeal request (which are similar to existing requirements for requesting a redetermination under § 405.944) include the beneficiary's name, Medicare number (the number on the beneficiary's Medicare card), name of the hospital and the dates of hospitalization, and the name of the skilled nursing facility and the dates of stay (as applicable). If the appeal includes SNF services not covered by Medicare, the written request must also include an attestation to the out-of-pocket payment(s) made by the beneficiary for such SNF services and must include documentation of payments made to the SNF for such services. CMS would prepare a model form that appellants may use to file requests for a retrospective appeal under these provisions. Once the appeal process is operational, this notice would be available online at *Medicare.gov* to download and complete and would be available to request in printed or accessible form by calling 1-800-MEDICARE.

We are also proposing in § 405.932(b)(2) that eligible parties attest to their out-of-pocket costs (other than customary cost sharing paid to a third-party payer or insurer) paid for SNF services not covered by Medicare because the statutory requisite, 3 consecutive day inpatient hospital stay, was not met. (We note that for the purposes of determining coverage of SNF services under section 1861 of the Act, inpatient hospital days are counted in accordance with longstanding,

existing policy in § 409.30, that is, a patient must have a qualifying inpatient stay of at least 3 consecutive calendar days starting with the admission day but not counting the discharge day. See proposed § 405.931(g).)

In cases where a third-party payer or insurer covered all of the cost of SNF services of an eligible party, we are proposing that such services be excluded from consideration in the retrospective appeals process. (Payments for SNF services made by a family member would not be considered payment by a third-party payer but would be considered out-of-pocket payment for the eligible party.) In light of the clarification to the court order indicating that the new appeal processes are intended to provide a remedy for class members who already endured uncompensated or undercompensated stays at skilled nursing facilities, we do not believe the court order requires the readjudication of such paid services under a Medicare appeal process if payment for that care is provided by another insurer.<sup>10</sup> Moreover, readjudicating these claims potentially puts Medicare trust fund dollars at risk for making duplicate payments to providers for previously compensated care, as Medicare does not have authority to compel refunds with respect to payments made by third-party payers to providers. In addition, focusing our efforts on situations involving payments for denied services made by beneficiaries (or their families) focuses resources for appeals for beneficiaries (or their families) that paid out of pocket for the cost of care.

We are proposing in § 405.932(d) that the eligibility contractor would be responsible for determining the validity of requests for appeal under these provisions, that is, whether the request is filed by an eligible party, is timely filed, and contains the required elements for a valid request specified in § 405.932(b)(1) and (2). The eligibility contractor would issue a decision to approve or deny such requests. In proposed § 405.932(d)(1)(ii), we would require the eligibility contractor to issue a written decision within 60 calendar days of receipt of a valid appeal request from the eligible party (or their representative). We propose in § 405.932(d)(2) that approved requests (meaning those meeting both eligibility

<sup>10</sup> However, if an eligible party paid out of pocket for some or all of the SNF services, including situations where a denial by a third-party insurer resulted in the beneficiary making out of pocket payments for some or all of the SNF services, then those SNF services that resulted in out of pocket payments would be eligible for an appeal under these proposed processes.

and filing requirements), would be forwarded to the processing contractor (the MAC with jurisdiction over the hospital claim), and the processing contractor would perform the appeal. Under proposed § 405.932(d)(3), requests that are not eligible for an appeal or do not meet the requirements under proposed in §§ 405.931 and 405.932 would be denied. However, we are proposing that individuals receiving a notice of denial of an appeal request would have an opportunity to request a review of the denial by the eligibility contractor in order to provide additional clarification, or correct any deficiencies in the filing, under the provisions proposed in § 405.932(e). Our proposed approach to handling requests that are ineligible for an appeal differs slightly from how similar appeal requests are handled under existing claims appeals procedures in § 405.952. Under existing rules, such requests are dismissed, and dismissals may be reviewed and vacated by the adjudicator who issued the dismissal or appealed to the next level adjudicator to determine if the dismissal was appropriate. However, given the complexity of the eligibility requirements, the age of the service in question and in many cases, the lack of a claim to review, in our view the most effective and efficient approach to resolving eligibility concerns is to keep these disputes with the eligibility contractor, requiring review by an individual not involved with the initial denial determination.

#### 4. Conduct of Appeals by Processing Contractors

Currently, MACs perform the first level of administrative appeal for Medicare claims (see 42 CFR 405.940 through 405.958). We are proposing a similar process for these new appeals, utilizing existing procedures, as appropriate, with MACs performing the first level of retrospective appeals under this rule. Specifically, we are proposing that the MAC that currently has jurisdiction over Part A claims from the relevant hospital would be responsible for conducting the retrospective appeal as the processing contractor. Where we believe the procedures for the new retrospective appeals would need to differ from existing claims appeals procedures, we are proposing new processes. For example, in § 405.931(b)(1) and (c), we are proposing that party status for these appeals be limited to the eligible class members (or their authorized representatives).

In § 405.932(f)(1), we are proposing that if the processing contractor determines there is necessary information missing from the appeal

case file, the processing contractor would attempt to obtain the information from the provider and/or the eligible party (or their representative), as applicable. We are proposing that the processing contractor afford entities up to 60 calendar days to submit requested information. If the requested information is not submitted in the specified timeframe, we propose that the processing contractor would make a decision based on the information available.

In proposed § 405.932(f)(3), we are requiring processing contractors to issue a written decision within 60 calendar days of receipt of a valid appeal request from the eligibility contractor. However, in cases where the processing contractor needs additional information to conduct the appeal from the eligible party (or their representative) or a provider, in § 405.932(f)(1), we are proposing that the time between the request for such information and when it is received (up to 60 calendar days) would not count towards the 60-day adjudication timeframe. If the requested information is not sent to the processing contractor, then we are proposing that the time afforded by the contractor for submission of the information would not count towards the adjudication timeframe. In effect, the 60-day timeline on which the processing contractor must make its decision will be tolled during the period between the date the processing contractor requests information from the provider and/or the eligible party and the later of the date that information is received or the deadline by which the information is requested has passed.

Under proposed § 405.932(f) and (g), based on the information available, the processing contractors would determine whether the hospital admission, and as applicable, SNF services, satisfied the relevant criteria for Part A coverage at the time of the admission, notwithstanding subsequent reclassification by the hospital, and whether the hospital services, and as applicable, SNF services, should have been covered under Part A. If the processing contractor determines that the hospital admission and, as applicable, SNF services satisfied the relevant criteria for Part A coverage at the time services were furnished, it would render a favorable decision and would send written notice to the eligible party (or their representative). The notice would explain the rationale for, and effect of, the decision, similar to existing notices for redeterminations.

In § 405.932(g)(4), when applicable, we are proposing that processing contractors would send notice of a

favorable decision to the SNF that furnished services to the beneficiary in order to inform the SNF of the reason for the decision and the effect of the decision. In addition, under § 405.932(g)(2) and (6), processing contractors would send SNFs notice of a partially favorable decision where the beneficiary's hospital inpatient admission would have met the criteria for Part A coverage, but the SNF services subsequently received by the beneficiary do not meet the relevant criteria for Part A coverage (for example, if the services are determined not medically reasonable and necessary under § 1862(a)(1)(A) of the Act). The notice of a partially favorable decision sent to a SNF informs the SNF of the reason the hospital services were determined to meet the relevant criteria for Part A coverage, and the reasons the SNF services were determined not to be covered under Part A. We are proposing that the processing contractor also explain that the notice is being sent to the SNF for informational purposes only, and that only the eligible party (or the eligible party's representative) may appeal the decision to the QIC under proposed § 405.934. An eligible party may appeal a partially favorable decision with respect to coverage of SNF services to the QIC under proposed § 405.934 in the same manner as unfavorable decisions with respect to Part A coverage of the hospital services. In addition, in § 405.932(g)(5), with respect to an appeal filed by a beneficiary not enrolled in Medicare Part B at the time of hospitalization, we are proposing that processing contractors would send notice of a favorable decision to the hospital to inform the hospital of the reason for the decision and the effect of the decision.

Providers are reminded that under sections 1814 and 1866 of the Act, §§ 489.20 and 489.21, and the terms of the provider agreement, providers may not collect any amounts for covered services other than applicable coinsurance and deductible. Accordingly, in the case of a favorable appeal decision that involves SNF services paid for by the beneficiary, we are proposing in § 405.932(g)(4) and (h)(2)(i) that SNFs would be required to refund any payments collected from the beneficiary for the covered SNF services (see 42 CFR part 489 Subpart D regarding the requirements for handling of incorrect collections). Similarly, in the case of a favorable appeal decision rendered for a beneficiary who was not enrolled in Medicare Part B at the time of hospitalization, we are proposing in § 405.932(g)(5) and (h)(2)(ii) that

hospitals would be required to refund any payments collected for the outpatient hospital services.

Furthermore, we believe that the Medicare statute requires a provider of services to submit new claims in order to determine the amount of benefits due for covered services and to receive payment under Part A of the program. Under section 1814(a)(1) of the Act, and 42 CFR 424.33, and 42 CFR 424.51, payment for Part A services furnished to an individual may be made only to a provider of services eligible to receive payment under section 1866 of the Act after a request for payment (a claim) is filed with Medicare by the provider. The clarifying order issued by the court stated that the program is not required to unwind previously filed Part B outpatient hospital claims in order to make payment for covered SNF services in the case of a favorable decision (meaning for the purposes of effectuating a favorable decision, any existing Part B outpatient hospital claim will not be reopened or revised by the MAC to reflect an appeal decision that the class member's hospital admission satisfied the relevant criteria for Part A coverage at the time of the admission, and the hospital will not be required to submit a claim for inpatient services under Medicare Part A<sup>11</sup>). However, the clarification only applies to beneficiary class members who were enrolled in Medicare Part B at the time of hospitalization. Thus, in the case of a beneficiary class member who was not enrolled in Medicare Part B at the time of hospitalization, we are proposing in § 405.932(h)(2)(ii) that following a favorable appeal decision and making any required refund for payments received for covered services, the hospital may submit a new Part A inpatient claim to Medicare in order to determine the appropriate amount of benefits and for Medicare to make payment for inpatient hospital services under Part A. We are also proposing in § 405.932(h)(2)(ii) that the claim must be submitted by the hospital within 180 calendar days after the hospital receives its notice of a favorable appeal decision for the eligible party.

In addition, if a favorable appeal decision includes eligible SNF services that are covered, in § 405.932(h)(2)(i), we are proposing that following a refund of amounts collected from the beneficiary, the SNF may then submit a claim (or claims) for such services to Medicare in order to determine the

<sup>11</sup> We note that a previously paid claim is still subject to reopening under § 405.980 for other reasons unrelated to the appeal decision (for example, if payment for the claim was procured by fraud or similar fault).

appropriate amount of benefits, and for Medicare to make payment for the covered SNF services. The SNF claim, following a favorable appeal decision (that is, the hospital admission satisfied the relevant criteria for Part A coverage as an inpatient at the time of admission and the SNF services met relevant Part A coverage criteria), would be processed without regard to the hospital's erroneous reclassification of the beneficiary as an outpatient receiving observation services. We are also proposing in § 405.932(h)(2)(i) that the SNF submit the claim within 180 calendar days after receiving the notice of a favorable appeal decision for the eligible party. CMS would issue operating instructions related to the submission of new claims by a SNF and a hospital when this rulemaking is finalized and effective.

If the processing contractor determines that the hospitalization did not meet applicable Part A inpatient coverage requirements, we are proposing in § 405.932(g)(3) the MAC would send notice of its unfavorable decision to the eligible party (or their representative). If the processing contractor determines that the hospital admission meets applicable Part A inpatient coverage requirements, but the SNF services eligible for the appeal do not meet applicable coverage requirements, we are also proposing in § 405.932(g)(2) that the processing contractor would send notice of its partially favorable decision to the eligible party (or their representative). The notice of an unfavorable or partially favorable decision would inform the eligible party (or their representative) of the right to request a reconsideration with a QIC under proposed § 405.934 and would provide detailed information about the requirements for filing the request and where the request must be filed.

#### 5. Conduct of Reconsiderations by Qualified Independent Contractors

In § 405.934(a), we are proposing that the second level of retrospective appeals be performed by QICs. As with the first level of appeal, we are proposing that the second level of retrospective appeal generally follow existing procedures for reconsiderations outlined in §§ 405.960 through 405.978, as appropriate, except as specified in the provisions proposed in this rule. Under proposed § 405.934(a), eligible parties (or their representative) who are dissatisfied with a MAC's unfavorable decision in proposed § 405.932(g)(2) may file a request for reconsideration with the QIC within 180 calendar days of receipt of the MAC's notice. The MAC's decision

would specify the elements required for the request for reconsideration, and we propose that those elements would be the same as the existing requirements for a reconsideration set forth in § 405.964. Requests for reconsideration under § 405.934 that are untimely or incomplete would be handled consistent with existing procedures for dismissals in § 405.972.

Consistent with the conduct of reconsiderations under existing procedures in § 405.968, the QICs shall review all evidence furnished during the first level of appeal and any additional evidence submitted with the request for reconsideration. Under proposed § 405.934(c), the QIC determines if the inpatient admission, and as applicable, SNF services, satisfied the relevant criteria for Part A coverage at the time the services were furnished, then the QIC issues notice of its decision to the eligible party (or their representative).

We are proposing in § 405.934(c)(3) that the QIC mail or otherwise transmit notice of its decision within 60 calendar days of receipt of the request for reconsideration. We are also proposing to apply existing procedures in § 405.970 regarding the calculation of decision-making timeframes, and the provisions regarding the escalation of cases for a QIC's failure to meet such timeframes, as appropriate, to these new appeals. In proposed § 405.934(c)(4), the notice of a favorable decision sent by the QIC to the eligible party (or their representative) would include an explanation of the decision and information regarding the effect of the decision, as well as other information similar to that found in existing reconsideration notices under § 405.974.

In § 405.934(c)(5), when applicable, we are proposing that QICs would send notice of a favorable reconsideration to the SNF that furnished services to the beneficiary in order to inform the SNF of the reason for its decision and the effect of the decision. In addition, in § 405.934(c)(6), with respect to an appeal filed by a beneficiary not enrolled in Medicare Part B at the time of hospitalization, we are proposing that the QIC would send notice of a favorable decision to the hospital to inform the hospital of the reason for its decision and the effect of the decision. In addition, we are proposing that the QIC would send the SNF notice of a partially favorable decision where the inpatient admission meets the criteria for Part A coverage, but the SNF services do not meet the relevant criteria for Part A coverage (for example, if the services are determined not medically reasonable and necessary under section

1862(a)(1)(A) of the Act). The notice of a partially favorable decision sent to a SNF would inform the SNF of the reason the hospital services were determined to meet the relevant criteria for Part A coverage, and the reason the SNF services were determined not to be covered under Part A. We are proposing that the QIC also explain that the notice is being sent to the SNF for informational purposes only, and that only the eligible party may appeal the decision to an ALJ under § 405.936. An eligible party would have the right to appeal such a partially favorable decision with respect to the coverage of SNF services under proposed § 405.936 in the same manner as unfavorable decisions with respect to Part A coverage of the hospital services.

Consistent with the processes following a favorable first level of appeal decision, as previously described, in the case of a beneficiary who was not enrolled in Medicare Part B at the time of hospitalization, we are proposing in § 405.934(d)(2)(ii) that following a favorable appeal decision and making any required refund for payments received for covered services, the hospital may submit a new Part A inpatient claim to Medicare in order to determine the appropriate amount of benefits, and for Medicare to make payment for inpatient hospital services. We are also proposing in § 405.934(d)(2)(ii) that the claim must be submitted by the hospital within 180 calendar days after the hospital receives its notice of favorable reconsideration for the eligible party.

In addition, if a favorable appeal decision includes eligible SNF services that are covered, in § 405.934(d)(2)(i), we are proposing that following a refund of amounts collected from the beneficiary, the SNF may then submit a claim (or claims) for such services in order to determine the appropriate amount of benefits, and that Medicare would make payment for the covered SNF services. We are also proposing in § 405.934(d)(2)(ii) that the SNF submit the claim within 180 calendar days after receiving the notice of a favorable appeal decision for the eligible party.

If the QIC determines that the hospitalization did not meet applicable Part A inpatient coverage requirements, we are proposing in § 405.934(c)(2) that the QIC would send notice of its unfavorable decision to the eligible party (or their representative). If the QIC determines that the hospital admission meets applicable Part A inpatient coverage requirements, but the SNF services eligible for the appeal do not meet applicable coverage requirements, we are also proposing in § 405.934(c)(2)

that the QIC would send notice of its partially favorable decision to the eligible party (or their representative). The notice of an unfavorable or partially favorable decision would inform the eligible party (or their representative) of the right to request a hearing before an ALJ (or review by an attorney adjudicator) under proposed § 405.936 and would provide detailed information about the requirements for filing the request and where the request must be filed.

#### 6. Conduct of Hearings Before Administrative Law Judges and Decisions by Administrative Law Judges or Attorney Adjudicators

Currently, the third level of claims appeals are performed by ALJs and attorney adjudicators within the HHS Office of Medicare Hearings and Appeals (OMHA). As with the first two levels of appeal, we are proposing in § 405.936(b) that the third level of retrospective appeal generally follow existing procedures for claims appeals in §§ 405.1000 through 405.1063, as appropriate, except as specified in the provisions proposed in this rule. Under proposed § 405.936(a), eligible parties (or their representative) who are dissatisfied with either a QIC's dismissal of a request for reconsideration, or an unfavorable reconsideration in proposed § 405.934(c)(2), may file a request in writing with the OMHA within 60 calendar days of receipt of the QIC's notice. The reconsideration notice would specify the elements required for the request for hearing, and we propose that these elements would mirror existing requirements for appeal requests in § 405.1014(a)(1). We are also proposing that untimely or incomplete requests would be handled under existing procedures for dismissals in § 405.1014(e) and § 405.1052.

As we previously noted, in some respects, the nature of the appeals required by the court order dictate a new implementation approach that cannot utilize existing procedures. For example, ordinarily under current claims appeals procedures, adjudicators review claims that contain denied items or services to determine whether items and/or services billed on a Medicare claim are covered and whether payment may be made. In addition, under § 405.1006, billed charges on claims submitted to Medicare serve as the basis for determining the amount in controversy required for an appeal at the third level of appeal and for judicial review in federal district court. However, under this proposed process, with respect to the relevant hospital

stay, there is no inpatient hospital claim and no denial of billed services.

For retrospective appeals, we are proposing to incorporate the existing amount in controversy requirement required for a hearing before an ALJ or judicial review in federal court consistent with section 1869(b)(1)(E) of the Act and § 405.1006.<sup>12</sup> However, with respect to the methodology for calculating the amount in controversy, we cannot utilize the existing method for claims appeals in § 405.1006(d)(1) to calculate such amount. The procedures in existing regulations require the use of actual charges from the disputed claim(s) billed to Medicare, and in the scenario giving rise to appeal rights in the court order, no Part A inpatient claim will have been filed. Without a Part A inpatient claim, there are no billed charges for the denied Part A coverage to serve as the basis for calculating the amount in controversy. Other methods in § 405.1006(d) for calculating the amount in controversy are designed for appeals that are factually different than these new appeals, and thus, we do not believe it would be appropriate to adopt other existing calculation methods to apply them here.

In the case of a beneficiary who was enrolled in Medicare Part B at the time of hospitalization, we believe it would be appropriate to utilize the billed charges on a claim filed by the hospital for Part B outpatient hospital services as the basis for calculating the amount in controversy for these new appeals. Since we do not have a Part A inpatient claim for the hospital services furnished to the beneficiary, we do not have available to us the costs of the denied Part A services that are at issue in the appeal to serve as the basis for the amount in controversy. While the billed charges for outpatient services will differ from those that would have been billed on an inpatient claim, we believe it is reasonable to use the billed charges on the approved outpatient claim for the purposes of determining the amount in controversy, and in § 405.936(c)(2) we propose including those charges in calculating the amount in controversy for a hearing before an ALJ and for judicial review in federal district court. We emphasize that, as explained in section III.A.4 of this proposed rule, for

<sup>12</sup> For calendar year 2024, the minimum amount in controversy for a hearing at the OMHA level is \$180, and for judicial review the minimum amount in controversy is \$1,840. These amounts are calculated annually in accordance with section 1869(b)(1)(E) of the Act, and notice of the minimum amounts for the following calendar year is published in the **Federal Register** and is available on <https://www.cms.gov/medicare/appeals-grievances/fee-for-service/third-level-appeal>.

beneficiaries enrolled in Part B at the time of hospitalization, we will not make an adjustment of payment related to the previously submitted Part B outpatient hospital claim (including any deductible and coinsurance amounts) when effectuating a favorable appeal decision. Nevertheless, we are proposing that the billed charges for the outpatient hospital services would be included in determining whether the amount in controversy requirement is met because we do not have available to us the costs of the denied Part A hospital services at issue in the appeal and because we believe that for purposes of determining the amount in controversy it is appropriate to attribute a dollar amount to the hospital services at issue, even if ultimately we would not adjust the payment for the hospital services.

For any billed SNF services that are included in the appeal, the billed charges on a claim submitted by the SNF would be utilized in calculating the amount in controversy. However, in cases where a claim was not submitted by the SNF because the services were not covered, the amount the beneficiary was charged for SNF services, as reflected in an itemized statement received by the beneficiary or evidence of payments made by the beneficiary to the SNF, would be used in determining the amount in controversy.

Thus, we are proposing in § 405.936(c)(2) that the billed charges on the Part B outpatient claim and the billed charges for any SNF claim at issue in the appeal, or the billed charges paid by the beneficiary in the absence of a claim, would serve as the amount in controversy for hearings before an ALJ and for judicial review in federal district court. Furthermore, as the cost sharing for a Part A inpatient claim will be different than the cost sharing for the Part B outpatient claim, we are not reducing the amount in controversy by any applicable cost sharing, or other payments made for the Part B outpatient hospital claim as we do for existing calculation methods. Nor are we factoring in any cost sharing or payments made related to the SNF claim, as applicable, to reduce the amount in controversy.

For beneficiaries who are eligible parties because they were not enrolled in Medicare Part B at the time of their hospitalization, in most situations, we do not believe hospitals would have submitted a claim to the program for Part B outpatient services. Therefore, for beneficiaries who were not enrolled in Part B at the time of hospitalization and did not have a claim submitted to Medicare on their behalf for hospital

outpatient services, we are proposing in § 405.936(c)(3) to calculate the amount in controversy by using the hospital's billed charges to the beneficiary for such outpatient services. We believe the hospital's charges to the beneficiary, as reflected in an itemized statement received by the beneficiary, or evidence of payments made to the hospital, are a reasonable estimation of the financial impact of the denial of Part A coverage to the beneficiary and the amount at issue in the appeal. In addition, the billed charges for SNF services, if any, paid by the beneficiary would also be used in computing the amount in controversy for appeals involving beneficiaries not enrolled in Medicare Part B at the time of hospitalization.

Consistent with the conduct of appeals before ALJs and attorney adjudicators under existing procedures in §§ 405.1028 through 405.1030, we are proposing that ALJs and attorney adjudicators review all evidence furnished during the first two levels of appeal and any additional evidence submitted by the beneficiary with the request for hearing or request for review of a dismissal. Under proposed § 405.936(d), the ALJ or attorney adjudicator determines if the inpatient admission, and as applicable, SNF services, satisfied the relevant criteria for Part A coverage at the time the services were furnished, and then issues notice of the decision to the eligible party (or their representative). In proposed § 405.936(d)(2), we explain that the notice of an unfavorable decision or partially favorable decision (that is, a decision where Part A coverage is approved for the hospital admission, but Part A coverage is not approved for applicable SNF services that are at issue in the appeal) would be sent to the eligible party (or their representative). In proposed § 405.936(d)(3), the notice of a favorable decision sent to the eligible party (or their representative) would include an explanation of the decision and information regarding the effect of the decision, as well as other information similar to that found in existing notices under § 405.1046.

In § 405.936(d)(4), when applicable, we are proposing that the ALJ or attorney adjudicator would send notice of a favorable reconsideration to the SNF that furnished services to the beneficiary in order to inform the SNF of the reason for the decision and the effect of the decision. In addition, in § 405.936(d)(5), with respect to an appeal filed by a beneficiary not enrolled in Medicare Part B at the time of hospitalization, we are proposing that the ALJ or attorney adjudicator would

send notice of a favorable decision to the hospital to inform the hospital of the reason for the decision and the effect of the decision. In the case of a partially favorable decision, we are proposing in § 405.936(d)(2) that notice would be sent to the SNF as an informational copy, and in proposed § 405.936(d)(6) we specify the elements included in the notice sent to the SNF. The notice of a partially favorable decision sent to a SNF would inform the SNF of the reason the hospital services were determined meet the relevant criteria for Part A coverage, and the reason the SNF services were determined not to be covered under Part A. We are proposing that the ALJ or attorney adjudicator also explain that the notice is being sent to the SNF for informational purposes only, and that only the eligible party may appeal the decision to the Council under § 405.938.

In § 405.936(d)(7), we are proposing to utilize the existing procedures in § 405.1016 regarding the calculation of timeframes within which ALJs and attorney adjudicators must issue decisions, including applicable waivers and extensions to the adjudication timeframe, and the option for an eligible party (or their representative) to escalate an appeal for failure to issue a decision in the applicable timeframe.

Consistent with the processes at the first two levels of appeal, as previously described, in the case of a beneficiary who was not enrolled in Medicare Part B at the time of hospitalization, we are proposing in § 405.936(e)(2)(ii) that following a favorable appeal decision and making any required refund for payments received for covered services, the hospital may submit a new Part A inpatient claim to Medicare in order to determine the appropriate amount of benefits, and for Medicare to make payment for inpatient hospital services. We are also proposing in § 405.936(e)(2)(ii) that the claim must be submitted by the hospital within 180 calendar days after the hospital receives its notice of favorable decision for the eligible party.

In addition, if a favorable appeal decision includes eligible SNF services that are covered, in § 405.936(e)(2)(i), we are proposing that following a refund of amounts collected from the beneficiary, the SNF may then submit a claim (or claims) for such services in order to determine the appropriate amount of benefits, and for Medicare to make payment for the covered SNF services. We are also proposing in § 405.936(e)(2)(i) that the SNF submit the claim within 180 calendar days after receiving the notice of a favorable appeal decision for the eligible party.

If the ALJ or attorney adjudicator determines that the hospital admission did not meet applicable Part A inpatient coverage requirements, we are proposing in § 405.936(d)(2) and (d)(3)(vii) the ALJ or attorney adjudicator would send notice of the unfavorable decision to the eligible party (or their representative). If the ALJ or attorney adjudicator determines that the hospital admission meets applicable Part A inpatient coverage requirements, but the SNF services eligible for the appeal do not meet applicable coverage requirements, we are also proposing in § 405.936(d)(2) that the ALJ or attorney adjudicator would send notice of its partially favorable decision to the eligible party (or their representative). The notice of an unfavorable or partially favorable decision would inform the eligible party (or their representative) of the right to request review by the Council under proposed § 405.938 and would provide detailed information about the requirements for filing the request and where the request must be filed.

In proposed § 405.936(e) and (f), we explain the effect of an ALJ or attorney adjudicator decision as binding on the eligible party unless it is further appealed or reopened. The reopening of an ALJ or attorney adjudicator decision would be processed under existing procedures in § 405.980(d) and (e). The effect of an ALJ or attorney adjudicator decision is consistent with the effect of decisions at other levels in the appeals process, as previously described. We are proposing that an eligible party (or their representative) who is dissatisfied with an unfavorable decision by an ALJ or attorney adjudicator may request review by the Council under proposed § 405.938(a), and the ALJ or attorney adjudicator decision notice would provide detailed information about the process for filing such a request.

#### 7. Conduct of Review by the Medicare Appeals Council

Under § 405.938, we are proposing that retrospective reviews at the fourth level of appeal would be conducted by the Council and would generally follow existing procedures for claims appeals in §§ 405.1100 through 405.1130, except as specified in the provisions proposed in this rule. Under proposed § 405.938(a), eligible parties (or their representative) who are dissatisfied with either a dismissal of a request for hearing by an ALJ or attorney adjudicator, or an unfavorable ALJ or attorney adjudicator decision in proposed § 405.936(d)(2) may file a request in writing with the Council within 60 calendar days of receipt of the

notice from the ALJ or attorney adjudicator. The request must include the elements specified in the notice issued by the ALJ or attorney adjudicator, and we propose to use the existing requirements for requests for Council review in § 405.1112. We are proposing that untimely or incomplete requests would be handled under existing procedures in §§ 405.1100 through 405.1116.

We are proposing that the Council would review appeal requests and requests for review of dismissal actions under existing procedures in §§ 405.1100 through 405.1132, as applicable. Under proposed § 405.938(c)(1), the Council makes a decision or remands the case to an ALJ or attorney adjudicator. We are proposing in § 405.938(c)(2) that the Council may adopt, modify, or reverse the decision of an ALJ or attorney adjudicator, consistent with existing Council procedures. In § 405.938(c)(3), we are proposing the Council would send notice of its decision, or its remand to an ALJ or attorney adjudicator, to the eligible party (or their representative), and we propose that a decision would contain information regarding the effect of a favorable decision. In the case of an unfavorable or partially favorable decision, we are proposing that the Council include information about filing a request for judicial review under existing procedures in 405.1136. We also explain in proposed § 405.938(c)(3) that a partially favorable decision issued by the Council refers to a determination that the inpatient admission satisfied the relevant criteria for Part A coverage, but the SNF services did not satisfy the relevant criteria for Part A coverage. Notice of a partially favorable decision is sent to the eligible party (or their representative), and to the SNF that furnished services under appeal, but for informational purposes only.

In addition, we are proposing in § 405.938(c)(4), when applicable, the Council would send notice of a decision favorable to an eligible party to the hospital and the SNF that furnished services. The notice would explain the effect of the decision as specified in proposed § 405.938(d), including the provider's obligation to refund payments collected for services determined to be covered following the appeal. The notice would also explain, as applicable, the process for a SNF or a hospital to submit a claim for the covered services to determine the amount of benefits due following the refund of payments previously collected.

In § 405.938(c)(5), we are proposing to utilize the existing procedures in

§ 405.1100 regarding the calculation of timeframes within which the Council must issue decisions, including applicable waivers and extensions to the adjudication timeframe,<sup>13</sup> and the option for an eligible party (or their representative) to escalate an appeal for failure to issue a decision in the applicable timeframe.

In proposed § 405.938(e) and (f), we explain that a Council decision is considered final and binding on the eligible party unless it is reopened and revised, or in the case of an unfavorable decision, a Federal district court issues a decision modifying the Council decision. The reopening of a Council decision would be processed under existing procedures in § 405.980(d) and (e). The effect of a favorable Council decision is consistent with the effect of decisions at other levels in the appeals process, as previously described. We are proposing in § 405.938(e)(1) that an eligible party (or their representative) who meets the requirements to escalate a case under § 405.1132 or is dissatisfied with an unfavorable decision by the Council, may request judicial review consistent with existing procedures in §§ 405.1132 through 405.1136. Based on its existing procedures, the Council's decision notice would provide detailed information about the process for filing such a request.

## 8. Judicial Review

We are proposing in § 405.938(f)(1) that eligible parties dissatisfied with a final decision of the Council whose claims meet the amount in controversy requirement in proposed § 405.936(c) may request judicial review in Federal district court under the existing procedures in § 405.1136. In addition, under proposed § 405.938(f)(2), an eligible party (or their representative) who satisfies the amount in controversy requirement in proposed § 405.936(c) and is entitled to escalate a case from the Council to Federal district court upon satisfying the criteria set forth in § 405.1132, may request judicial review under the existing procedures in § 405.1136.

<sup>13</sup> For example, under § 405.1106(a), if a party submits a timely filed request for Council review with an entity other than the entity specified in the notice of the ALJ's or attorney adjudicator's action, the Council's adjudication period to conduct a review begins on the date the request for review is received by the entity specified in the notice of the ALJ's or attorney adjudicator's action. In other words, if an ALJ decision specifies that a party must submit a request for Council review with the Council, and the party mistakenly files their request with, for example, OMHA, then the Council's adjudication time period does not begin until the Council receives the request for review from OMHA.

## B. Prospective Appeal Rights

### 1. Overview

This proposed rule would also establish and implement a new notice requirement and an expedited appeals process, on a prospective basis, for certain beneficiaries whose status was changed from inpatient to outpatient receiving observation services while they were still in the hospital. The proposed expedited appeals process parallels the process in effect for inpatient hospital discharge appeals set forth at 42 CFR 405.1205 through 1206, with some differences. In its order dated March 26, 2020, the court indicated that HHS should use a process for the expedited appeals that is "substantially similar" to the existing process for expedited hospital discharge appeals at §§ 405.1205 through 405.1208; under that hospital discharge appeals process, beneficiaries receive a notice of their rights and may request an expedited determination by a Quality Improvement Organization (QIO) about the hospital's decision to discharge the beneficiary. While the processes are largely similar, a notable difference is that the issue under appeal in this proposed process relates to the change of status from an inpatient to an outpatient receiving observation services. This change of status may affect cost sharing for the hospital stay as well as whether any post hospital care in a skilled nursing facility would be covered by Medicare.

CMS contracts with QIOs, pursuant to Title XI, Part B of the Act and section 1862(g) of the Act, to perform certain statutorily required functions and contractual quality improvement and other activities for the purposes of improving the quality of care furnished to Medicare beneficiaries with respect to Medicare covered items and services. The QIO Program is part of the HHS' national quality strategy for providing quality and patient centered care to Medicare beneficiaries. Section 1154(a)(1) of the Act establishes certain review functions of QIOs, including that QIOs review the services furnished to Medicare beneficiaries by physicians, other healthcare practitioners, and institutional and non-institutional providers of services (as defined in section 1861(u) of the Act and including hospitals). In addition, under section 1154(a)(18) of the Act, QIOs must also provide, subject to the terms of their contract with CMS, such other activities as the Secretary determines may be necessary for the purposes of improving the quality of care furnished to individuals with respect to items and services for which payment may be

made under Medicare. This flexibility allows CMS to establish and further define the types of reviews performed by the QIOs in order to meet evolving needs and issues pertaining to healthcare delivered under the Medicare program.

As discussed in sections II. and III.A. of this rule, a recent court decision requires the Secretary to implement an appeal process for certain Medicare beneficiaries that is substantially similar to the existing hospital discharge appeals conducted by QIOs under §§ 405.1205 through 405.1208. See *Alexander v. Azar*, 613 F. Supp. 3d 559 (D. Conn. 2020), *aff'd sub nom.*, *Barrows v. Becerra*, 24 F.4th 116 (2d Cir. 2022). These new review and appeals activities are within the scope of the Secretary's authority under section 1154(a)(18) of the Act to contract with QIOs to perform additional activities that are not already specified in section 1154 of the Act or other provisions. Section 1155 of the Act governs appeals of QIO determinations that are made under Title XI, subpart B, which includes section 1154 of the Act. Therefore, the proposed new QIO determinations, performed under section 1154(a)(18) of the Act, are subject to the appeal process specified in section 1155 of the Act.<sup>14</sup> Based on the QIOs' expertise and longstanding performance of similar functions, CMS has determined that the QIOs are the most appropriate entity to perform beneficiary-initiated appeals of hospital reclassifications of inpatients to outpatients receiving observation services proposed in §§ 405.1211 through 405.1212.

This proposed expedited appeals process would be available to beneficiaries<sup>15</sup> who, after formally being admitted as an inpatient, have subsequently been reclassified by the

hospital as an outpatient while the beneficiary is still in the hospital, receive observation services following the reclassification, and met one of the following two criteria:

- Their stay in the hospital was at least 3 days.
- Did not have Medicare Part B coverage (these eligible beneficiaries would not need to remain in the hospital for at least 3 days to be eligible for an appeal).

We are proposing in new § 405.1210(a)(3) the criteria that must be met for a beneficiary to be eligible for the new prospective appeal rights. We are proposing to require hospitals to deliver, as soon as possible after certain conditions are met and prior to release from the hospital, a new standardized beneficiary notice, informing eligible beneficiaries of the change in their status, the resulting effect on Medicare coverage of their stay, and their appeal rights if they wish to challenge that change. This new notice will be called the Medicare Change of Status Notice (MCSN). This new notice follows the format and structure of the Important Message from Medicare (IM), which is the notice hospitals are required, by § 405.1205, to provide to beneficiaries to inform them of their right to appeal an inpatient hospital discharge. See section IV.D. of this proposed rule for details on how to obtain a copy of the proposed MCSN form.

We considered alternatives to creating a new notice for this process. One consideration was standardizing and adding appeals information to the required written Condition Code 44 notification used by hospitals to inform beneficiaries when their status is changed from inpatient to outpatient after review by a hospital utilization review committee and the entire episode will be billed as outpatient. However, those eligible for this new process would be a small subset of the population receiving the existing Condition Code 44 notification. Specifically, individuals would not only require a change of status from inpatient to outpatient, they must also meet the criteria set forth in proposed § 405.1210 (a)(2) and (3) to pursue an appeal regarding a change in status. The vast majority of beneficiaries receiving the existing notification of inpatient to outpatient change will not be eligible for this new appeals process and would likely find the inclusion of information about an appeals process for which they are not eligible confusing. We also considered adding appeals information to the Medicare Outpatient Observation Notice (MOON). The MOON (42 CFR 489.20(y)) is used to inform

beneficiaries who receive observation services for a certain amount of time that they are not hospital inpatients, but rather outpatients receiving observation services. However, like the change in status notice mentioned earlier, the MOON would be overbroad and the vast majority of beneficiaries receiving it would not be eligible for an appeal in this new process. Further, per section 1866(a)(1)(Y) of the Act, the MOON is only required for beneficiaries who have been outpatients receiving observation services for more than 24 hours, yet we are proposing that, for prospective appeals, beneficiaries reclassified from inpatients to outpatients receiving observation services be eligible for an appeal if any amount of time is spent in observation following the status change (in this respect, we are expanding the population of beneficiaries eligible for an appeal beyond the class as defined by the court, and not limiting eligibility to those beneficiaries who have received a MOON). Because the MOON is not required for observation stays shorter than 24 hours, using the MOON would likely result in not all eligible beneficiaries receiving notification of their appeal rights under the proposed new process. We concluded that a targeted appeals notice, delivered only to those beneficiaries eligible for this specific appeal, would be the most effective and efficient means of informing eligible beneficiaries of their appeal rights.

The proposed MCSN contains a similar layout and language to the IM and includes information on the change in coverage, a description of appeal rights and how to appeal, and the implications for skilled nursing facility coverage following the hospital stay. We believe that by proposing the delivery of this largely generic notice, the notice delivery burden on hospitals would be as minimal as possible, without any adverse effect on patient rights. Much of the verbiage in the MCSN has been used in similar, consumer-tested CMS beneficiary notices which were subject to multiple comment periods during the PRA renewal process as language included in the IM and another similar Medicare appeals notice, the Notice of Medicare Non-Coverage.

We have reviewed the notice delivery procedures for the IM notice related to inpatient hospital discharges and have mirrored that process in this new process, wherever possible. In proposing this approach, our goal is to design notice procedures that balance a beneficiary's need to be informed about his or her appeal rights in an appropriate and timely manner, without

<sup>14</sup> Under section 1155 of the Act, a beneficiary who is entitled to benefits under title XVIII (that is, a Medicare beneficiary) and who is dissatisfied with a determination made by a QIO in conducting its review responsibilities shall be entitled to a reconsideration of such determination by the reviewing organization (that is, the QIO). For the purposes of these proposed appeals, section 1155 of the Act authorizes the QIO to conduct a reconsideration of its expedited determination regarding the hospital reclassification under proposed § 405.1211 to determine if an eligible beneficiary is entitled to coverage under Part A of the program.

<sup>15</sup> Since the court order specifically requires the provision of appeal rights to a defined set of class members, and that definition does not include the provider of services (that is, hospitals and SNFs), we are limiting party status for these new appeals to the defined class members. We note that this limitation currently exists for hospital discharge appeals procedures in §§ 405.1205 and 405.1206, where a provider of services does not have party status.

imposing unnecessary burdens on hospitals.

We are proposing to require hospitals to deliver the notice to eligible beneficiaries as soon as possible after a beneficiary is eligible for this process per § 405.1210(a)(2) and (3), but no later than 4 hours prior to discharge. For beneficiaries with Part B, we propose that the notice must be delivered as soon as possible after the hospital reclassifies the beneficiary from inpatient to outpatient receiving observation services and the third day in the hospital is reached. Beneficiaries will likely not reach this required third day in the hospital until very close to release from the hospital. This is because these will be beneficiaries that hospitals have determined do not need an inpatient level of care and thus, the overall length of the hospital stay is not expected to exceed a few days. For beneficiaries without Medicare Part B coverage, we are proposing that hospitals must deliver the notice as soon as possible after the change in status from inpatient to outpatient receiving observation services because a 3-day hospital stay is not required for these beneficiaries to be part of the class specified in the court order.

We believe the approach we are proposing would not be overly burdensome for hospitals as the proposed notice is standardized and requires very little customization by the hospital before delivery. The proposed notice is modeled after the existing hospital discharge appeals notice (Important Message from Medicare-IM), and like that notice, does not require extensive time for hospitals to prepare and deliver to beneficiaries. We believe that the number of beneficiaries that are eligible for this proposed appeal process would be significantly lower than the volume that receive the hospital discharge appeals notification. (Please see section IV.B. for more information on assumptions and estimates related to this proposed appeals process.) Additionally, the delivery of the MCSN notice to the beneficiary would mimic the process already in place for hospitals delivering the IM, so implementing this process should not be overly difficult or burdensome.

One notable difference, as compared to that for inpatient hospital discharge appeals, is that beneficiaries would not have financial liability protection during this new appeals process. Section 1869(c)(3)(C)(iii)(III) of the Act, which provides beneficiaries with coverage during the inpatient hospital discharge appeal, only applies to beneficiaries being discharged from a Medicare covered inpatient hospital

stay, and thus would not be applicable to beneficiaries pursuing an appeal regarding the change in status from inpatient to outpatient receiving observation services.

We are proposing that the Quality Improvement Organizations (QIOs) perform these reviews. The nature of these reviews is consistent with the mission and functions of the QIO Program. QIOs have contracts with CMS under section 1862(g) of the Act and Part B of Title XI of the Act to perform certain statutorily required reviews of the services furnished to Medicare beneficiaries and to implement quality improvement initiatives involving Medicare beneficiaries, providers, and their communities. (See 42 CFR parts 475 through 480.) Historically, QIOs have performed expedited discharge reviews for beneficiaries appealing inpatient discharges (42 CFR 405.1205 through 405.1208, 422.620 and 422.622) as well as similar expedited reviews for termination of provider services in non-hospital settings (42 CFR 405.1202 through 405.1204, 422.624, and 422.626). Currently, these reviews, as well as other case reviews related to the quality of care received by Medicare beneficiaries, compliance with certain conditions of coverage for inpatient services, and reviews of the validity of certain diagnostic and procedural information supplied by hospitals among other types of care reviews, are performed by the Beneficiary and Family Centered Care QIOs (BFCC-QIOs), while quality improvement initiatives are performed by a different type of QIO. If our proposal is finalized, we intend to require the BFCC-QIOs to perform this new type of appeal because their scope of knowledge, expertise and experience with beneficiary appeals and Medicare coverage ensures an adequate and reliable review.

Finally, the court order only requires that an *expedited* appeals process be made available to class members “who have stayed, or will have stayed, at the hospital for 3 or more consecutive days.” For class members who lacked Part B and did not stay in the hospital for 3 or more consecutive days, it would appear that a non-expedited appeals process might be sufficient. Nonetheless, we are proposing to use the expedited process for all prospective appeals, with minor differences depending on whether the expedited appeal request is made timely. In other words, an eligible beneficiary may request the QIO review at or around the time of receiving the notice in a hospital, or after a claim is filed, and in both instances, beneficiaries will be afforded a review and determination by

the QIO. An appeal filed outside of the expedited timeframes may also be referred to herein as a standard appeal.

## 2. Notifying Eligible Beneficiaries of Appeal Rights When a Beneficiary Is Reclassified From an Inpatient to an Outpatient Receiving Observation Services (§ 405.1210)

To implement the changes we are proposing, we would revise Subpart J of 42 CFR 405 to add new §§ 405.1210 through 405.1212. These new proposed regulations are largely modeled after the existing regulations at §§ 405.1205 through 405.1206 controlling notices to beneficiaries and the QIO review of hospital discharges.

Proposed new § 405.1210(a) sets forth the applicability and scope of this new appeals process along with definitions of specific terms used in the proposed new regulations. Specifically, in § 405.1210(a)(1) we propose to define a hospital as, for purposes of the new notice requirements and appeals process, any facility providing care at the inpatient hospital level, to include short term or long term, acute or non-acute, paid through a prospective payment system or other reimbursement basis, limited to specialty care or providing a broader spectrum of services and including critical access hospitals (CAHs). This broad definition tracks § 405.1205(a).

Paragraphs (a)(2) and (a)(3) of proposed § 405.1210 address the circumstance and eligibility of beneficiaries for appeals in this new process. A change in status occurs when a hospital reclassifies a beneficiary from an inpatient to an outpatient receiving observation services. The phrase “outpatient receiving observation services” used in §§ 405.1210 through 405.1212 is used as defined in proposed § 405.931(h) to mean when the hospital changes beneficiary’s status from inpatient to outpatient while the beneficiary is in the hospital and the beneficiary subsequently receives observation services following a valid order for such services. An eligible beneficiary, consistent with the court order, would be one who: (1) was formally admitted as a hospital inpatient; (2) while in the hospital was subsequently reclassified as an outpatient receiving observation services; and (3) either (A) was not enrolled in Part B coverage at the time of the beneficiary’s hospitalization, or (B) stayed at the hospital for 3 or more consecutive days but was classified as an inpatient for fewer than 3 days. We are also proposing to be explicit in new § 405.1210(a)(iv)) that the period “3 or more consecutive days” is counted

using the existing rules for determining coverage of SNF services under section 1861 of the Act and § 409.30 of this chapter. This means that the admission day is counted as a day, but the discharge day is not. For example, if a beneficiary is admitted to a Medicare covered inpatient hospital stay on a Monday and discharges on the following Wednesday, Monday and Tuesday are counted towards the “3 or more consecutive days”, but Wednesday is not.

The provisions of proposed § 405.1210(b) are designed to track closely with the provisions of § 405.1205 that require delivery of a notice to beneficiary about inpatient hospital discharges. We are proposing in § 405.1210(b)(1) that hospitals would be required to deliver a standardized, largely generic, notice informing eligible beneficiaries about the availability of the new appeals process.

We are proposing to require hospitals to deliver the notice to eligible beneficiaries as soon as possible after a beneficiary is eligible for this process per § 405.1210(a)(2) and (3) and no later than 4 hours prior to discharge. For beneficiaries with Part B, we propose that the notice must be delivered as soon as possible after the hospital reclassifies the beneficiary from inpatient to outpatient receiving observation services and the third day in the hospital is reached. For beneficiaries without Medicare Part B coverage, we propose that hospitals must deliver the notice as soon as possible after the change in status from inpatient to outpatient receiving observation services because a 3-day hospital stay is not required for these beneficiaries to be eligible for an appeal.

Per proposed § 405.1210(b)(2), the new notice would include (1) the beneficiary's right to request an expedited determination regarding the decision to change the beneficiary's status from an inpatient to an outpatient receiving observation services, including a description of the process as specified in § 405.1211, and the availability of possible appeals procedures if the beneficiary's request is untimely; (2) an explanation of the implications of the decision to change the status of the eligible beneficiary from an inpatient to an outpatient receiving observation services, the potential change in beneficiary hospital charges resulting from a favorable decision, and subsequent eligibility for Medicare coverage for SNF services; and (3) any other information required by CMS. As to category (2) (see § 405.1210(b)(2)(ii) of this proposed rule) regarding the implications of the

decision, this notice would describe for eligible beneficiaries the possible changes in the charges for their hospital stay as well as the potential for non-coverage if they enter a skilled nursing facility after the hospital stay.

Proposed new § 405.1210(b)(3) and (4) provide that notice delivery would be valid when the notice is delivered as required in § 405.1210(a)(3) and the beneficiary signs and dates the notice to indicate receipt and that the beneficiary understands the notice. Further, if a beneficiary refuses to sign the notice to acknowledge receipt, the hospital may annotate its copy of the beneficiary's notice to indicate the refusal. The date of refusal would be considered the date of receipt of the notice. The hospital would be required to maintain a copy of the signed or annotated notice as part of its records regarding the stay, per federal or state law.

As with existing beneficiary notice requirements, hospitals generally would need to determine whether a patient is capable of comprehending and signing the notice. Hospitals would be required to comply with applicable State laws and CMS guidance regarding the use of representatives and have procedures in place to determine an appropriate representative.

### 3. Expedited Determination Procedures When a Beneficiary Is Reclassified From an Inpatient to an Outpatient Receiving Observation Services (§ 405.1211)

Proposed new § 405.1211 sets forth the procedures for the proposed new expedited QIO review leading up to issuance and effect of the QIO's determination. Proposed § 405.1211 would establish the responsibilities of the hospitals, QIOs, and beneficiaries relative to the process.

Proposed § 405.1211(a) describes a beneficiary's right to request an expedited determination by a QIO when they are reclassified by their hospital from an inpatient to an outpatient receiving observation services, and the beneficiary meets the criteria to be eligible for an appeal as established in § 405.1210(a)(3). As previously discussed, QIOs are experienced in performing expedited appeals for beneficiaries in a hospital setting and thus, are well prepared to implement and execute this new appeals process in an effective and expeditious manner. Currently, Beneficiary and Family Centered QIOs (BFCC-QIOs) perform the case review functions that are similar to the reviews that would be required by §§ 405.1211 and 405.1212, so we intend to assign these new reviews to BFCC-QIOs under our contracts with them; in the event that

CMS reconsiders in the future how QIO functions are assigned and the categorization of QIOs, we intend that the type of QIOs that perform case review functions (see 42 CFR 405.1200 through 405.1208, 475.102, 476.1 *et. seq.*) would also perform these new reviews of changes in status.

In new § 405.1211(b), we are proposing the process for eligible beneficiaries to request an expedited determination by the QIO. First, the eligible beneficiary's request must be by telephone to the QIO, or in writing. We are not proposing any parameters of what a request in writing would constitute, but it could be an email or fax transmitted to the QIO. We are also proposing at § 405.1211(b)(1) the timeframe for requesting such an appeal: eligible beneficiaries would be required to request an appeal to the QIO prior to release from the hospital. The notice required under proposed § 405.1210 would identify the BFCC-QIO that serves the geographic area that includes the hospital so that this information is available to the eligible beneficiary.

Proposed sections 405.1211(b)(2) and (b)(3) would explain the responsibilities of beneficiaries to discuss the case, if requested by the QIO, and their right to submit written evidence to be considered by the QIO. Per proposed § 405.1211(b)(4), if an eligible beneficiary requests an appeal timely, they would not be billed during the QIO appeals process. However, if the appeal is untimely, the hospital may bill a beneficiary before this QIO process is complete; proposed paragraphs (b)(4) and (e) make this clear. Finally, we are also proposing, in § 405.1211(b)(5), that an eligible beneficiary may file a request for review by the QIO regarding the change in status after the deadline established in proposed § 405.1211(b)(1) (that is, the beneficiary may file the request after release from the hospital) but that the QIO's determination will be provided on a different timeframe and the eligible beneficiary will not be entitled to the billing protection proposed in paragraph (e). Keeping untimely appeals with the QIO will provide beneficiaries with a decision far sooner though (two calendar days), than if those beneficiaries were provided with the timeframes set forth in the standard claims appeals (60 days at the first level of the claims appeals process). We are proposing that these untimely requests may be made at any time in order to afford maximum opportunity for beneficiaries to exercise their appeal rights. Of most concern is those beneficiaries who may have had a SNF stay following their change in status

from an inpatient to an outpatient receiving observation services. These beneficiaries should have the maximum opportunity to appeal and potentially obtain coverage for what might have been a costly out-of-pocket outlay.

Proposed § 405.1211(c)(1) through (c)(5) describe the procedures that the QIO would be required to follow in performing the expedited determination. We propose at § 405.1211(c)(1) that the QIO must immediately notify the hospital that a request for an expedited appeal has been made. In addition, as proposed in § 405.1211(c)(2) and (3), the QIO would be required to determine whether valid notice was delivered and examine medical and other relevant records that pertain to change in status. As proposed at § 405.1211(c)(4) and (5), the QIO would be required to solicit the views of the beneficiary and provide the hospital an opportunity to explain why the reclassification of the beneficiary from an inpatient to an outpatient receiving observations services is appropriate. *The QIO will review the information submitted with the appeal request and any additional information it obtains to determine if the inpatient admission satisfied the relevant criteria for Part A coverage at the time the services were furnished.*

Proposed section 405.1211(c)(6) addresses the timing of the QIO's determination. Per proposed paragraph (c)(6)(i), the QIO must render a decision and notify all relevant persons and entities within one calendar day of receiving all requested pertinent information if the eligible beneficiary requested the expedited determination as specified in proposed § 405.1211(b)(1) (that is, no later than the day of release from the hospital). Based on current experience regarding documentation submitted by hospitals under other expedited beneficiary appeal timeframes, we do not anticipate that the QIO will encounter delays in receiving any information necessary from the hospital once the hospital is notified of the appeal (see proposed § 405.1211(d)(1)). This timeframe is as rapid as possible to minimize potential liability for beneficiaries as well as to maximize their potential for coverage in a skilled nursing facility should they obtain a favorable decision by the QIO. A Medicare covered skilled nursing facility stay must begin within 30 days of a beneficiary's discharge from a hospital. To that end, QIOs would make their decisions as quickly as possible so beneficiaries receiving favorable decisions will have time to plan for and begin a SNF stay within the 30-day parameter.

Proposed § 405.1211(c)(6)(ii) provides that the 1 calendar day QIO decision deadline does not apply if a beneficiary makes an untimely request for an expedited appeal, but that the QIO would still accept the request and render a decision within two calendar days after the QIO receives all requested information that the hospital must provide per proposed § 405.1211(d)(1). This provides a beneficiary with the maximum ability to exercise their right to an expedited appeal, and the opportunity to obtain SNF coverage within the Medicare coverage limitation of 30 days after leaving a hospital, should their appeal to the QIO be favorable. Both proposed paragraphs (c)(6)(i) and (ii) require the QIO to provide notice of its expedited determination.

In § 405.1211(c)(7) we propose that if the QIO does not receive the information needed to make its decision, the QIO may move forward and make a decision based on the information it has at the time. This is to protect the interests of the beneficiary by ensuring they receive their decision within the QIO's required timeframes of 1 calendar day for a timely request and two calendar days for an untimely request.

The QIO decision, as required by proposed § 405.1211(c)(8), must be conveyed to the eligible beneficiary, the hospital, and SNF (if applicable) by telephone followed by a written notice. We are proposing that the QIO's written notice of its determination must include the basis for the determination, a detailed rationale for the QIO decision, an explanation of the Medicare *payment* consequences of the determination, and information about the beneficiary's right to an expedited reconsideration as set forth in § 405.1212, including how and in what time period a beneficiary may make that reconsideration request. The basis of a decision is a description of, and citations to, the Medicare coverage rule, instruction, or other policies applicable to the review. A detailed rationale is an explanation of why services do or do not meet the relevant criteria for Part A coverage based on the facts specific to the beneficiary's situation and the QIO's review of the pertinent information provided by the hospital (as with other expedited beneficiary appeals of hospital discharges and service terminations).

Proposed § 405.1211(d) sets forth the responsibilities of hospitals in the expedited appeals process. Section 405.1211(d)(1) provides that the hospital must supply all information that the QIO needs, no later than noon of the calendar day after the QIO

notifies the hospital of the appeals request. We are also proposing that at the discretion of the QIO, the hospital must make the information available by phone or in writing (with a written record of any information not transmitted initially in writing). Section 405.1211(d)(2) requires that hospitals, upon request, must provide the beneficiary any documentation, including written records of any information provided by telephone, it provides to the QIO. We are proposing that this obligation work the same way that it does under § 405.1206(d)(3), specifically that the hospital may charge a reasonable amount to cover the costs of duplicating and delivering the requested materials and must accommodate such a request by no later than close of business of the first day after the material is requested by the beneficiary or the beneficiary's representative.

In § 405.1211(e), we propose that a hospital may not bill a beneficiary who has appealed timely for any services at issue in the appeal until the expedited determination process (and reconsideration process) is complete. Although there is liability protection in the inpatient discharge expedited appeals process under section 1869(c)(3)(C)(iii) of the Act (incorporating the financial liability protection in section 1154(e)(4) of the Act in effect prior to the enactment of section 1869(c)(3)(C) of the Act, there is no statutory provision protecting the beneficiary from financial liability for the hospital stay and services furnished during the pendency of the QIO's review proposed here. Therefore, we are proposing only that the hospital may not bill the beneficiary until after the QIO has issued its determination. This proposal mirrors existing procedures for the similar expedited appeals procedures the termination of non-hospital services found at § 405.1202(g). This process would not extend coverage available to beneficiaries during an appeal, which is consistent with § 405.1202(g).

Proposed § 405.1211(f) sets forth that a QIO determination is binding for payment purposes on the beneficiary, hospital, and MAC, unless the beneficiary pursues an expedited reconsideration per § 405.1212. The decision is binding for purposes of payment only, such that if the hospital submits a claim under Part A, CMS will make payment.

#### 4. Expedited Reconsideration Procedures When a Beneficiary Is Reclassified From an Inpatient to an Outpatient Receiving Observation Services (§ 405.1212)

In new § 405.1212 we propose to set forth the procedures for the new expedited reconsideration process. Proposed § 405.1212 contains the responsibilities of the hospitals, QIOs, and beneficiaries relative to the reconsideration process.

Proposed § 405.1212(a) describes an eligible beneficiary's right to request an expedited reconsideration by a QIO when they are dissatisfied with the expedited determination decision by the QIO.

In § 405.1212(b) we are proposing a process for beneficiaries to request an expedited reconsideration by a QIO. Proposed paragraph (b)(1) provides that beneficiaries must request an appeal to the QIO no later than noon of the calendar day following the initial notification of the expedited determination by the QIO. Under this proposal, the earlier of the calendar day of the QIO's notification of the beneficiary by telephone or in writing of its determination (under § 405.1211(c)(8)) would start the timeframe for the beneficiary to request an expedited reconsideration. The beneficiary's request for a reconsideration may be in writing or by telephone.

Proposed §§ 405.1212(b)(2) and (b)(3) also explain the responsibilities of beneficiaries to discuss the case, if requested by the QIO, as well as beneficiaries' right to submit written evidence to be considered by the QIO. Finally, proposed (b)(4) and (b)(5) state that if a beneficiary requests an appeal timely, they would not be billed until the QIO makes its reconsideration decision; however, if the beneficiary's request for an expedited reconsideration is untimely, the hospital may bill a beneficiary before the reconsideration determination has been made.

Proposed §§ 405.1212(c)(1) through 405.1212(c)(4) describe the procedures that the QIO must follow in performing the expedited reconsideration. Specifically, we propose in § 405.1212(c)(1) that the QIO must immediately notify a hospital that a request for an expedited reconsideration has been made; this means that the notice to the hospital must be the day the QIO receives the request for expedited reconsideration. Per proposed § 405.1212(c)(2), the QIO would be required to offer both the beneficiary and the hospital an opportunity to provide further information. An

example of further information from the hospital could include an explanation of why the beneficiary was reclassified from an inpatient to an outpatient receiving observation services. Similarly, an example of further information from the eligible beneficiary could include an explanation of why inpatient status should have been maintained.

Proposed § 405.1212(c)(3)(i) provides that the QIO must render a decision and notify all relevant persons and entities within two calendar days of receiving all information necessary to complete the appeal if the beneficiary requested the reconsideration by noon of the day after receiving notice of the QIO's determination under § 405.1211. This timeframe is as rapid as possible to minimize potential liability for beneficiaries as well as to maximize their potential for coverage in a SNF should they obtain a favorable reconsideration decision by the QIO. A Medicare covered skilled nursing facility stay must begin within 30 days of a beneficiary's discharge from a hospital. To that end, we are proposing a review process for QIOs to make their decisions as quickly as possible so beneficiaries receiving favorable decisions will have time to plan for and begin a SNF stay within the 30-day limit for coverage.

Proposed § 405.1212(c)(3)(ii) provides that if a beneficiary makes an untimely request for an expedited reconsideration, the QIO must still accept the request and render a decision within 3 calendar days. Under this proposal, the two-calendar day QIO decision deadline does not apply in the case of an untimely request for an expedited reconsideration. However, the expeditious 3-day untimely timeframe affords a beneficiary the ability to exercise their right to an expedited appeal and potentially be entitled to SNF coverage within the 30-calendar day time limit for SNF coverage following hospital release, should they receive a favorable expedited reconsideration determination from a QIO.

The QIO decision, as required by proposed § 405.1212(c)(4)(i–iv), must include the basis and detailed rationale for the QIO decision. The basis of a decision is a description of, and citations to, the Medicare coverage rule, instruction, or other policies applicable to the review. A detailed rationale includes the facts specific to the beneficiary's situation and a detailed explanation of why the inpatient admission did or did not satisfy the relevant criteria for Part A coverage at the time the services were furnished.

The decision must also include the potential financial ramifications, such as deductibles or coinsurance for the beneficiary, the beneficiary's right to a hearing by an ALJ, and how a beneficiary may make a request for an expedited reconsideration.

Proposed § 405.1212(d) sets forth the responsibilities of hospitals in the expedited appeals process. As proposed, a hospital may, but is not required to, submit evidence to be considered by a QIO in making its reconsideration decision. If a hospital does not furnish a QIO with requested additional information, the QIO may proceed to make a decision based on the information used in the expedited determination. This is to protect the interests of the beneficiary by ensuring they receive their decision within the BFCC–QIO's required timeframes of two calendar days for a timely request and 3 calendar days for an untimely request. This proposed policy is consistent with obligations on hospitals in the second level expedited review of a hospital discharge and on providers of services in the second level expedited review of a termination of provider services (§ 422.1204(e)).

In § 405.1212(e) we propose that a hospital may not bill a beneficiary who has appealed timely for any services at issue in the appeal until the expedited reconsideration process is complete.

Proposed § 405.1212(f) sets forth that a QIO reconsideration is binding on the beneficiary, hospital, and MAC unless the beneficiary pursues an appeal with an ALJ in accordance with 42 CFR part 478 subpart B. This concept is consistent with the existing claims appeals process currently established under §§ 405.1000 through 405.1140. The decision is binding for purposes of payment only, such that if the hospital submits a claim under Part A, CMS will make payment.

Per section 1155 of the Act, a beneficiary who is dissatisfied by a QIO's reconsideration of its initial decision may seek additional administrative review and, ultimately, judicial review, if the amount in controversy limits are met.<sup>16</sup> Our proposal follows that process.

#### 5. Conforming Changes Beneficiary Notice of Discharge or Change in Status Rights (§ 489.27)

In conjunction with the proposed notice provisions §§ 405.1210 through 405.1212, we are proposing to make

<sup>16</sup> Under section 1155 of the Act, for an appeal with an ALJ, the amount in controversy must be \$200 or more, and for judicial review, the amount in controversy must be \$2,000 or more.

conforming changes to a related existing regulatory provision. We propose to amend the provider agreement requirements in § 489.27(b) to cross-reference the proposed notice requirements. Thus, proposed § 489.27(b) would specify that delivery of the proposed appeals notice is required as part of the Medicare provider agreement. Lastly, to account for this conforming change, we are proposing to change the title of § 489.27 to include “change in status” to more accurately reflect the actions that would require the issuance of a notice.

#### 6. Conforming Changes to Quality Improvement Organization (QIO) Review Regulations

We are also proposing to amend the QIO regulations at § 476.71(a) to conform with the proposed changes in review responsibilities at §§ 405.1210 through 405.1212. The proposed amendment to the QIO regulations would add a new review type to the currently enumerated list of reviews performed by QIOs, specifically for beneficiary appeals of hospital reclassifications of a fee-for-service beneficiary’s inpatient status to that of outpatient receiving observation services. The beneficiary eligibility requirements for filing expedited appeals and the required processes for those appeals are proposed in sections III.B.1 through III.B.5 of this proposed rule. This proposed amendment to the QIO regulation would specify that QIO perform review functions for these beneficiary appeals in a manner that is consistent with other QIO review functions while ensuring alignment with the proposed beneficiary eligibility and process requirements for such appeals.

The QIO regulations at 42 CFR 476.1(a) define “QIO review” as a review performed in fulfillment of a contract with CMS, either by the QIO or its subcontractors. Under regulations at § 476.71, the QIO’s review responsibilities currently include: (1) whether services are or were reasonable and medically necessary for diagnosis or treatment; (2) whether the quality of the services meets professionally recognized standards of health care, as determined through the resolution of oral beneficiary complaints; (3) whether care and services furnished or proposed on an inpatient basis could be effectively furnished more economically on an outpatient basis or in another inpatient setting; (4) diagnostic related group (DRG) validation of diagnosis and procedure information provided by hospitals; (5) the completeness,

adequacy and quality of hospital care provided; (6) medical necessity, reasonableness and appropriateness of hospital admissions and discharges; (7) medical necessity, reasonableness and appropriateness of inpatient hospital care for which additional outlier payment is sought; and (8) whether a hospital has misrepresented admission or discharge information resulting in unnecessary or multiple admissions, or inappropriate billing.

Our proposed amendment to § 476.71(a) would add paragraph (9) to this list of QIO review responsibilities to include the new beneficiary-initiated appeals proposed here for when a hospital reclassifies certain fee-for-service beneficiaries’ admission status from inpatient to that of outpatient.

In considering the existing hospital discharge appeals process, CMS determined that the circumstances for these new appeals, and the potential impact of such appeal decisions on Part A coverage for subsequent care in other settings, necessitated a new notification process and review timelines which differ from the processes that govern the existing hospital discharge appeals process. These new appeals are proposed in section III.B of this proposed rule and would be in new appeals regulations at §§ 405.1210 through 405.1212.

The proposed amendment to the QIO regulations, as previously discussed, applies to the processes and timeframes for the new appeals discussed in section III.B of this proposed rule, which have been designed to meet the needs of beneficiaries who have had their inpatient status reclassified to outpatient receiving observation services.

We welcome public comment on the addition of these appeals.

#### C. Severability

Finally, we note that while the various provisions of this proposed rule are intended to implement the District Court order in *Alexander v. Azar*, 613 F. Supp. 3d 559 (D. Conn. 2020), *aff’d sub nom., Barrows v. Becerra*, 24 F.4th 116 (2d Cir. 2022), the proposals described previously for retrospective appeals and prospective appeals would be, if finalized, distinct provisions. We believe these distinct processes may function independent of each other. To the extent a court may enjoin any part of a final rule, the Department intends that other provisions or parts of provisions should remain in effect. Should they be finalized, we intend that any provision of the proposals described in this section or in another section held

to be invalid or unenforceable by its terms, or as applied to any person or circumstance, would be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding is one of utter invalidity or unenforceability, in which event we intend that the provision would be severable from the other finalized provisions described in this section and in other sections and would not affect the remainder thereof or the application of the provision to persons not similarly situated or to dissimilar circumstances.

#### IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a “collection of information” requirement is submitted to the Office of Management and Budget (OMB) for review and approval. For the purpose of the PRA and this section of the proposed rule, collection of information is defined under 5 CFR 1320.3(c) of the PRA’s implementing regulations.

To fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment (see section IV.D of this proposed rule) on each of these issues for the following sections of this document that contain information collection requirements. Comments, if received, will be responded to within the subsequent final rule.

##### A. Wage Estimates

*Private Sector:* To derive average costs, we used wage data from the U.S. Bureau of Labor Statistics’ (BLS) May 2022 National Occupational Employment and Wage Estimates ([https://www.bls.gov/oes/2022/may/oes\\_nat.htm](https://www.bls.gov/oes/2022/may/oes_nat.htm)). In this regard, Table 1 presents BLS’ mean hourly wage, our estimated cost of fringe benefits and other indirect costs, and our adjusted hourly wage.

TABLE 1—NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES

| Occupation title       | Occupation code | Mean hourly wage (\$/hr) | Fringe benefits and other indirect costs (\$/hr) | Adjusted hourly wage (\$/hr) |
|------------------------|-----------------|--------------------------|--------------------------------------------------|------------------------------|
| Registered Nurse ..... | 29-1141         | 39.78                    | 39.78                                            | 79.56                        |

As indicated, we are adjusting our hourly wage estimate by a factor of 100 percent. This is necessarily a rough adjustment, both because fringe benefits and other indirect costs vary significantly from employer to employer, and because methods of estimating these costs vary widely from study to study. Nonetheless, we believe that doubling the hourly wage to estimate the total cost is a reasonably accurate estimation method.

**Beneficiaries:** We believe that the cost for beneficiaries undertaking administrative and other tasks on their own time is a post-tax wage of \$21.98/hr.

The Valuing Time in U.S. Department of Health and Human Services Regulatory Impact Analyses: Conceptual Framework and Best Practices<sup>17</sup> identifies the approach for valuing time when individuals undertake activities on their own time. To derive the costs for beneficiaries, a measurement of the usual weekly earnings of wage and salary workers of \$1,059<sup>18</sup> for 2022, divided by 40 hours to calculate an hourly pre-tax wage rate of \$26.48/hr. This rate is adjusted downwards by an estimate of the effective tax rate for median income households of about 17 percent or \$4.50/hr (\$26.48/hr × 0.17), resulting in the post-tax hourly wage rate of \$21.98/hr (\$26.48/hr – \$4.50/hr). Unlike our State and private sector wage adjustments, we are not adjusting beneficiary wages for fringe benefits and other indirect costs since the individuals' activities, if any, would occur outside the scope of their employment.

#### B. Proposed Information Collection Requirements (ICRs)

This proposed rule sets forth new appeals procedures as required by the court order in the case *Alexander v. Azar*, 613 F. Supp. 3d 559 (D. Conn. 2020)), *aff'd sub nom., Barrows v. Becerra*, 24 F.4th 116 (2d Cir. 2022). Certain beneficiaries in Original Medicare, who are initially admitted to a hospital as an inpatient by a physician but whose status during their stay was

changed to outpatient receiving observation services by the hospital, thereby effectively denying Part A coverage for their hospital stay, may pursue an appeal under this proposed rule. In some cases, the status change also affects coverage of a beneficiary's post-hospital extended care services furnished in a skilled nursing facility (SNF). The appeal is filed with Medicare to decide if the inpatient admission meets the relevant criteria for Part A coverage.

#### 1. ICRs Regarding Retrospective Appeals Requests (§ 405.932)

The proposals in new § 405.932 will be submitted to OMB for review under control number 0938–TBD (CMS–10885). At this time, the control number has yet to be determined, but will be assigned by OMB upon their clearance of this proposed collection of information request. CMS will include that number in the subsequent CMS–4204–F final rule. OMB will issue the control number's expiration date upon their approval of the final rule's collection of information request. The issuance of that date can be monitored at [www.Reginfo.gov](http://www.Reginfo.gov).

As discussed in section III.A.3, § 405.932 proposes that eligible parties may file in writing an appeal related to a change in patient status which resulted in the denial of Part A coverage. A written appeal request must be received by the eligibility contractor no later than 365 days after the implementation date of the final rule. Details regarding the deadline to file an appeal and where such appeals should be filed would be posted to [Medicare.gov](http://Medicare.gov) once the retrospective appeals process is operational. The written request must include the following information:

- Beneficiary name.
- Beneficiary Medicare number (the number on the beneficiary's Medicare card).
- Name of the hospital and dates of hospitalization.
- Name of the SNF and the dates of stay (as applicable).

If the appeal includes SNF services not covered by Medicare, the written request must also include an attestation to the out-of-pocket payment(s) made by

the beneficiary for such SNF services and must include documentation of payments made to the SNF for such services.

We estimate that it would take an individual approximately 30 minutes (0.5 hr) to complete the appeal request including the attestation and documentation of out-of-pocket payments for SNF services and submit the completed information to the eligibility contractor.

Because this is a new appeal right and associated process, CMS does not have precise data and cannot meaningfully estimate how many individuals may request an appeal under the new appeals process. However, we believe that the closest equivalent is using the rate of individuals who appeal denials of initial claim determinations under the claim appeals process at the first level of appeal to a MAC (which is 3 percent), and aligning it with the appeal rates of higher levels of appeal (ranging from 21 percent to 27 percent) to arrive at an estimate of 20 percent. This estimate reflects our expectation that eligible parties in this process will be more motivated than in the claim appeals process to avail themselves of this unique opportunity for a retrospective appeal on potentially high dollar claims.

Based on these data, we estimate that the total number of eligible beneficiaries is 32,894.<sup>19</sup> Assuming that 20 percent of individuals (6,579 = 32,894 × 0.20) who are eligible to appeal will file a request, we estimate a one-time burden of 3,290 hours (6,579 requests × 0.5 hr/request) at a cost of \$72,314 (3,290 hr × \$21.98/hr).

<sup>19</sup> The data used in this report came from the 2022 CMS Part B institutional administrative claims data for 100 percent of Medicare beneficiaries enrolled in the fee-for-service (FFS) program, which are available from the Integrated Data Repository (IDR). The IDR contains a subset of data transmitted by the Common Working File (CWF), a computerized database maintained by CMS in connection with its processing and payment of Medicare claims.

<sup>17</sup> [https://aspe.hhs.gov/sites/default/files/migrated\\_legacy\\_files/176806/VOT.pdf](https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/176806/VOT.pdf).

<sup>18</sup> <https://fred.stlouisfed.org/series/LEU0252881500A>.

## 2. ICRs Regarding Notifying Beneficiaries of Appeal Rights When Hospital Inpatient Coverage Is Reclassified to Coverage as an Outpatient Receiving Observation Services (§ 405.1210)

The proposals in new § 405.1210 will be submitted to OMB for review under control number 0938–TBD (CMS–10868). At this time, the control number has yet to be determined, but will be assigned by OMB upon their clearance of this proposed collection of information request. CMS will include that number in the subsequent CMS–4204–F final rule. OMB will issue the control number's expiration date upon their approval of the final rule's collection of information request. The issuance of that date can be monitored at *reginfo.gov*.

Section 405.1210 proposes to require hospitals to deliver, prior to discharge, a standardized notice informing eligible beneficiaries of the change in status from an inpatient to an outpatient receiving observation services, and their appeal rights if they wish to challenge that change.

The proposed Medicare Change of Status Notice (MCSN) is new and is intended to be furnished only to those beneficiaries eligible for this specific proposed new appeal. The proposed MCSN notice contains only two fields that hospitals must complete: (1) the beneficiary's name, and (2) the beneficiary's identifier number. The remaining information (information on the change in coverage, a description of appeal rights and how to appeal, and the implications for skilled nursing facility coverage following the hospital stay) is standardized.

For beneficiaries with Medicare Part B coverage, hospitals would be required to deliver the notice to eligible beneficiaries as soon as possible after hospital reclassifies the beneficiary from an inpatient to an outpatient and the beneficiary has stayed in the hospital for 3 or more consecutive days but was an inpatient for fewer than 3 days. The notice must be delivered no later than 4 hours before the beneficiary is released from the hospital.

For beneficiaries without Medicare Part B coverage, hospitals would be required to deliver the notice to eligible beneficiaries as soon as possible after the change from inpatient to outpatient with observation services is made as a 3-day hospital stay is not required for these beneficiaries. The notice must be delivered no later than 4 hours before the beneficiary is released from the hospital.

We estimate it would take 10 minutes (0.1667 hr) at \$79.56/hr for a Registered Nurse to complete the two data fields and deliver each notice to the applicable beneficiary.

The 10-minute estimate is same as that for our Important Message from Medicare (CMS–10065/10066; OMB 0938–1019), which the proposed MCSN notice is modeled after.

In 2022 there were approximately 15,655 instances where hospital stays met the criteria for an appeal.<sup>20 21</sup> With regard to this proposed rule we estimate that hospitals would be required to give an estimated 15,655 MCSN notices to beneficiaries each year. In aggregate, we estimate an annual hospital burden of 2,610 hours (15,655 notices × 0.1667 hr/notice) at a cost of \$207,652 (2,610 hr × \$79.56/hr).

Please note, our data does not permit us to determine whether the observation services occurred prior to the initial inpatient stay or followed the change in status from inpatient to outpatient, as required to qualify for an appeal. As a result, 15,655 MCSN notices likely overstates the number of beneficiaries eligible for an appeal.

Please see section IV.D. of this proposed rule if you wish to view the draft standardized notice and supporting documentation.

## 3. ICRs Regarding Applicable QIO Review Regulations (§ 476.71 and § 476.78)

In section III.B. of this proposed rule, we are proposing that the QIOs would review the prospective expedited appeals under their contracts with the Secretary. CMS expects to revise the BFCC–QIO's contracts under the 13th Statement of Work to include the new prospective expedited appeals requirements after publication of the subsequent final rule. The additional costs to the government for the BFCC–QIOs to review the new appeals would include payment for the additional level of effort associated with communicating with beneficiaries and hospitals for the duration of the appeal, collecting and reviewing patient records, performing reconsiderations if requested, and

providing case files requested for further levels of review if needed. It also would include the cost of reimbursing hospitals for the submission of patient records for prospective expedited appeals. Hospitals would submit patient records and request reimbursement from the QIO using the process established in the existing memorandums of agreement (MOAs) under § 476.78(a) between hospitals and the QIO having jurisdiction over the particular State in which the hospital stay occurred.

As discussed in section III.B. of this proposed rule, hospitals would be required to submit patient records to the QIOs for prospective expedited appeals under proposed § 405.1211(d). Existing QIO regulations at § 476.78(b)(2) and (c) require providers and practitioners to electronically submit patient records to the QIOs for purposes of one or more QIO functions and allow for the reimbursement of providers and practitioners by the QIO for the electronic submission of patient records for one or more QIO functions at a rate of \$3.00 per submission under § 476.78(e)(2). Hospitals that have waivers for the required electronic submission of records under § 476.78(d) may be reimbursed by the QIO at a rate of \$0.15 per page for submission of the patient records under § 476.78(e)(3).

The estimation methodology used to determine the reimbursement rates for electronic and non-electronic submission of patient records for one or more QIO functions is discussed further in section IX.A. of the Fiscal Year (FY) 2021 Hospital Inpatient Prospective Payment System (IPPS)/Long-Term Care Prospective Payment System (LTCH PPS) final rule (85 FR 58977 through 58985). This estimation methodology is appropriate when applied to the proposed prospective expedited appeals due to the substantial similarity of its requirements and processes to those of other QIO functions upon which these rates were determined.

In section III.B.6 of this proposed rule, we are proposing the addition of a QIO review type at § 476.71(a)(9) making the QIO's review of the prospective expedited appeals under proposed § 405.1211(d) a QIO function using our authority in section 1154(a)(18) of the Act. As established earlier in the ICR section, the proposed prospective appeals process would constitute a CMS administrative action toward a specific individual or entity. Thus, the preparation and submission of the appeal, supporting documentation needed for the appeal, and communications between the QIO and parties to the appeal are not subject to

<sup>20</sup> The data used in this report come from the 2022 CMS Part B institutional administrative claims data for 100 percent of Medicare beneficiaries enrolled in the fee-for-service (FFS) program, which are available from the CMS Chronic Condition Data Warehouse ([www2.ccwdata.org/web/guest/home](http://www2.ccwdata.org/web/guest/home)), accessed August 2023.

<sup>21</sup> The data used in this report come from the 2022 CMC Part B institutional administrative claims data for 100 percent of Medicare beneficiaries enrolled in the fee-for-service (FFS) program, which are available from the CMS Chronic Condition Data Warehouse ([www2.ccwdata.org/web/guest/home](http://www2.ccwdata.org/web/guest/home)), accessed August 2023.

the PRA as stipulated under 5 CFR 1320.4(a)(2).

*C. Summary of Annual Burden  
Estimates for Proposed Changes*

TABLE 2—PROPOSED ANNUAL REQUIREMENTS AND BURDEN ESTIMATES

| Regulation section(s) under Title 42 of the CFR | OMB control No. (CMS ID No.) | Respondents           | Total responses | Time per response (hours) | Total time (hours) | Labor cost (\$/hr) | Total cost (\$) |
|-------------------------------------------------|------------------------------|-----------------------|-----------------|---------------------------|--------------------|--------------------|-----------------|
| \$ 405.932 .....                                | 0938—TBD (CMS—10885).        | 32,894 beneficiaries  | 6,579           | 0.5 (30 min)              | 3,290              | 21.98              | 72,314          |
| \$ 405.1210 .....                               | 0938—TBD (CMS—10868).        | 6,162 hospitals ..... | 15,655          | 0.1667 (10 min).          | 2,610              | 79.56              | 207,652         |
| Total .....                                     | .....                        | 39,056 .....          | 22,234          | varies .....              | 5,900              | varies             | 279,966         |

*D. Submission of Comments*

We have submitted a copy of this proposed rule to OMB for its review of the rule's information collection requirements. The requirements are not effective until they have been approved by OMB.

To obtain copies of the supporting statement and any related forms for the proposed collections discussed previously, please visit the CMS website at <https://www.cms.gov/regulations-and-guidance/legislation/paperworkreductionactof1995/pralisting>, or call the Reports Clearance Office at 410–786–1326.

We invite public comments on these potential information collection requirements. If you wish to comment, please submit your comments electronically as specified in the **DATES** and **ADDRESSES** section of this proposed rule and identify the rule (CMS–4204–P), the ICR's CFR citation, and OMB control number.

**V. Regulatory Impact Statement**

We have examined the impact of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), Executive Order 14094 entitled “Modernizing Regulatory Review” (April 6, 2023), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999).

Executive Orders 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). The Executive Order 14094 entitled “Modernizing Regulatory Review” (hereinafter, the Modernizing E.O.) amended section 3(f) of Executive Order 12866 (Regulatory Planning and Review). The amended section 3(f)(1) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a rule: (1) having an annual effect on the economy of \$200 million or more in any 1 year. A regulatory impact analysis (RIA) must be prepared for the rules with significant regulatory action/s as per section 3(f)(1) (\$200 million or more in any 1 year). This rule does not reach the economic threshold and thus is not considered a significant rule under section 3(f)(1).

We are making the determination that the proposed new appeals process will not have a significant financial impact on the Medicare program or interested parties based on our assumption about the overall number of projected appeals. While it is difficult to project how many beneficiaries will pursue appeals under this new process, overall, we anticipate a relatively low volume of retrospective appeals. We estimate that the total number of eligible beneficiaries is 32,894.<sup>22</sup> We are projecting approximately 6,600 appeals at the first level of appeal (MAC level); 5,000 appeals at the second level of appeal (QIC Level); 2,800 appeals at the third level of appeal (ALJ level); and 150 at the Medicare Appeals Council. There will be administrative costs associated

<sup>22</sup> The data used in this report came from the 2022 CMS Part B institutional administrative claims data for 100 percent of Medicare beneficiaries enrolled in the fee-for-service (FFS) program, which are available from the Integrated Data Repository (IDR). The IDR contains a subset of data transmitted by the Common Working File (CWF), a computerized database maintained by CMS in connection with its processing and payment of Medicare claims.

with tasking a contractor to serve as a point of contact and clearinghouse for incoming retrospective appeals requests.

We also anticipate a very low volume of prospective and standard appeals on an ongoing basis. We estimate that around 15,000 notices informing beneficiaries of their change in status and informing them of their right to appeal will be delivered annually.<sup>23</sup> We are estimating an appeal rate of 50 percent, which would result in about 7,500 appeals per year.

While our estimates reflect a relatively low number of appeals, we acknowledge that there will be administrative costs for hospitals to accommodate the new appeals process, as well as costs associated with modifying contracts for MACs, QICs, and the BFCC–QIOs to perform the retrospective, prospective and standard appeals. We welcome comment on these proposed estimates.

The RFA requires agencies to analyze options for regulatory relief of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than \$9.0 million to \$47.0 million in any 1 year. Individuals and states are not included in the definition of a small entity. We are not preparing an analysis for the RFA because we have determined, and the Secretary certifies, that this would not have a significant economic impact on a substantial number of small entities. In addition, section 1102(b) of the Act requires us to

<sup>23</sup> The data used in this report come from the 2022 CMS Part B institutional administrative claims data for 100 percent of Medicare beneficiaries enrolled in the fee-for-service (FFS) program, which are available from the CMS Chronic Condition Data Warehouse ([www2.ccwdata.org/web/guest/home](http://www2.ccwdata.org/web/guest/home)), accessed August 2023.

prepare an RIA if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital at 42 CFR 412.108 as a hospital that is located outside of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this proposed regulation would not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2023, that threshold is approximately \$177 million. This rule will have no consequential effect on state, local, or tribal governments or on the private sector.

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. Since this regulation does not impose any costs on state or local governments, the requirements of Executive Order 13132 are not applicable.

In accordance with the provisions of Executive Order 12866, this proposed rule was reviewed by the Office of Management and Budget.

## VI. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

Chiquita Brooks-LaSure, Administrator of the Centers for Medicare & Medicaid Services, approved this document on December 18, 2023.

## List of Subjects

### 42 CFR Part 405

Administrative practice and procedure, Diseases, Health facilities,

Health professions, Medical devices, Medicare, Reporting and recordkeeping requirements, Rural areas, X-rays.

### 42 CFR Part 476

Grant programs—health, Health care, Health facilities, Health professions, Health records, Peer Review Organization (PRO), Penalties, Privacy, Reporting and recordkeeping requirements.

### 42 CFR Part 489

Health facilities, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as set forth below:

## PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

- 1. The authority citation for part 405 continues to read as follows:

**Authority:** 42 U.S.C. 263a, 405(a), 1302, 1320b-12, 1395x, 1395y(a), 1395ff, 1395hh, 1395kk, 1395rr, and 1395ww(k).

- 2. Subpart I is amended by adding an undesignated center heading after § 405.930 and §§ 405.931, 405.932, 405.934, 405.936, and 405.938 to read as follows:

Retrospective Appeals for Changes in Patient Status That Resulted in Denial of Part A Coverage for Hospital Services.  
Sec.

- 405.931 Scope, basis, and definitions.
- 405.932 Right to appeal a denial of Part A coverage resulting from a change in patient status.
- 405.934 Reconsideration.
- 405.936 Hearings before an ALJ and decisions by an ALJ or Attorney Adjudicator.
- 405.938 Review by the Medicare Appeals Council and judicial review.

### § 405.931 Scope, basis, and definitions.

(a) *Scope and basis.* The provisions in §§ 405.931 through 405.938—

(1) Implement a federal district court order requiring appeal rights for hospital stays on or after January 1, 2009, for a specified class of beneficiaries under certain conditions (defined in § 405.931(b)(1)) who were admitted to a hospital as inpatients, but were subsequently reclassified by the hospital as outpatients receiving observation services; and

(2) Apply to retrospective appeals, that is, appeals for hospital outpatient services, and as applicable, post-hospital extended care services in a skilled nursing facility (SNF services), furnished to eligible parties as defined in paragraph (b) of this section before the implementation of the prospective

appeal process set forth in §§ 405.1210 through 405.1212.

(b) *Definitions.* For the purposes of the appeals conducted under §§ 405.931 through 405.938, the following definitions apply:

*Eligible party* means a beneficiary who, on or after January 1, 2009, meets the following criteria, and is, thus, eligible to request an appeal under §§ 405.931 through 405.938:

(i) Was formally admitted as a hospital inpatient.

(ii) While in the hospital was subsequently reclassified as an outpatient receiving observation services (as defined in § 405.931(h)).

(iii) Has received an initial determination (as defined in § 405.920) or a Medicare Outpatient Observation Notice (MOON) (as described in § 489.20(y)) indicating that the observation services are not covered under Medicare Part A.

(iv)(A) Was not enrolled in the Supplementary Medical Insurance program (that is, Medicare Part B coverage) at the time of beneficiary's hospitalization; or

(B) Stayed at the hospital for 3 or more consecutive days but was designated as an inpatient for fewer than 3 days, unless more than 30 calendar days has passed after the hospital stay without the beneficiary's having been admitted to a SNF.

(v) Medicare beneficiaries who meet the requirements of the paragraph (iv)(A) or (B) of this definition but who pursued an administrative appeal and received a final decision of the Secretary before September 4, 2011, are excluded from the definition of an eligible party.

*Eligibility contractor* means the contractor who meets all of the following:

(i) Is identified on the *Medicare.gov* website for accepting appeal requests.

(ii) Receives appeal requests and makes determinations regarding eligibility for the appeal under §§ 405.931 through 405.938.

(iii) Issues notices of eligibility.

(iv) Refers valid appeal requests to the processing contractor for a decision on the merits of the appeal.

*Processing contractor* means the contractor responsible for conducting the first-level appeal and issuing a decision on the merits of the appeal. Appeals under § 405.932 are conducted by the MAC who, at the time of the referral of the request for appeal under § 405.932(d)(2), has jurisdiction over claims submitted by the hospital where the eligible party received the services at issue.

(c) *Party to an appeal.* For the purposes of the appeals conducted

under §§ 405.931 through 405.938, an eligible party is the only party to the appeal. The provisions of § 405.906 do not apply to appeals processed under these provisions, and the provider that furnished services to an eligible party may not file a request for an appeal and is not considered a party to any appeal decision or determination.

(d) *Authorized representatives, appointed representatives, or representatives of a deceased eligible party.* For the purposes of appeals conducted under §§ 405.931 through 405.938:

(1) The provisions of § 405.910 apply to an eligible party appointing a representative to assist in such appeal, as appropriate, except as follows:

(i) A provider of services who furnished items or services to a beneficiary whose claims are the subject of an appeal under the provisions of §§ 405.931 through 405.938 is prohibited from representing the beneficiary or eligible party in such appeal.

(ii) [Reserved.]

(2) An authorized representative (as defined in § 405.902) may act on behalf of an eligible party and has all of the same rights and responsibilities of an eligible party throughout the appeals process.

(3) The provisions of § 405.906(a)(1) apply to a deceased eligible party in the same manner in which such provisions apply to a deceased beneficiary.

(4) The provisions of § 405.906(c) do not apply.

(5) A beneficiary who is an eligible party is considered unrepresented if the beneficiary meets any of the following:

(i) Has not appointed a representative under § 405.910.

(ii) Has an authorized representative as defined in § 405.902.

(iii) Has appointed as its representative a member of the beneficiary's family, a legal guardian, or an individual who routinely acts on behalf of the beneficiary, such as a family member or friend who has a power of attorney.

(iv) Is deceased but met the conditions for an eligible party in paragraph (b)(1) of this section and the appeal is filed by an individual who meets the conditions set forth in § 405.906(a)(1).

(e) *Prohibition on assignment of appeal rights.* For the purposes of the appeals conducted under §§ 405.931 through 405.938, an eligible party may not assign appeal rights to a provider under the provisions of § 405.912.

(f) *Date of receipt of a notice or decision.* For the purposes of the appeals conducted under §§ 405.931

through 405.938, the date of receipt of a notice or decision sent by the eligibility contractor, processing contractor or other appeals adjudicator is presumed to be 5 calendar days following the date on the notice unless there is evidence to the contrary.

(g) *Three or more consecutive days.* For the purposes of the appeals conducted under §§ 405.931 through 405.938, when determining if a beneficiary is an eligible party and for the purposes of determining coverage of SNF services under section 1861 of the Act, inpatient hospital days are counted in accordance with § 409.30, that is, a patient must have a qualifying inpatient stay of at least 3 consecutive calendar days starting with the admission day but not counting the discharge day.

(h) *Outpatient receiving observation services.* For the purposes of appeals conducted under §§ 405.931 through 405.938 when determining if a beneficiary is an eligible party, a beneficiary is considered an outpatient receiving observation services when the hospital changes beneficiary's status from inpatient to outpatient while the beneficiary is in the hospital and the beneficiary subsequently receives observation services following a valid order for such services.

**§ 405.932 Right to appeal a denial of Part A coverage resulting from a change in patient status.**

(a) *Filing an appeal request related to a change in patient status which resulted in the denial of Part A coverage.* (1) Only an eligible party, the party's appointed representative, or an authorized representative of an eligible party may request an appeal at any level of the appeals process under §§ 405.931 through 405.938.

(2) To initiate an appeal under §§ 405.931 through 405.938, an eligible party, the party's appointed representative, or an authorized representative of an eligible party must meet the following requirements:

(i) Submit a request for an appeal in writing to the eligibility contractor.

(ii) The request must be received by the eligibility contractor no later than 365 days after the implementation date of the final rule. The eligibility contractor denies the written request if it is not received by the applicable filing timeframe under § 405.932(d)(3), unless the eligible party established good cause for late submission as specified in § 405.942(b)(2) and (3).

(3) If an eligible party (or the party's representative) misfiles a request for appeal with a contractor or government entity other than the eligibility contractor, then for the purpose of

determining timeliness of the request for appeal, the date the misfiled request was received by the contractor or government agency is considered the date of receipt. The misfiled request and all documentation must be forwarded to the eligibility contractor within 30 calendar days of receipt, or as soon as practicable.

(b) *Content of the appeal request.* (1) The written request filed by an eligible party, the party's appointed representative, or an authorized representative of an eligible party may be made on a model CMS form. If the model form is not used, to be valid, the written request must include all of the following identifying information:

(i) Beneficiary name.

(ii) Beneficiary Medicare number (the number on the beneficiary's Medicare card).

(iii) Name of the hospital and dates of hospitalization.

(iv) Name of the SNF and the dates of stay (as applicable).

(2) If the appeal includes SNF services not covered by Medicare, the written request must also include an attestation to the out-of-pocket payment(s) made by the beneficiary for such SNF services and must include documentation of payments made to the SNF for such services.

(i) Payments for an eligible party's SNF services made by a third-party payer do not constitute out-of-pocket expenses or payment for an eligible party. If a third-party payer made payment for the eligible party's SNF services, then the services are excluded from consideration in the appeal.

(ii) Payments made for cost sharing (including, but not limited to, coinsurance and deductible) for SNF services covered by a third-party payer are not considered an out-of-pocket payment for the purposes of this provision.

(iii) Payments made by a family member for an eligible party's SNF services are considered an out-of-pocket payment for the eligible party.

(3) In the written request for an appeal, an eligible party (or their representative) may include an explanation of why the hospital admission satisfied the relevant criteria for Part A coverage and should have been covered under the Part A hospital insurance benefit instead of under the Part B supplementary medical insurance benefit.

(c) *Evidence and other information to be submitted with the appeal request.*

(1) Eligible parties (or their representatives) are encouraged to submit all available information and documentation, including medical

records related to the hospital stay and SNF services, as applicable, at issue in the appeal with the written request for an appeal.

(2) If the eligibility contractor determines there is information missing from the request that is needed to establish the beneficiary's eligibility as a party under § 405.931(b)(1) or satisfy other conditions for eligibility for an appeal, the eligibility contractor works with the appropriate MAC and attempts to obtain the information from the provider or the eligible party (or the party's representative) or both, as applicable. The eligibility contractor allows up to 60 calendar days for submission of missing information.

(3) If the necessary information cannot be obtained from either the provider or the eligible party (or the party's representative), the eligibility contractor makes an eligibility determination based on the information available.

(d) *Determining eligibility for an appeal.* (1)(i) The eligibility contractor reviews the information submitted with the appeal request and any additional information it obtains to determine if the individual submitting the appeal request is an eligible party and that the services previously furnished are eligible for an appeal under § 405.931.

(ii) The eligibility contractor mails or otherwise transmits the notice of its determination to the eligible party (or the party's representative) within 60 calendar days of receipt of the appeal request.

(iii) The time between the eligibility contractor's request for missing information and receipt of such information (or in the case of information that is requested but is not received, the time allowed by the contractor to submit the information) does not count toward the timeframe for issuing a notice to the eligible party (or the party's representative).

(2) If the eligibility contractor determines that the individual is an eligible party and the services previously furnished are eligible for an appeal, the eligibility contractor—

(i) Issues a notice of acceptance to the eligible party (or the party's representative), explaining that the appeal has been accepted for processing; and

(ii) Refers the appeal to the processing contractor for adjudication under § 405.932(e).

(3)(i) If the eligibility contractor determines that the request for appeal is untimely or incomplete, the individual does not satisfy the requirements for an eligible party, or the services previously furnished are not eligible for an appeal,

the eligibility contractor issues a denial notice to the individual (or the party's representative) in writing.

(ii) The denial notice explains that the request is not eligible for an appeal, the reason(s) for the denial of the appeal request, and the process for requesting a review of the eligibility denial under § 405.932(e).

(4) Notices regarding eligibility for an appeal issued by the eligibility contractor are written in a manner to be understood by the eligible party or the party's representative.

(e) *Review of an eligibility contractor's denial of a request for an appeal.* (1)(i) An individual (or their representative) may request a review of the eligibility contractor's denial of a request for an appeal by filing a request in writing with the eligibility contractor.

(ii) The request for review should explain the reason(s) the denial of the request for an appeal was incorrect, and should include additional information, as applicable, to support the validity of the original appeal request.

(2) The request for review, with any additional information, must be received by the eligibility contractor no later than 60 calendar days from the date of receipt of the denial notice. If the request for review is received after this deadline, the individual (or the individual's representative) must establish good cause for untimely filing. In determining whether good cause for untimely filing exists, the eligibility contractor applies the provisions in § 405.942(b)(2) and (3).

(3) The review by the eligibility contractor must be conducted by individuals not involved in the initial denial of the request for an appeal.

(4) The eligibility contractor may issue a decision that affirms or reverses the denial of the request for an appeal or may dismiss the request for review. The notice of the eligibility contractor's decision must meet both of the following requirements:

(i) Be written in a manner to be understood by the individual or the individual's representative.

(ii) Be mailed or otherwise transmitted in writing within 60 calendar days of the date of receipt of the request for review.

(5) If the decision is to affirm the denial, or dismiss the request, the eligibility contractor must explain the rationale for the decision.

(6) A denial notice under paragraph (d)(3) of this section issued due to receipt of an untimely appeal request must be reversed if the eligible party (or the party's representative) establishes good cause for late filing under § 405.942(b)(2) and (3).

(7) If the eligibility contractor reverses the initial denial of the request for appeal, the eligibility contractor forwards the request for appeal to the processing contractor under § 405.932(f).

(8) The eligibility contractor's decision that affirms the initial denial of a request for an appeal is binding and not subject to further review.

(9) If the eligibility contractor determines that the request for review of the eligibility denial under paragraph (e)(2) of this section was not submitted timely, and the eligibility contractor did not find good cause for the untimely submission, then the eligibility contractor dismisses the request for review, and such dismissal is binding and not subject to further review.

(f) *Processing eligible requests for appeal.* (1) If the processing contractor determines there is necessary information missing from the appeal case file, the processing contractor attempts to obtain the information from the provider or the eligible party (or the party's representative), as applicable.

(i) The processing contractor allows the provider or eligible party (or the party's representative), or both, up to 60 calendar days to submit missing information.

(ii) If the provider or eligible party (or the party's representative) does not submit the missing information within the allotted time, the processing contractor makes a decision on the request for appeal based on the information available.

(iii) The time between the processing contractor's request for information and receipt of such information (or in the case of information that is requested but is not received, the time allowed by the contractor to submit the information) does not count toward the timeframe for issuing the processing contractor's decision.

(2) The processing contractor reviews the information submitted with the appeal request and any additional information it obtains to determine if the inpatient admission satisfied the relevant criteria for Part A coverage at the time services were furnished. If the appeal request also includes a request to review denied SNF services that are eligible for an appeal, the processing contractor also determines if such eligible SNF services satisfied relevant criteria for Part A coverage at the time the services were furnished.

(3) Subject to the provisions in paragraph (e)(1) of this section, the processing contractor mails or otherwise transmits its written decision on the request for appeal within 60 calendar days of receipt of the request.

(g) *Notice and content of the decision.*

(1) If the processing contractor determines that the inpatient admission, and as applicable, SNF services, satisfied the relevant criteria for Part A coverage at the time the services were furnished, then the processing contractor issues notice of the favorable decision to the eligible party (or the party's representative). The processing contractor also notifies the hospital and SNF, as applicable, in the case of a favorable determination for Part A coverage.

(2)(i) If the processing contractor determines that the inpatient admission, or as applicable, SNF services, did not satisfy the relevant criteria for Part A coverage at the time the services were furnished, then the processing contractor issues notice of the unfavorable or partially favorable decision to the eligible party (or the party's representative).

(ii) The processing contractor issues a notice of a partially favorable decision to the SNF if the inpatient admission satisfied the relevant criteria for Part A coverage, but the SNF services did not satisfy the relevant criteria for Part A coverage.

(3) The notice issued to the eligible party (or the party's representative) must be written in a manner calculated to be understood by the eligible party (or the party's representative) and include all of the following:

(i) A clear statement of the decision made by the processing contractor.

(ii) The reason the hospital admission, and as applicable, the SNF services, satisfied or did not satisfy the relevant criteria for Part A coverage at the time the services were furnished.

(iii) A summary of the facts, including as appropriate, a summary of any clinical or scientific evidence used in making the determination.

(iv) An explanation of how pertinent laws, regulations, coverage rules, and CMS policies apply to the facts of the case.

(v) If a favorable decision, the effect of such decision, including, as applicable, a statement about the obligation of the SNF to refund any amounts collected for the covered SNF services, and that the SNF may then submit a new claim(s) for services covered under Part A in order to determine the amounts of benefits due.

(vi) If an unfavorable or partially favorable decision, a statement of any specific missing documentation that should be submitted with a request for reconsideration, if applicable.

(vii) The procedures for obtaining additional information concerning the decision, such as specific provisions of

the policy, manual, regulations, or other rules used in making the decision.

(viii) If an unfavorable or partially favorable decision, information about the procedures for filing a request for reconsideration under § 405.934.

(ix) Any other requirements specified by CMS.

(4) As applicable, a notice of a favorable decision issued to the SNF (including a decision for a beneficiary not enrolled in the Supplementary Medical Insurance program (Medicare Part B) at the time of beneficiary's hospitalization), includes all of the following:

(i) A clear statement of the decision made by the processing contractor.

(ii) The reason the SNF services satisfied the relevant criteria for Part A coverage at the time the services were furnished.

(iii) A summary of the facts, including as appropriate, a summary of any clinical or scientific evidence used in making the determination.

(iv) An explanation of how pertinent laws, regulations, coverage rules, and CMS policies apply to the facts of the case.

(v) The effect of such decision, including a statement explaining that the SNF must refund any payments collected from the beneficiary for the covered SNF services, and that the SNF may then submit a new claim(s) to determine the amount of benefits due for covered services.

(vi) Any other requirements specified by CMS.

(5) In the case of a favorable decision for a beneficiary not enrolled in the Supplementary Medical Insurance program (Medicare Part B) at the time of the beneficiary's hospitalization, notice is issued to the hospital that includes all of the following:

(i) A clear statement of the decision made by the processing contractor.

(ii) The reason the hospital admission satisfied the relevant criteria for Part A coverage at the time the services were furnished.

(iii) A summary of the facts, including as appropriate, a summary of any clinical or scientific evidence used in making the determination.

(iv) An explanation of how pertinent laws, regulations, coverage rules, and CMS policies apply to the facts of the case.

(v) The effect of such decision, including a statement explaining that the hospital must refund any payments collected for the outpatient hospital services, and that the hospital may then submit a new Part A inpatient claim in order to determine the amount of benefits due for covered services.

(vi) Any other requirements specified by CMS.

(6) In the case of a partially favorable decision issued to a SNF, the notice includes the following:

(i) A clear statement of the decision made by the processing contractor.

(ii) The reason the hospital admission satisfied the relevant criteria for Part A coverage at the time the services were furnished, and the reason the SNF services did not satisfy the relevant criteria for Part A coverage.

(iii) A summary of the facts, including as appropriate, a summary of any clinical or scientific evidence used in making the determination.

(iv) An explanation of how pertinent laws, regulations, coverage rules, and CMS policies apply to the facts of the case.

(v) The effect of such decision, including a statement explaining that the decision is being sent for informational purposes only, and that only the eligible party may appeal the decision to a QIC under § 405.934.

(vi) Any other requirements specified by CMS.

(h) *Effect of a favorable appeal decision.*

(1)(i) If the processing contractor issues a decision that the beneficiary's inpatient admission satisfied the relevant criteria for Part A coverage and the hospital's decision to change the inpatient admission to outpatient receiving observation services was therefore erroneous, the beneficiary's reclassification as an outpatient is disregarded for the purposes of determining Part A benefits, including Part A SNF coverage, if applicable.

(ii) For the purposes of effectuating a favorable decision by the processing contractor, any claims previously submitted for outpatient hospital services and payments made for such services (including any applicable deductible and coinsurance amounts) are not reopened or revised by the MAC, and payment, as applicable, for covered SNF services may be made by the MAC to the SNF without regard to the hospital claim.

(2) In order to determine Part A benefits to be paid and to make payment for covered services as a result of a favorable decision, as applicable:

(i) The SNF that furnished services to the beneficiary must refund payments previously collected from the beneficiary for the covered services and may then submit a Part A claim(s) for such services within 180 calendar days of receipt of the notice of a favorable decision.

(ii) In the case of an appeal for a beneficiary not enrolled in the

Supplementary Medical Insurance program (Medicare Part B) at the time of the beneficiary's hospitalization, the hospital that furnished services must refund any payments collected for the outpatient hospital services and may then submit a Part A inpatient claim for such services within 180 calendar days of receipt of the notice of a favorable decision.

(3) The hospital, and as applicable, the SNF, must comply with all applicable provisions regarding charges to the beneficiary for covered services, including but not limited to relevant provisions in part 489 Subparts B through D of this chapter.

(i) A favorable appeal decision is considered binding unless it is reopened and revised under the provisions of §§ 405.980 through 405.986.

(ii) The provisions regarding reopening of a redetermination in § 405.980(b) and (c) apply in the same manner to favorable decisions issued under this section.

(4) The notice of a favorable decision issued to a hospital and, as applicable, a SNF does not convey party status to such provider.

(i) *Effect of an unfavorable or partially favorable decision.* (1) An unfavorable or partially favorable appeal decision is considered binding unless—

(A) It is reopened and revised under the provisions of §§ 405.980 through 405.986; or

(B) An eligible party (or the party's representative) files a request for reconsideration under § 405.934.

(2) The provisions regarding reopening of a redetermination in §§ 405.980(b) and (c) apply in the same manner to unfavorable or partially favorable decisions issued under this section.

#### **§ 405.934 Reconsideration.**

(a) *Filing a request for reconsideration.* An eligible party, the party's appointed representative, or an authorized representative who is dissatisfied with the decision rendered by a processing contractor in § 405.932(g)(2) may request a reconsideration with a QIC within 180 calendar days of receipt of the processing contractor's notice. The request for reconsideration must include the elements specified in the processing contractor's notice.

(b) *Applicability of other provisions.* The provisions in §§ 405.960 through 405.978 that apply to reconsiderations of initial determinations apply to the extent they are appropriate/in the same manner to reconsiderations performed by a QIC under this section unless otherwise specified.

(c) *Notice and content of a reconsideration.* (1) If the QIC determines that the inpatient admission, and as applicable, eligible SNF services, satisfied the relevant criteria for Part A coverage at the time the services were furnished, then the QIC issues notice of the favorable reconsideration to the eligible party (or the party's representative). The QIC also notifies the hospital and SNF, as applicable, in the case of a favorable determination for Part A coverage.

(2)(i) If the QIC determines that the inpatient admission, or as applicable, SNF services, did not satisfy the relevant criteria for Part A coverage at the time the services were furnished, then the QIC issues notice of the unfavorable or partially favorable reconsideration to the eligible party (or the party's representative).

(ii) The QIC issues a notice of a partially favorable reconsideration to the SNF if the inpatient admission satisfied the relevant criteria for Part A coverage, but the SNF services did not satisfy the relevant criteria for Part A coverage.

(3) The notice of reconsideration must be mailed or otherwise transmitted within 60 calendar days of the QIC's receipt of the request for reconsideration, subject to the exceptions specified in § 405.970.

(4) The notice of reconsideration issued to the eligible party (or the party's representative) must be written in a manner calculated to be understood by the eligible party (or the party's representative) and include all of the following:

(i) A clear statement of the decision made by the QIC.

(ii) The reason the hospital admission, and as applicable, the SNF services, satisfied or did not satisfy the relevant criteria for Part A coverage at the time the services were furnished.

(iii) A summary of the facts, including as appropriate, a summary of any clinical or scientific evidence used in making the determination.

(iv) An explanation of how pertinent laws, regulations, coverage rules, and CMS policies apply to the facts of the case.

(v) If a favorable decision, the effect of such decision, including a statement about the obligation of the SNF to refund any amounts collected for the covered SNF services, and that the SNF may then submit a new claim(s) for services covered under Part A in order to determine the amounts of benefits due.

(vi) If the decision in § 405.932(f) indicated that specific documentation should be submitted with the

reconsideration request, and the documentation was not submitted with the request for reconsideration, the summary must indicate how the missing documentation affected the reconsideration.

(vii) The procedures for obtaining additional information concerning the decision, such as specific provisions of the policy, manual, regulations, or other rules used in making the decision.

(viii) If an unfavorable or partially favorable decision, information concerning an eligible parties' right to an ALJ hearing, including the applicable amount in controversy requirement and aggregation provisions and other procedures for filing a request for an ALJ hearing under § 405.936.

(ix) Any other requirements specified by CMS.

(5) As applicable, a notice of a favorable reconsideration issued to the SNF (including a decision for a beneficiary not enrolled in the Supplementary Medical Insurance program (Medicare Part B) at the time of the beneficiary's hospitalization), includes all of the following:

(i) A clear statement of the decision made by the QIC.

(ii) The reason the SNF services, satisfied the relevant criteria for Part A coverage at the time the services were furnished.

(iii) A summary of the facts, including as appropriate, a summary of any clinical or scientific evidence used in making the determination.

(iv) An explanation of how pertinent laws, regulations, coverage rules, and CMS policies apply to the facts of the case.

(v) The effect of such decision, including a statement explaining the SNF must refund any payments collected from the beneficiary for the covered SNF services, and that the SNF may then submit a new claim(s) to determine the amount of benefits due for the covered services.

(vi) Any other requirements specified by CMS.

(6) In the case of a favorable reconsideration for a beneficiary not enrolled in the Supplementary Medical Insurance program (Medicare Part B) at the time of the beneficiary's hospitalization, notice is issued to the hospital that includes all the following:

(i) A clear statement of the decision made by the QIC.

(ii) The reason the hospital admission satisfied the relevant criteria for Part A coverage at the time the services were furnished.

(iii) A summary of the facts, including as appropriate, a summary of any

clinical or scientific evidence used in making the determination.

(iv) An explanation of how pertinent laws, regulations, coverage rules, and CMS policies apply to the facts of the case.

(v) The effect of such decision, including a statement explaining that the hospital must refund any payments collected for the outpatient hospital services, and that the hospital may then submit a new Part A inpatient claim in order to determine the amount of benefits due for covered services.

(vi) Any other requirements specified by CMS.

(7) In the case of a partially favorable reconsideration issued to a SNF the notice includes the following:

(i) A clear statement of the decision made by the QIC.

(ii) The reason the hospital admission satisfied the relevant criteria for Part A coverage at the time the services were furnished, and the reason the SNF services did not satisfy the relevant criteria for Part A coverage.

(iii) A summary of the facts, including as appropriate, a summary of any clinical or scientific evidence used in making the determination.

(iv) An explanation of how pertinent laws, regulations, coverage rules, and CMS policies apply to the facts of the case.

(v) The effect of such decision, including a statement explaining that the decision is being sent for informational purposes only, and that only the eligible party may appeal the decision to an ALJ under § 405.936.

(vi) Any other requirements specified by CMS.

(d) *Effect of a favorable reconsideration.* (1)(i) If the QIC issues a reconsideration decision that the beneficiary's inpatient admission satisfied the relevant criteria for Part A coverage and the hospital's decision to change the inpatient admission to outpatient receiving observation services was therefore erroneous, the beneficiary's reclassification as an outpatient is disregarded for the purposes of determining Part A benefits, including both Part A hospital coverage and Part A SNF coverage, if applicable.

(ii) For the purposes of effectuating a favorable reconsideration, any claims previously submitted for outpatient hospital services and payments made for such services (including any applicable deductible and coinsurance amounts) are not reopened or revised by the MAC, and payment, as applicable, for covered SNF services may be made by the MAC to the SNF without regard to the hospital claim.

(2) In order to determine Part A benefits to be paid and to make payment for covered services as a result of a favorable decision, as applicable:

(i) The SNF that furnished services to the beneficiary must refund payments previously collected from the beneficiary for the covered services and may then submit a Part A claim(s) for such services within 180 calendar days of receipt of the notice of a favorable decision;

(ii) In the case of an appeal for a beneficiary not enrolled in the Supplementary Medical Insurance program (Medicare Part B) at the time of the beneficiary's hospitalization, the hospital that furnished services must refund any payments collected for the outpatient hospital services and may then submit a Part A inpatient claim for such services within 180 calendar days of receipt of the notice of a favorable decision.

(3) The hospital, and as applicable, the SNF, must comply with all applicable provisions regarding charges to the beneficiary for covered services, including but not limited to relevant provisions in part 489 Subparts B through D of this chapter.

(4) A favorable reconsideration is considered binding unless it is reopened and revised under the provisions of §§ 405.980 through 405.986. The provisions regarding reopening of a reconsideration in § 405.980(d) and (e) apply in the same manner to favorable reconsiderations issued under this section.

(5) The notice of a favorable reconsideration sent to a hospital and, as applicable, a favorable or partially favorable reconsideration sent to a SNF does not convey party status.

(e) *Effect of an unfavorable or partially favorable reconsideration.* (1) An unfavorable or partially favorable reconsideration is considered binding unless—

(i) It is reopened and revised under the provisions of § 405.980(d) or (e); or

(ii) An eligible party (or the party's representative) files a request for a hearing by an ALJ under § 405.936.

(2) The provisions regarding reopening of a reconsideration in § 405.980(d) and (e) apply in the same manner to unfavorable and partially favorable decisions issued under this section.

**§ 405.936 Hearings before an ALJ and decisions by an ALJ or Attorney Adjudicator.**

(a) *Filing a request for hearing.* An eligible party, the party's appointed representative, or an authorized representative who is dissatisfied with

the reconsideration rendered by a QIC in § 405.934(c)(2), or a dismissal of a request for reconsideration, may request a hearing before an ALJ within 60 calendar days of receipt of the reconsideration. The request for hearing must include the elements specified in the QIC's reconsideration.

(b) *Applicability of other provisions.* The provisions in §§ 405.1000 through 405.1064 that apply to ALJ hearings and decisions by an ALJ or an attorney adjudicator apply to the extent they are appropriate/in the same manner to ALJ hearings and decisions by an ALJ or an attorney adjudicator under this section unless otherwise specified.

(c) *Calculating the amount remaining in controversy for an ALJ hearing or judicial review.* (1)(i) A request for ALJ hearing for an appeal under the provisions of §§ 405.931 through 405.938 must meet the amount in controversy requirement in § 405.1006(b).

(ii) A request for judicial review in federal district court for an appeal under the provisions of §§ 405.931 through 405.938 must meet the amount in controversy requirement in § 405.1006(c), subject to the calculation methodology set forth in this paragraph.

(2) For appeals under the provisions of §§ 405.931 through 405.938, the amount remaining in controversy for an ALJ hearing or for judicial review in federal district court under § 405.1136 is determined by the sum of the billed charges on the Part B outpatient hospital claim and, as applicable, any billed charges for the SNF claim at issue, if such claims were submitted to Medicare. If no SNF claim was submitted for services furnished to the beneficiary, then the billed charges to the beneficiary as indicated on an itemized statement or evidence of payment made by the beneficiary for such services are used in calculating the amount remaining in controversy.

(3) In the case of an appeal under the provisions of §§ 405.931 through 405.938 filed by an eligible party who was not enrolled in Part B at the time of hospitalization, and no Part B outpatient hospital claim was billed to Medicare, the amount remaining in controversy is determined by the charges billed to the beneficiary by the hospital for the outpatient hospital stay and billed charges for SNF services, if applicable. An itemized statement from the provider such services, or evidence of the payment made by the beneficiary to the provider is acceptable for the purpose of calculating the amount remaining in controversy.

(4) Any payments made, including coinsurance and deductible, for the Part

B outpatient hospital claim, and as applicable, the SNF claim must not reduce the calculation of the amount in controversy for the purposes of a hearing or judicial review under this paragraph.

(d) *Notice and content of an ALJ or attorney adjudicator decision.* (1) If the ALJ or attorney adjudicator determines that the inpatient admission, and as applicable, eligible SNF services, satisfied the relevant criteria for Part A coverage at the time the services were furnished, then the ALJ or attorney adjudicator issues notice of the favorable decision to the eligible party (or the party's representative).

(ii) The ALJ or attorney adjudicator also notifies the hospital and SNF, as applicable, in the case of a favorable determination for Part A coverage.

(2)(i) If the ALJ or attorney adjudicator determines that the inpatient admission, or as applicable, SNF services, did not satisfy the relevant criteria for Part A coverage at the time the services were furnished, then the ALJ or attorney adjudicator issues notice of the unfavorable or partially favorable decision to the eligible party (or the party's representative).

(ii) The ALJ or attorney adjudicator issues a notice of a partially favorable decision to the SNF if the inpatient admission satisfied the relevant criteria for Part A coverage, but the SNF services did not satisfy the relevant criteria for Part A coverage.

(3) The ALJ or attorney adjudicator decision issued to the eligible party (or the party's representative) must be written in a manner calculated to be understood by the eligible party (or the party's representative) and include all of the following:

(i) A clear statement of the decision made by the ALJ or attorney adjudicator.

(ii) The findings of fact.

(iii) The conclusions of law.

(iv) The reason for the determination that the hospital admission, and as applicable SNF services, satisfied or did not satisfy the relevant criteria for Part A coverage at the time the services were furnished, and, to the extent appropriate, a summary of any clinical or scientific evidence used in making the determination.

(v) The procedures for obtaining additional information concerning the decision, such as specific provisions of the policy, manual, regulations, or other rules used in making the decision.

(vi) If a favorable decision, the effect of such decision, including, as applicable, a statement about the obligation of the SNF to refund any amounts collected for the covered SNF services, and that the SNF may then

submit a new claim(s) for services covered under Part A in order to determine the amount of benefits due.

(vii) If an unfavorable decision or a partially favorable decision, information about the procedures for filing a request for review by the Appeals Council under § 405.938.

(4) As applicable, a notice of a favorable ALJ or attorney adjudicator decision (including a decision for a beneficiary not enrolled in the Supplementary Medical Insurance program (Medicare Part B) at the time of the beneficiary's hospitalization) issued to the SNF, includes the following:

(i) A clear statement of the decision made by the ALJ or attorney adjudicator.

(ii) The findings of fact.

(iii) The conclusions of law.

(iv) The reason for the determination that the SNF services, satisfied the relevant criteria for Part A coverage at the time the services were furnished, and to the extent appropriate, a summary of any clinical or scientific evidence used in making the determination.

(v) The effect of such decision, including a statement explaining that the SNF must refund any payments collected from the beneficiary for the covered SNF services, and that the SNF may then submit a new claim(s) to determine the amount of benefits due for the covered services.

(5) In the case of a favorable ALJ or attorney adjudicator decision for a beneficiary not enrolled in the Supplementary Medical Insurance program (Medicare Part B) at the time of beneficiary's hospitalization, notice is issued to the hospital that includes all of the following:

(i) A clear statement of the decision made by the ALJ or attorney adjudicator.

(ii) The findings of fact.

(iii) The conclusions of law.

(iv) The reason for the determination that the hospital admission satisfied the relevant criteria for Part A coverage at the time the services were furnished, and to the extent appropriate, a summary of any clinical or scientific evidence used in making the determination.

(v) The effect of such decision, including a statement explaining that the hospital must refund any payments collected for the outpatient hospital services, and that the hospital may then submit a new Part A inpatient claim in order to determine the amount of benefits due for covered services.

(6) In the case of a partially favorable decision issued to a SNF, the notice includes the following:

(i) A clear statement of the decision made by the ALJ or attorney adjudicator.

(ii) The findings of fact.

(iii) The conclusions of law.

(iv) The reason for the determination that the hospital admission satisfied the relevant criteria for Part A coverage at the time the services were furnished, and the reason the SNF services did not satisfy the relevant criteria for Part A coverage, and to the extent appropriate, a summary of any clinical or scientific evidence used in making the determination.

(v) The effect of such decision, including a statement explaining that the decision is being sent for informational purposes only, and that only the eligible party may appeal the decision to the Medicare Appeals Council under § 405.938.

(7) The timeframe within which notices must be issued under this paragraph are determined under the provisions in § 405.1016.

(e) *Effect of a favorable ALJ or attorney adjudicator decision.* (1)(i) If the ALJ or attorney adjudicator issues a decision that the beneficiary's inpatient admission satisfied the relevant criteria for Part A coverage and the hospital's decision to change the inpatient admission to outpatient receiving observation services was therefore erroneous, the beneficiary's reclassification as an outpatient is disregarded for the purposes of determining Part A benefits, including Part A SNF coverage, if applicable.

(ii) For the purposes of effectuating a favorable decision by an ALJ or attorney adjudicator any claims previously submitted for outpatient hospital services and payments made for such services (including any applicable deductible and coinsurance amounts) are not reopened or revised by the MAC, and payment, as applicable, for covered SNF services may be made by the MAC to the SNF without regard to the hospital claim.

(2) In order to determine Part A benefits to be paid and to make payment for covered services as a result of a favorable decision, as applicable:

(i) The SNF that furnished services to the beneficiary must refund payments previously collected from the beneficiary for the covered services and may then submit a Part A claim(s) for such services within 180 calendar days of receipt of the notice of a favorable decision;

(ii) In the case of an appeal for a beneficiary not enrolled in the Supplementary Medical Insurance program (Medicare Part B) at the time of the beneficiary's hospitalization, the hospital that furnished services must refund any payments collected for the outpatient hospital services and may

then submit a Part A inpatient claim for such services within 180 calendar days of receipt of the notice of a favorable decision.

(3) The hospital, and as applicable, the SNF, must comply with all applicable provisions regarding charges to the beneficiary for covered services, including but not limited to relevant provisions in part 489 Subparts B through D of this chapter.

(4) A favorable ALJ or attorney adjudicator decision is considered binding unless it is reopened and revised under the provisions of §§ 405.980 through 405.986. The provisions regarding reopening of an ALJ or attorney adjudicator decision in § 405.980(d) and (e) apply in the same manner to favorable ALJ or attorney adjudicator decisions issued under this section.

(5) The notice of a favorable decision issued to a hospital and, as applicable, notice of a favorable or partially favorable decision sent to a SNF does not convey party status to such provider.

(f) *Effect of an unfavorable or partially favorable ALJ or attorney adjudicator decision.* (1) An unfavorable or partially favorable ALJ or attorney adjudicator decision is considered binding unless—

(i) It is reopened and revised under the provisions of § 405.980(d) or (e); or

(ii) An eligible party (or the party's representative) files a request for Medicare Appeals Council review under § 405.938.

(2) The provisions regarding reopening of an ALJ or attorney adjudicator decision in § 405.980(d) and (e) apply in the same manner to unfavorable and partially favorable decisions issued under this section.

#### **§ 405.938 Review by the Medicare Appeals Council and judicial review.**

(a) *Filing a request for Council review.* An eligible party, the party's appointed representative, or an authorized representative who is dissatisfied with the unfavorable decision of an ALJ or an attorney adjudicator in § 405.936(d)(2) may request the Council review the decision within 60 calendar days of receipt of the decision. The request for review must contain the elements specified in the ALJ or attorney adjudicator's decision notice.

(b) *Applicability of other provisions.* The provisions in §§ 405.1100 through 405.1130 that apply to Council review apply to the extent they are appropriate in the same manner to Council review under this section unless otherwise specified.

(c) *Notice of the Council's action.* (1) After it has reviewed all the evidence in

the administrative record and any additional evidence received, subject to the limitations on consideration of additional evidence in § 405.1122, the Council makes a decision or remands the case to an ALJ or attorney adjudicator.

(2) The Council may adopt, modify, or reverse the ALJ's or attorney adjudicator's decision or recommended decision.

(3) Notice of the Council's decision or remand order is issued to the eligible party (or the party's representative).

(i) In the case of a modification or reversal of the ALJ's or attorney adjudicator's decision that is favorable to the eligible party, the Council's decision includes information regarding the effect of such decision, including, as applicable, a statement about the obligation of the SNF to refund any amounts collected from the beneficiary for the covered SNF services, and that the SNF may then submit a new claim(s) for services covered under Part A in order to determine the amount of benefits due.

(ii) If the appeal involves a beneficiary not enrolled in the Supplementary Medical Insurance program (Medicare Part B) at the time of the beneficiary's hospitalization, a modification or reversal of the ALJ's or attorney adjudicator's decision that is favorable to the eligible party with respect to hospital services also includes a statement about the obligation of the hospital to refund any amounts collected for the outpatient hospital services, and that the hospital may then submit a new claim for covered inpatient hospital services in order to determine the amount of benefits due.

(iii)(A) If the Council adopts or modifies an ALJ or attorney adjudicator decision that is unfavorable or partially favorable to the eligible party, the decision includes information about the procedures for filing a request for judicial review under § 405.1136, including information regarding the amount in controversy requirement in § 405.936(c).

(B) A partially favorable decision issued by the Council refers to a determination that the inpatient admission satisfied the relevant criteria for Part A coverage but the SNF services did not satisfy the relevant criteria for Part A coverage.

(4) Notice of a Council decision, favorable or partially favorable to the eligible party, that modifies or reverses the decision or recommended decision by an ALJ or attorney adjudicator, or a remand order that is favorable to the eligible party, is issued to the SNF, as applicable, and to the hospital in the

case of an appeal filed by, or on behalf of, a beneficiary not enrolled in the Supplementary Medical Insurance program (Medicare Part B) at the time of hospitalization.

(i)(A) Notice issued to the SNF includes information regarding the effect of such decision, including, as applicable, a statement explaining that the SNF must refund any payments collected from the beneficiary for the covered SNF services, and that the SNF may then submit a new claim(s) to determine the amount of benefits due for the covered services.

(B) A decision that is partially favorable to the eligible party is sent to the SNF and explains the reason the hospital admission satisfied the relevant criteria for Part A coverage at the time the services were furnished, the reason the SNF services did not satisfy the relevant criteria for Part A coverage and explains that the decision is being sent for informational purposes only.

(ii) Notice issued to a hospital (in the case of an appeal filed by, or on behalf of, a beneficiary not enrolled in the Supplementary Medical Insurance program (Medicare Part B) at the time of hospitalization) includes information regarding the effect of such decision, including a statement explaining that the hospital must refund any payments collected for the outpatient hospital services, and that the hospital may then submit a new Part A inpatient claim in order to determine the amount of benefits due for covered services.

(5) The timeframe within which notices must be sent under this paragraph are determined under the provisions in § 405.1100.

(d) *Effect of a favorable Council decision.* (1)(i) If the Council issues a decision that the beneficiary's inpatient admission satisfied the relevant criteria for Part A coverage and the hospital's decision to change the inpatient admission to outpatient receiving observation services was therefore erroneous, the beneficiary's reclassification as an outpatient is disregarded for the purposes of determining Part A benefits, including both Part A hospital coverage and Part A SNF coverage, if applicable.

(ii) For the purposes of effectuating a favorable decision by the Council, any claims previously submitted for outpatient hospital services and payments made for such services (including any applicable deductible and coinsurance amounts) are not reopened or revised by the MAC, and payment, as applicable, for covered SNF services may be made by the MAC to the SNF without regard to the hospital claim.

(2) In order to determine Part A benefits to be paid and to make payment for covered services as a result of a favorable decision, as applicable—

(i) The SNF, that furnished services to the beneficiary must refund payments previously collected from the beneficiary for the covered services and may then submit a Part A claim(s) for such services within 180 calendar days of receipt of the notice of a favorable decision;

(ii) In the case of an appeal for a beneficiary not enrolled in the Supplementary Medical Insurance program (Medicare Part B) at the time of the beneficiary's hospitalization, the hospital that furnished services must refund any payments collected for the outpatient hospital services and may then submit a Part A inpatient claim for such services within 180 calendar days of receipt of the notice of a favorable decision.

(3) The hospital, and as applicable, the SNF, must comply with all applicable provisions regarding charges to the beneficiary for covered services, including but not limited to relevant provisions in part 489 Subparts B through D of this chapter.

(4) A favorable Council decision is considered final and binding unless it is reopened and revised under the provisions of §§ 405.980 through 405.986. The provisions regarding reopening of a Council decision in § 405.980(d) and (e) apply in the same manner to favorable Council decisions issued under this section.

(5) The notice of a favorable decision issued to a hospital and, as applicable, notice of a favorable or partially favorable decision issued to SNF does not convey party status to such provider.

(e) *Effect of an unfavorable or partially favorable Appeals Council decision.* (1) An unfavorable or partially favorable Appeals Council decision is considered final and binding unless it is reopened and revised under the provisions of § 405.980(d) or (e), or a Federal district court issues a decision modifying the Council's decision.

(2) The provisions regarding reopening of an Appeals Council decision in § 405.980(d) and (e) apply in the same manner to unfavorable and partially favorable decisions issued under this section.

(f) *Judicial review.* (1) An eligible party (or the party's representative) dissatisfied with a final and binding decision under paragraph (e) of this section who satisfies the amount in controversy requirement in § 405.936(c) may request judicial review in Federal

district court under the procedures set forth in § 405.1136.

(2) An eligible party (or the party's representative) who satisfies the amount in controversy requirement in § 405.936(c) and the requirements to escalate a case from the Council in § 405.1132 may request judicial review in Federal district court under the procedures set forth in § 405.1136.

■ 3. The heading of subpart J is revised to read as follows:

**Subpart J—Procedures and Beneficiary Rights for Expedited Determinations and Reconsiderations When Coverage Is Changed or Terminated**

■ 4. Add §§ 405.1210, 404.1211, and 405.1212 to read as follows:

**§ 405.1210 Notifying eligible beneficiaries of appeal rights when a beneficiary is reclassified from an inpatient to an outpatient receiving observation services.**

(a) *Applicability and scope.* (1) For purposes of §§ 405.1210 through 405.1212, the term “hospital” is defined as any facility providing care at the inpatient hospital level, whether that care is short term or long term, acute or non-acute, paid through a prospective payment system or other reimbursement basis, limited to specialty care or providing a broader spectrum of services. This definition includes critical access hospitals (CAHs).

(2) For purposes of §§ 405.1210 through 405.1212, the change in status occurs when a beneficiary is reclassified from an inpatient to an outpatient receiving observation services (as defined in § 405.931(h)).

(3) For purposes of §§ 405.1210 through 405.1212, a beneficiary is eligible to pursue an appeal regarding a change in status when the beneficiary meets all the following:

(i) Was formally admitted as a hospital inpatient in accordance with an order for inpatient admission by a physician or other qualified practitioner.

(ii) Was subsequently reclassified by the hospital as an outpatient receiving observation services after the admission.

(iii)(A) Was not enrolled in Part B coverage at the time of the beneficiary's hospitalization; or

(B) Stayed at the hospital for 3 or more consecutive days but was classified as an inpatient for fewer than 3 days.

(iv) The period “3 or more consecutive days” is counted using the rules for determining coverage of SNF services under section 1861 of the Act and § 409.30 of this chapter (that is, a beneficiary must have a qualifying

inpatient stay of at least 3 consecutive calendar days starting with the admission day but not counting the discharge day).

(b) *Advance written notice of appeal rights.* For all eligible beneficiaries, hospitals must deliver valid, written notice of an eligible beneficiary's right to pursue an appeal regarding the decision to reclassify the beneficiary from an inpatient to an outpatient receiving observation services. The hospital must use a standardized notice specified by CMS in accordance with the following procedures:

(1) *Timing of notice.* The hospital must provide the notice not later than 4 hours before release from the hospital and as soon as possible after the earliest of either of the following:

(i) The hospital reclassifies the beneficiary from an inpatient to an outpatient receiving observation services and the beneficiary is not enrolled in Part B.

(ii) The hospital reclassifies the beneficiary from an inpatient to an outpatient receiving observation services and the beneficiary has stayed in the hospital for 3 or more consecutive days but was an inpatient for fewer than 3 days.

(2) *Content of the notice.* The notice must include the following information:

(i) The eligible beneficiary's change in status and the appeal rights under § 405.1211 if the beneficiary wishes to pursue an appeal regarding that change.

(ii) An explanation of the implications of the change in status, including the potential change in beneficiary hospital charges resulting from a favorable decision, and subsequent eligibility for Medicare coverage for SNF services.

(iii) Any other information required by CMS.

(3) *When delivery of the notice is valid.* Delivery of the written notice of appeal rights described in this section is valid if—

(A) The eligible beneficiary (or the eligible beneficiary's representative) has signed and dated the notice to indicate that he or she has received the notice and can comprehend its contents and except as provided in paragraph (b)(4) of this section; and

(B) The notice is delivered in accordance with paragraph (b)(1) of this section and contains all the elements described in paragraph (b)(2) of this section.

(4) *If an eligible beneficiary refuses to sign the notice.* The hospital may annotate its notice to indicate the refusal, and the date of refusal is considered the date of receipt of the notice.

**§ 405.1211 Expedited determination procedures when a beneficiary is reclassified from an inpatient to an outpatient receiving observation services.**

(a) *Beneficiary's right to an expedited determination by the QIO.* An eligible beneficiary has a right to request an expedited determination by the QIO when—

(1) A hospital changes a beneficiary's status from an inpatient to an outpatient receiving observation services; and

(2) The beneficiary meets other eligibility criteria as specified in § 405.1210(a)(3).

(b) *Requesting an expedited determination.* (1) A eligible beneficiary who wishes to exercise the right to an expedited determination must submit a request to the QIO that has an agreement with the hospital as specified in § 476.78 of this chapter. The request must be made in writing or by telephone before release from the hospital.

(2) The eligible beneficiary, or his or her representative, upon request by the QIO, must be available to discuss the case.

(3) The eligible beneficiary may, but is not required to, submit written evidence to be considered by the QIO in making its decision.

(4) An eligible beneficiary who makes a timely request for an expedited QIO review in accordance with paragraph (b)(1) of this section is subject to the billing protection under paragraph (e) of this section, as applicable.

(5) An eligible beneficiary who fails to make a timely request for an expedited determination by a QIO, as described in paragraph (b)(1) of this section, may still request an expedited QIO determination at any time. The QIO issues a decision in accordance with paragraph (c)(ii) of this section, but the coverage protection under paragraph (e) of this section does not apply.

(c) *Procedures the QIO must follow.* (1) When the QIO receives the request for an expedited determination under paragraph (b)(1) of this section, it must immediately notify the hospital that a request for an expedited determination has been made.

(2) The QIO determines whether the hospital delivered valid notice consistent with § 405.1210(b)(3).

(3) The QIO examines the medical and other records that pertain to the change in status.

(4) The QIO must solicit the views of the eligible beneficiary (or the eligible beneficiary's representative) who requested the expedited determination.

(5) The QIO must provide an opportunity for the hospital to explain why the reclassification of the beneficiary from an inpatient to an

outpatient receiving observation services is appropriate.

(6) The following timeframes apply for the QIO's decision when an eligible beneficiary requests—

(i) A timely expedited determination in accordance with paragraph (b)(1) of this section, the QIO must make a determination within 1 calendar day of receiving all requested pertinent information specified in paragraph (d)(1)(i) of this section; or

(ii) An untimely request for a QIO expedited determination, the QIO must make a determination within 1 calendar day after the QIO receives all requested information specified in paragraph (d)(1)(i) of this section.

(7) If the QIO does not receive the information needed to make its decision, it may make its determination based on the evidence at hand, or it may defer a decision until it receives the necessary information.

(8) When the QIO issues an expedited determination, the QIO must notify the eligible beneficiary, the hospital, and SNF (if applicable) of its decision by telephone, followed by a written notice that must include the following information:

(i) The basis for the determination.

(ii) A detailed rationale for the determination.

(iii) An explanation of the Medicare payment consequences of the determination.

(iv) Information about the eligible beneficiary's right to an expedited reconsideration of the QIO's determination as set forth in § 405.1212, including how to request a reconsideration and the time period for doing so.

(d) *Responsibilities of hospitals.* (1)(i) Upon notification by the QIO of the request for an expedited determination, the hospital must supply all information that the QIO needs to make its expedited determination, including a copy of the notice as required in § 405.1210(b) of this section.

(ii) The hospital must furnish this information as soon as possible, but no later than by noon of the calendar day after the QIO notifies the hospital of the request for an expedited determination.

(iii) At the discretion of the QIO, the hospital must make the information available by phone or in writing (with a written record of any information not transmitted initially in writing).

(2)(i) At an eligible beneficiary's (or representative's) request, the hospital must furnish the beneficiary with a copy of, or access to, any documentation that it sends to the QIO, including written records of any information provided by telephone.

(ii) The hospital may charge the beneficiary a reasonable amount to cover the costs of duplicating the documentation or delivering or both it to the beneficiary.

(iii) The hospital must accommodate such a request by no later than close of business of the first calendar day after the material is requested.

(e) *Billing during QIO expedited review.* When an eligible beneficiary requests an expedited determination in accordance with paragraphs (b)(1) through (b)(4) of this section, the hospital may not bill the beneficiary for any disputed services until the expedited determination process (and reconsideration process, if applicable) has been completed.

(f) *Effect of an expedited QIO determination.* The QIO determination is binding for payment purposes upon the eligible beneficiary, hospital, and MAC, except if the eligible beneficiary is dissatisfied with the determination, he or she may request a reconsideration according to the procedures described in § 405.1212.

**§ 405.1212 Expedited reconsideration procedures regarding Part A coverage when a beneficiary is reclassified from an inpatient to an outpatient receiving observation services.**

(a) *Beneficiary's right to an expedited reconsideration.* An eligible beneficiary who is dissatisfied with a QIO's expedited determination per § 405.1211(c)(6) may request an expedited reconsideration by the QIO identified in the written notice specified in § 405.1211(c)(8)(iv).

(b) *Requesting an expedited reconsideration.* (1) An eligible beneficiary who wishes to obtain an expedited reconsideration must submit a request for the reconsideration to the appropriate QIO, in writing or by telephone, by no later than noon of the calendar day following initial notification (whether by telephone or in writing) after receipt of the QIO's determination.

(2) The eligible beneficiary, or his or her representative, must be available to answer questions or supply information that the QIO may request to conduct its reconsideration.

(3) The eligible beneficiary may, but is not required to, submit evidence to be considered by the QIO in making the reconsideration.

(4) An eligible beneficiary who makes a timely request for an expedited reconsideration in accordance with paragraph (b)(1) of this section is subject to the billing protection under paragraph (e) of this section, as applicable.

(5) An eligible beneficiary who fails to make a timely request for an expedited reconsideration by a QIO, as described in paragraph (b)(1) of this section, may still request an expedited QIO reconsideration at any time. The QIO issues a reconsideration in accordance with paragraph (c)(3)(ii) of this section, but the billing protection under paragraph (e) of this section does not apply.

(c) *Procedures and responsibilities of the QIO.* (1) On the day the QIO receives the request for an expedited reconsideration under paragraph (b) of this section, the QIO must immediately notify the hospital of the request for an expedited reconsideration.

(2) The QIO must offer the eligible beneficiary and the hospital an opportunity to provide further information.

(3) When the eligible beneficiary makes—

(i) A timely request from in accordance with paragraph (b)(1) of this section, the QIO must make a reconsideration determination within 2 calendar days of receiving all requested pertinent information; or

(ii) An untimely request, the QIO must make a reconsideration determination within 3 calendar days of receiving all requested pertinent information.

(4) When the QIO issues an reconsideration determination, the QIO must notify the eligible beneficiary, the hospital, and SNF, if applicable, of its decision by telephone, followed by a written notice that must include the following information:

(i) The basis for the determination.

(ii) A detailed rationale for the determination.

(iii) An explanation of the Medicare payment consequences of the determination.

(iv) Information about the eligible beneficiary's right to appeal the QIO's reconsideration decision to OMHA for an ALJ hearing in accordance with subpart I of this part, including how to request an appeal and the time period for doing so.

(d) *Responsibilities of the hospital.* A hospital may, but is not required to, submit evidence to be considered by a QIO in making its reconsideration decision. If a hospital fails to comply with a QIO's request for additional information beyond that furnished to the BFCC–QIO for purposes of the expedited determination, the QIO makes its reconsideration decision based on the information available.

(e) *Billing during QIO reconsideration.* When an eligible beneficiary requests an expedited reconsideration in accordance with the deadline specified in paragraph (b)(1) of this section, the hospital may not bill the beneficiary for any disputed services until the QIO makes its reconsideration decision.

(f) *Effect of an expedited QIO reconsideration.* The QIO expedited reconsideration is binding for payment purposes only, upon the eligible beneficiary, hospital, and MAC, except if a beneficiary elects to request a hearing by an ALJ in accordance with 42 CFR part 478 subpart B if he or she is dissatisfied with the expedited reconsideration decision.

## **PART 476—QUALITY IMPROVEMENT ORGANIZATION REVIEW**

■ 5. The authority citation for part 476 continues to read as follows:

**Authority:** 42 U.S.C. 1302 and 1395hh.

■ 6. Section 476.71 is amended by adding paragraph (a)(9) to read as follows:

### **§ 476.71 QIO review requirements.**

(a) \* \* \*

(9) Hospital reclassification of a beneficiary's inpatient admission status to that of an outpatient receiving observation services when a beneficiary meets the eligibility criteria at §§ 405.1210 through 405.1212 of this chapter. Appeals of determinations are available as specified in § 405.1212(f) of this chapter.

\* \* \* \* \*

## **PART 489—PROVIDER AGREEMENTS AND SUPPLIER APPROVAL**

■ 7. The authority citation for part 489 continues to read as follows:

**Authority:** 42 U.S.C. 1302, 1395i–3, 1395x, 1395aa(m), 1395cc, 1395ff, and 1395hh.

■ 8. Section 489.27 is amended by revising the section heading and paragraph (b) to read as follows:

### **§ 489.27 Beneficiary notice of discharge or change in status rights.**

\* \* \* \* \*

(b) *Notification by hospitals and other providers.* Hospitals and other providers (as identified at § 489.2(b)) that participate in the Medicare program must furnish each Medicare beneficiary, or representative, applicable CMS notices in advance of discharge, termination of Medicare services, or of changes from inpatient to outpatient status, including the notices required under §§ 405.1200, 405.1202, 405.1206, 405.1210, and 422.624 of this chapter.

Dated: December 18, 2023.

**Xavier Becerra,**

*Secretary, Department of Health and Human Services.*

[FR Doc. 2023–28152 Filed 12–21–23; 11:15 am]

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Vol. 88, No. 247

Wednesday, December 27, 2023

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### FEDERAL REGISTER PAGES AND DATE, DECEMBER

|                  |    |
|------------------|----|
| 83809-84066..... | 1  |
| 84067-84232..... | 4  |
| 84233-84682..... | 5  |
| 84683-85090..... | 6  |
| 85091-85466..... | 7  |
| 85467-85816..... | 8  |
| 85817-86020..... | 11 |
| 86029-86256..... | 12 |
| 86257-86540..... | 13 |
| 86541-86810..... | 14 |
| 86811-87328..... | 15 |
| 87329-87650..... | 18 |
| 87651-87892..... | 19 |
| 87893-88220..... | 20 |
| 88221-88526..... | 21 |
| 88527-88814..... | 22 |
| 88815-89274..... | 26 |
| 89275-89538..... | 27 |

### CFR PARTS AFFECTED DURING DECEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

#### 3 CFR

##### Proclamations:

|            |       |
|------------|-------|
| 10679..... | 84679 |
| 10680..... | 84681 |
| 10681..... | 84683 |
| 10682..... | 85091 |
| 10683..... | 85817 |
| 10684..... | 86257 |
| 10685..... | 86810 |
| 10685..... | 86541 |
| 10686..... | 87653 |
| 10687..... | 87893 |

##### Executive Orders:

|                                                 |       |
|-------------------------------------------------|-------|
| 12977 (Superseded and revoked by EO 14111)..... | 83809 |
| 14024 (amended by 14114).....                   | 89271 |
| 14068 (amended by 14114).....                   | 89271 |
| 14090 (superseded by 14113).....                | 89259 |
| 14111.....                                      | 83809 |
| 14112.....                                      | 86021 |
| 14113.....                                      | 89259 |
| 14114.....                                      | 89271 |

##### Administrative Orders:

|                                                  |       |
|--------------------------------------------------|-------|
| Memorandums: Memorandum of December 7, 2023..... | 87651 |
| Notices: Notice of December 13, 2023.....        | 28609 |
| Notice of December 18, 2023.....                 | 87891 |

#### 5 CFR

|               |       |
|---------------|-------|
| 315.....      | 84685 |
| 335.....      | 84685 |
| 531.....      | 85467 |
| 2412.....     | 84067 |
| 3601.....     | 86029 |
| Ch. CIII..... | 85467 |

##### Proposed Rules:

|           |       |
|-----------|-------|
| 335.....  | 89321 |
| 1302..... | 87960 |
| 1303..... | 87960 |

#### 7 CFR

|               |       |
|---------------|-------|
| 3.....        | 89275 |
| 205.....      | 86259 |
| 246.....      | 86545 |
| 272.....      | 86563 |
| 301.....      | 85469 |
| 905.....      | 89276 |
| 989.....      | 85819 |
| 3550.....     | 85470 |
| Ch. XLII..... | 86566 |
| 4279.....     | 86566 |

##### Proposed Rules:

|          |       |
|----------|-------|
| 271..... | 87725 |
| 275..... | 87725 |

|           |       |
|-----------|-------|
| 923.....  | 85519 |
| 926.....  | 85130 |
| 927.....  | 83870 |
| 929.....  | 85130 |
| 930.....  | 84075 |
| 958.....  | 86066 |
| 987.....  | 89327 |
| 1005..... | 84038 |
| 1006..... | 84038 |
| 1007..... | 84038 |

#### 10 CFR

|          |       |
|----------|-------|
| 50.....  | 85824 |
| 52.....  | 85824 |
| 72.....  | 86571 |
| 100..... | 85824 |
| 429..... | 84188 |
| 430..... | 87502 |
| 431..... | 84188 |
| 851..... | 86811 |

##### Proposed Rules:

|              |       |
|--------------|-------|
| 50.....      | 87967 |
| 52.....      | 87967 |
| Ch. III..... | 84082 |
| 429.....     | 87062 |
| 430.....     | 89330 |
| 431.....     | 87062 |
| 460.....     | 88844 |
| 1008.....    | 87371 |
| 1021.....    | 88854 |

#### 12 CFR

|           |       |
|-----------|-------|
| 228.....  | 87895 |
| 345.....  | 87895 |
| 609.....  | 85825 |
| 614.....  | 89280 |
| 620.....  | 89280 |
| 1003..... | 88221 |
| 1026..... | 88223 |

##### Proposed Rules:

|          |       |
|----------|-------|
| 364..... | 84089 |
|----------|-------|

#### 13 CFR

##### Proposed Rules:

|          |       |
|----------|-------|
| 121..... | 85852 |
|----------|-------|

#### 14 CFR

|            |                                                                                                                                                                                      |
|------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Ch. I..... | 85474, 87668                                                                                                                                                                         |
| 21.....    | 87655                                                                                                                                                                                |
| 39.....    | 83813, 83817, 83820, 83822, 84690, 84693, 85093, 85833, 85836, 86029, 86032, 86034, 86036, 86260, 86263, 86571, 86574, 86816, 86819, 87329, 87331, 87334, 87336, 87655, 89286, 89290 |
| 71.....    | 84071, 85094, 85472, 85473, 86039, 86578, 86579, 87338, 88527, 88528, 88529, 88531, 88532, 89292, 89293                                                                              |
| 73.....    | 84695, 87339, 88227                                                                                                                                                                  |
| 91.....    | 89294                                                                                                                                                                                |
| 97.....    | 84233, 84234, 87665,                                                                                                                                                                 |

|                                                                                                                                                                                                                      |                                     |                                                                                                                   |                                                                                          |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------|-------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------|
| 87666                                                                                                                                                                                                                | 184.....86580                       | 525.....87714                                                                                                     | 704.....84242                                                                            |
| <b>Proposed Rules:</b>                                                                                                                                                                                               | 186.....86580                       | 569.....87715                                                                                                     | 721.....87346                                                                            |
| 25.....86274                                                                                                                                                                                                         | 202.....89303                       | 1010.....88732                                                                                                    | <b>Proposed Rules:</b>                                                                   |
| 39.....84759, 84761, 84764,<br>84767, 85856, 86069, 86073,<br>86080, 86084, 86088, 86840,<br>87725, 88271, 88274, 88276,<br>88541, 88544, 89339                                                                      | 312.....88228                       | <b>32 CFR</b>                                                                                                     | 52.....86093, 86303, 86870,<br>87850, 87981, 87988, 88300,<br>88308, 88310, 89351, 89355 |
| 71.....83873, 83874, 83875,<br>85133, 85135, 85519, 85523,<br>85858, 85860, 87375, 87377,<br>87380, 87382, 87730, 87731,<br>88279, 88281, 88283, 88284,<br>88286, 88546, 88548, 88550,<br>88552, 88854, 89342, 89344 | 510.....84696                       | 286.....84236                                                                                                     | 55.....86094                                                                             |
| 73.....88288                                                                                                                                                                                                         | 516.....84696                       | <b>Proposed Rules:</b>                                                                                            | 62.....86312                                                                             |
| 91.....84090                                                                                                                                                                                                         | 520.....84696                       | 117.....86288                                                                                                     | 63.....83889, 88553                                                                      |
| 120.....85137                                                                                                                                                                                                        | 522.....84696                       | 170.....89058                                                                                                     | 131.....85530, 88315                                                                     |
| 121.....84090                                                                                                                                                                                                        | 524.....84696                       | <b>33 CFR</b>                                                                                                     | 141.....84878                                                                            |
| 125.....84090                                                                                                                                                                                                        | 558.....84696                       | 3.....87928, 88249                                                                                                | 142.....84878                                                                            |
| 135.....84090                                                                                                                                                                                                        | 573.....87670                       | 100.....84238, 85110, 85496,<br>87928, 88249                                                                      | 180.....87733                                                                            |
| <b>15 CFR</b>                                                                                                                                                                                                        | 812.....88228                       | 117.....85111, 85498, 86822,<br>88251                                                                             | 271.....86100                                                                            |
| 6.....89300                                                                                                                                                                                                          | 1308.....85104, 86040, 86266        | 147.....87716                                                                                                     | <b>41 CFR</b>                                                                            |
| 732.....86821                                                                                                                                                                                                        | <b>Proposed Rules:</b>              | 165.....83825, 83827, 84238,<br>85112, 85500, 86046, 86048,<br>86580, 87341, 87343, 87719,<br>87928, 87930, 88249 | 301–10.....87363                                                                         |
| 734.....86821                                                                                                                                                                                                        | 101.....88613                       | <b>Proposed Rules:</b>                                                                                            | 301–70.....87363                                                                         |
| 736.....86821                                                                                                                                                                                                        | 1308.....86278                      | 100.....86295                                                                                                     | <b>42 CFR</b>                                                                            |
| 738.....85479                                                                                                                                                                                                        | <b>22 CFR</b>                       | 117.....86301                                                                                                     | 430.....84713                                                                            |
| 740.....85479, 85487, 86821                                                                                                                                                                                          | 42.....85109                        | 165.....84249                                                                                                     | 435.....84713                                                                            |
| 742.....85479, 86821                                                                                                                                                                                                 | 121.....84072                       | 334.....85115                                                                                                     | <b>Proposed Rules:</b>                                                                   |
| 744.....85095, 85487, 86821,<br>87668, 87897                                                                                                                                                                         | 181.....87671                       | <b>34 CFR</b>                                                                                                     | 93.....84116                                                                             |
| 746.....86821                                                                                                                                                                                                        | <b>23 CFR</b>                       | Ch. III.....89305, 89306                                                                                          | 405.....89506                                                                            |
| 748.....86821                                                                                                                                                                                                        | 470.....87672                       | 662.....85502                                                                                                     | 476.....89506                                                                            |
| 758.....86821                                                                                                                                                                                                        | 490.....85364                       | 663.....85502                                                                                                     | 489.....89506                                                                            |
| 770.....86821                                                                                                                                                                                                        | 635.....87672                       | <b>36 CFR</b>                                                                                                     | 1001.....84116                                                                           |
| 772.....86821                                                                                                                                                                                                        | 655.....87672                       | 7.....86050                                                                                                       | <b>43 CFR</b>                                                                            |
| 774.....85479, 86821                                                                                                                                                                                                 | <b>24 CFR</b>                       | 212.....84704                                                                                                     | 10.....86452                                                                             |
| <b>Proposed Rules:</b>                                                                                                                                                                                               | 1000.....87900                      | 214.....84704                                                                                                     | 8360.....87363                                                                           |
| 740.....85734                                                                                                                                                                                                        | 1003.....87900                      | 251.....84704                                                                                                     | <b>45 CFR</b>                                                                            |
| 744.....85734                                                                                                                                                                                                        | 1006.....87900                      | <b>37 CFR</b>                                                                                                     | 16.....84713                                                                             |
| <b>16 CFR</b>                                                                                                                                                                                                        | <b>Proposed Rules:</b>              | 380.....88253                                                                                                     | 149.....88494                                                                            |
| 423.....85495                                                                                                                                                                                                        | 115.....85529                       | 385.....86058, 88253                                                                                              | <b>46 CFR</b>                                                                            |
| <b>Proposed Rules:</b>                                                                                                                                                                                               | 125.....85529                       | 386.....84710                                                                                                     | 298.....86608                                                                            |
| 425.....85525                                                                                                                                                                                                        | 247.....83877                       | <b>38 CFR</b>                                                                                                     | <b>47 CFR</b>                                                                            |
| 1110.....85760                                                                                                                                                                                                       | 880.....83877                       | 3.....86058                                                                                                       | 1.....85514                                                                              |
| 1264.....85861                                                                                                                                                                                                       | 884.....83877                       | 4.....89307                                                                                                       | 10.....86824                                                                             |
| 1408.....85862                                                                                                                                                                                                       | 886.....83877                       | 21.....84239                                                                                                      | 25.....84737, 87723                                                                      |
| <b>17 CFR</b>                                                                                                                                                                                                        | 891.....83877                       | <b>Proposed Rules:</b>                                                                                            | 51.....83828                                                                             |
| 200.....87156                                                                                                                                                                                                        | 966.....83877                       | 14.....88295                                                                                                      | 52.....85794                                                                             |
| 201.....87156                                                                                                                                                                                                        | <b>25 CFR</b>                       | 36.....85863                                                                                                      | 54.....83829, 84406                                                                      |
| 230.....85396                                                                                                                                                                                                        | 151.....86222                       | <b>39 CFR</b>                                                                                                     | 63.....85514                                                                             |
| 232.....87156                                                                                                                                                                                                        | <b>26 CFR</b>                       | 20.....87344                                                                                                      | 64.....84406, 85794, 88257,<br>88261                                                     |
| 240.....84454, 87156                                                                                                                                                                                                 | 1.....87696, 87903                  | 111.....85508, 88825                                                                                              | 73.....86064                                                                             |
| 242.....87156                                                                                                                                                                                                        | 54.....88494                        | 233.....85851                                                                                                     | 97.....85126                                                                             |
| 249.....87156                                                                                                                                                                                                        | 301.....87696                       | <b>Proposed Rules:</b>                                                                                            | <b>Proposed Rules:</b>                                                                   |
| <b>18 CFR</b>                                                                                                                                                                                                        | <b>Proposed Rules:</b>              | 11.....84251, 86868                                                                                               | 1.....85553                                                                              |
| <b>Proposed Rules:</b>                                                                                                                                                                                               | 1.....84098, 84770, 86844,<br>89220 | 3050.....83887                                                                                                    | 25.....85553                                                                             |
| 33.....89346                                                                                                                                                                                                         | 5.....84770                         | <b>40 CFR</b>                                                                                                     | 54.....85157                                                                             |
| <b>20 CFR</b>                                                                                                                                                                                                        | 301.....84770                       | 9.....87346                                                                                                       | 64.....86614                                                                             |
| 404.....85104                                                                                                                                                                                                        | 602.....84770                       | 19.....89309                                                                                                      | 73.....84771                                                                             |
| <b>20 CFR</b>                                                                                                                                                                                                        | <b>28 CFR</b>                       | 52.....83828, 84241, 84626,<br>85112, 85511, 86581, 87359,<br>87720, 87932, 87934, 88254,<br>88255                | 97.....85171                                                                             |
| <b>Proposed Rules:</b>                                                                                                                                                                                               | 543.....87903                       | 60.....86062                                                                                                      | <b>48 CFR</b>                                                                            |
| 416.....83877                                                                                                                                                                                                        | <b>29 CFR</b>                       | 61.....86062                                                                                                      | Ch. 1.....88708, 88729                                                                   |
| 656.....88290                                                                                                                                                                                                        | 9.....86736                         | 62.....85124                                                                                                      | 1.....88708                                                                              |
| <b>21 CFR</b>                                                                                                                                                                                                        | 2590.....88494                      | 84.....88825                                                                                                      | 7.....88708                                                                              |
| 50.....88228                                                                                                                                                                                                         | 4044.....87340                      | 180.....86268, 87361                                                                                              | 22.....88708                                                                             |
| 161.....86580                                                                                                                                                                                                        | <b>Proposed Rules:</b>              | 261.....84710                                                                                                     | 36.....88708                                                                             |
| 164.....86580                                                                                                                                                                                                        | 250.....86285                       | 262.....84710                                                                                                     | 52.....88708                                                                             |
|                                                                                                                                                                                                                      | 290.....86285                       | 266.....84710                                                                                                     | 205.....88533                                                                            |
|                                                                                                                                                                                                                      | <b>31 CFR</b>                       | 302.....87723                                                                                                     | 211.....88533                                                                            |
|                                                                                                                                                                                                                      | 1.....88815                         |                                                                                                                   | 212.....88533                                                                            |
|                                                                                                                                                                                                                      |                                     |                                                                                                                   | 225.....88533                                                                            |
|                                                                                                                                                                                                                      |                                     |                                                                                                                   | 245.....88533                                                                            |
|                                                                                                                                                                                                                      |                                     |                                                                                                                   | 252.....88533                                                                            |
|                                                                                                                                                                                                                      |                                     |                                                                                                                   | 1252.....88261                                                                           |
|                                                                                                                                                                                                                      |                                     |                                                                                                                   | <b>Proposed Rules:</b>                                                                   |
|                                                                                                                                                                                                                      |                                     |                                                                                                                   | 203.....89357                                                                            |

|                              |                |                               |                               |
|------------------------------|----------------|-------------------------------|-------------------------------|
| 204.....89357                | 1405.....85172 | <b>Proposed Rules:</b>        | 660 .....83830, 86838, 87369, |
| 207.....89357                | 1414.....85172 | 215 .....85561                | 89313                         |
| 212.....88554, 89357         | 1416.....85172 | 674.....88337                 | 665 .....88835                |
| 215.....88554, 89357         | 1419.....85172 | 675.....88337                 | 679 .....84248, 84754, 88836, |
| 227.....89357, 89358         | 1426.....85172 |                               | 88839, 88840, 88842, 89319    |
| 234.....88554                | 1431.....85172 | <b>50 CFR</b>                 | <b>Proposed Rules:</b>        |
| 252 .....88554, 89357, 89358 | 1442.....85172 | 216.....88262                 | 17 .....84252, 85177, 88012,  |
| 502.....88856                | 1443.....85172 | 217 .....87937                | 88035, 88338                  |
| 538.....88856                | 1449.....85172 | 300.....83830, 88832          | 223.....85178                 |
| 552.....88856                |                | 622.....83860, 87365          | 224.....85178                 |
| 1401.....85172               | <b>49 CFR</b>  | 635.....85517                 | 648.....83893                 |
| 1402.....85172               |                | 648 .....84243, 86837, 87368, | 660.....89358                 |
| 1403.....85172               | 571 .....84514 | 88266, 88540, 88834           | 679.....84278, 85184          |

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. This list is also available online at <https://www.archives.gov/federal-register/laws/current.html>.

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**H.R. 2670/P.L. 118-31**  
National Defense Authorization Act for Fiscal Year 2024 (Dec. 22, 2023; 137 Stat. 136)  
**Last List December 26, 2023**

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